IN THE JUDICIAL CONDUCT TRIBUNAL OF THE JUDICIAL SERVICE COMMISSION OF SOUTH AFRICA HELD AT MIDRAND, GAUTENG

Ref: JCT/Makhubele J

In the complaint between:

#UNITE BEHIND	**Complainant**
And	
JUDGE T A N MAKHUBELE	**Respondent**

WRITTEN ARGUMENT OF THE EVIDENCE LEADER

INTRODUCTION

1 **On 14 January 2019, #UniteBehind (the Complainant)** addressed a letter to the Chief Justice as Chairperson of the Judicial Conduct Committee lodging a complaint in terms of **section 14(3) of the Judicial Service Commission Act , 9 of 1994 (JSC Act)** against **Judge Tintswalo Annah Nana Makhubele (the Respondent).**

2 The complaint, as set forth comprehensively on behalf of the complainant in the affidavit of **Zukiswa Fokazi,** consisted of two parts being:

Part A which alleged that the Respondent had undermined the independence of the judiciary by having served in, and received remuneration for, the position of **Chairperson of the Interim Board of Control of PRASA (IBOC)**, which was a role in the executive branch of government after her position with the judiciary had come into effect.

Part B alleged that the manner, in which the Respondent conducted herself as Chairperson of IBOC, she failed in her duty to act honourably and to avoid the appearance of impropriety in all her activities. She also acted in a manner unbecoming of the judicial office which was incompatible with a fit and proper person in that her actions lacked honesty and integrity and lead to unethical conduct.

Volume 1: 1 - 52

3 On **11 March 2020**, the Complainant was advised by letter from the Secretary of the **Judicial Conduct Committee (JCC),** that the Chief Justice had decided to refer the complaint to the JCC in in terms of **section 16(1)(a) of JSC Act.** The Complainant was notified that the meeting of the JCC would take place on **20 March 2020** to consider whether to recommend to the **Judicial Service Commission (JSC)** that the complaint against the Respondent be investigated and reported on by a Tribunal.

Volume 1: 204 - 206

4 The Respondent was also advised on 11 March 2020 that the complaint had been referred to the JCC, and that she could make representations which she duly did.

Volume 1: 207 – 209

5 On **20 March 2020**, the **JCC** hearing took place at which the Respondent was permitted to address the **JCC**.

Volume 1: 308 – 383

6 In **September 2020,** the JCC in its ruling recommended to the JSC that the complaint against the Respondent be investigated by a Tribunal. The JCC ruled that after consideration of the complaint and representations of the Complainant and the response of the Respondent, it was satisfied that the allegations against her were very serious. If it were proven, it was likely that a finding of gross misconduct would be made.

In reaching that conclusion the JCC referred to the factors which would determine whether a finding of gross misconduct could be made in the following terms:

Judge Makhubele was appointed a High Court Judge with effect from 1 January 2018. The question is whether as a Judge she ought to have continued to serve as a Chairperson of the Interim Board of Control of PRASA before the revocation of her appointment.

If it were established that of all the case that PRASA was involved in she paid special attention only to those of Siyaya; that she marginalised the PRASA legal unit and terminated the mandate of PRASA's attorneys and personally appointed another firm of attorneys in their stead to represent PRASA; that she negotiated with Siyaya's attorneys and entered into a confidential settlement agreement that is manifestly and materially prejudicial to the interests pf PRASA, relying on non-existent "major concessions" on its liability to Siyaya allegedly made by PRASA employees at the insolvency inquiry; and frustrated PRASA attempts to resist the enforcement of the settlement.

Volume 1: 384 – 386

7 On **10 September 2020**, the Complainant and the Respondent were advised that the **Judicial Conduct Committee of the JSC (the Committee)** would be conducting a virtual meeting on **9 October 2020** were also advised that they could make representations to be considered by the Committee.

Volume 1: 388 – 389

8 The Respondent set out extensively in the form of an affidavit supported by numerous annexures the representations which she required the Committee to consider.

Volume 2: 532 – 984

9 On **9 October 2020, the Committee** met virtually to consider the recommendation of the **JCC.**

Volume 3: 985 – 1017

10 On **12 October 2020, the Acting Chairperson of the JSC, Judge M M Leeuw** conveyed in writing to the Chief Justice a request in terms of **section 19(1) of the JSC Act** that he appoint a Tribunal in terms of **section 21 of the JSC Act.** In terms of section 19(1) of the JSC Act, the allegations which the Tribunal was required to investigate and report on were the following:

(a) Whether Judge Makhubele, improperly held a dual status as a Judge of the High Court of South Africa and Chairperson of the Interim Board of Control of the PRASA.

(b) Whether of all the cases that PRASA was involved in, Judge Makhubele paid special attention only to those of Siyaya; she marginalised the PRASA legal unit and terminated or caused to be terminated the mandate of PRASA's attorneys and personally appointed another firm of attorneys in their stead to represent PRASA; she negotiated with Siyaya's attorneys and entered into a confidential settlement agreement that is manifestly and materially prejudicial to the interests of PRASA relying on non-existent "major concessions" of its liability to Siyaya allegedly made by PRASA employees at the Insolvency Inquiry; and frustrated PRASA attempts to resist the enforcement of the settlement.

The JSC also resolved in terms of **section 19(4) of the JSC Act** that it was desirable that the Respondent be suspended from office in terms of **section 177(3) of the Constitution** with the condition that she be allowed to finalise her partly heard matters and reserved judgments during the period of suspension. The Respondent's suspension was to endure until the complaints against her had been finalised.

Volume 3: 1018 – 1019

11 On **13 October 2020, the Chief Justice** informed the **President of the Republic of South Africa** in a letter that he had been requested by the JSC to appoint a Judicial Conduct Tribunal to investigate and report on the complaint made by the Complainant against the Respondent, and that the JSC resolved that it was desirable that the Respondent be suspended from office in terms of **section 177 (3) of the Constitution** on the conditions mentioned *supra.*

Volume 3: 1020 – 1022

12 On **24 October 2020, the President** signed a notice of suspension addressed to the Respondent in terms of **section 177(3) of the Constitution** in accordance with the request made to him by the Chief Justice.

Volume 3: 1026 – 1028

13 On **18 February 2021,** in terms of **section 22 of the JSC Act, the Chief Justice** made the appointments of **Judge F D J Brand as President of the JCT with Judge S S D Moshidi and Ms N Maduba-Silevu** as members and advised them of the terms of reference dated **16 February 2021**, which are those set forth *supra*.

Volume 3: 1029 – 1034

14 On **12 April 2021, the Minister of Justice and Correctional Services,** appointed **Advocate E Zungu (Harrison) as the Evidence Leader** of the JCT hearing involving the Respondent.

Volume 3: 1040

15 On **30 August 2021, Mabuza Attorneys** who were then acting on behalf of the Respondent sent a letter to the **Secretariat of the JSC** to request the recusal of Judge Brand and that the inquiry be expedited**.**

Volume 3: 1047 - 1048

16 **On 15 October 2021,** Mabuza attorneys directed further correspondence to the Secretariat of the JSC advising that the Respondent's counsel **Mr Trengove SC** was not available to appear as counsel on the date the hearing had been set for on **10 – 11 January 2022** and requested a postponement to a date which would suit her counsel. Mabuza attorneys raised again the issue of the recusal of Judge Brand.

Volume 3:1049

17 On **22 October 2021, Judge Brand** requested the **Secretariat** to convey a message to the **Acting Chief Justice** that, in the light of the fact that the Respondent sought his recusal, he requested the Acting Chief Justice to appoint another retired judge in his stead.

Volume 3: 1052

18 On **19 May 2022, the Chief Justice** appointed **Judge A N Jappie** as the President of the JCT **in terms of section 22(1) of the JSC Act.**

Volume 3: 1055 – 1056

19 On **12 August 2022,** a virtual meeting of the Tribunal took place involving representatives of the parties as well as the Evidence Leader. Mr Luthuli who was briefed by Mabuza Attorneys advised the Tribunal that the Respondent intended to brief **Mr Trengove SC** to act for the Respondent and he was only available in **February 2023**. It was resolved that the parties would meet in **November 2022** to conduct a pretrial meeting to let the Tribunal know that matters were on track. It was ultimately agreed that the hearing would commence on **Monday 20 February 2023.**

Volume 3: 1101 – 1133

20 On **18 August 2022,** the President of the Tribunal fixed the date that the Tribunal was to commence as **20 February 2023.**

Volume 3: 1134

THE FIRST COMPLAINT:

Whether Judge Makhubele, improperly held a dual status as a Judge of the High Court of South Africa and Chairperson of the Interim Board of Control of the PRASA.

The following facts appear to be common cause between the parties in respect of the first complaint to be investigated and reported on by the Tribunal:

1 Sometime in **June or July 2017**, the Respondent submitted the relevant documentation to the JSC regarding her nomination as a judge. At this point, she had decided that she wanted to be a judge.

2 The Respondent's CV was received by the Department of Transport.

3 On **4 October 2017**, the Respondent was interviewed by the JSC for appointment as a judge. At no point did she indicate when she would be available to commence her appointment. On **5 October 2017** the JSC formally recommended to the President that the Respondent be appointed as a judge.

4 On **18 October 2017**, Cabinet approved the appointment of the Respondent as Chairperson of the Interim Board of Control of PRASA (IBOC).

5 On **19 October 2017**, Judge Dunstan Mlambo, the Judge President of the Gauteng Division (the JP) caused a directive to be issued via email to the successful appointees in which the JP expressed himself as follows on the issue of the starting date of the Respondent's appointment as a judge:

Dear Colleagues

*Let me formally take this opportunity to congratulate all of you on <u>your elevation to the bench permanently</u> (my underlining). I look forward to welcoming you and swearing you all in sometime in January. I just thought I'd advise you that your permanent appointment would be with effect from **1 January 2018** even though the presidency takes time to sign the necessary certificates and letters. Although they always attend to these after the date I have mentioned, they make it with effect from that day so it should not pose any problems.*

6 On **19 October 2017**, an announcement was made that the Respondent had been appointed as the Chairperson of IBOC. The Respondent was appointed as **a non-executive director of IBOC (Volume 2: 763)**. The Respondent then immediately took up her duties at IBOC.

7 In an email to the JP on **20 October 2017**, the Respondent replied as follows:

Dear JP

Thank you for the support and recommendation.

1. *I am glad to accept the placement in Pretoria.*
2. *I would like to have further discussions with you with regard to the starting date of my appointment.*
3. *Are we compelled to purchase new vehicles or is it allowed to just claim the allowance.*

I look forward to meeting you soon to discuss the mater in 1.

Best regards

Nana

8 On **23 October 2017**, the JP replied by email as set forth hereunder to which the Respondent did not immediately respond:

Hello Nana

Thanks for your response. You are not compelled to procure a vehicle and yes you can continue using your vehicle and claim S&T. I suggest that you indicate what your view is regarding the starting date via email as I'm hectic this week. I hope you find this in order.

Sincerely

D Mlambo
Judge President
Gauteng Division of the High Court
Of South Africa

9 On **2 November 2017**, the former President, Jacob Zuma, appointed the Respondent as a Judge of the Gauteng Division of the High Court with effect from **1 January 2018 (Vol 7: 43).**

10 On **4 December 2017**, the Respondent emailed the Judge President in which she stated the following:

Dear Judge President Mlambo

I apologise for taking time to respond to your email below (that is, the email of 23 October 2017). I had to do much reflection on the matter taking into account all the positions that I am currently occupying.

After much reflection and considering every aspect of the challenges, I think that it will be in the best interest of the Bench if I start in ***April 2018****.*

I trust that this will be acceptable to you. I am still hopeful of a meeting with you to explain the challenges.

Best regards

Nana

On **6 December 2017**, the JP emailed the Respondent with the following message:

Hello Nana

*Thanks for your email. The delay has been your undoing unfortunately. The President has already done the appointment wef **1 January 2018**. I'm waiting for the appointment letters and certificates. We can meet week after next.*

D Mlambo
Judge President
Gauteng Division of the High Court
Of South Africa

11 On **6 December 2017**, the JP emailed the draft duty rosters to all colleagues including the Respondent for the first term of 2018 with the following message:

Dear Colleagues

Herewith the Draft Duty Rosters for Term 1 _ 2018.

*I request feedback regarding clashes and double bookings in particular, by 14:00pm on Friday **08th December 2017** to enable me to finalize the duty rosters.*

Registrars are requested not to distribute any files until the final duty roster is finalized next week and only then may they distribute files to Judges.

D Mlambo
Judge President
Gauteng Division of the High Court
Of South Africa

12 On **7 December 2017**, the Respondent replied by email to the JP as follows:

Dear Judge President Mlambo
Thank you for the email. I have noted the allocation.
I request that you place me on 'hold' until we finalize the discussion about my application to start later than January 2018.
Best regards.
Nana

13 On **15 December 2017**, the Respondent emailed the Director-General of the Department of Water Affairs and Sanitation to advise that she would formally resign from her position as Chairperson of the Water Tribunal with effect from **30 March 2018**.

14 On **21 December 2017**, a Judge's Secretary, Ofentse Komane emailed the Respondent as follows:

Dear Judge

I hope this email finds you well.

Kindly note that your Appeal files are ready collection (sic). Please fin attached summary of your weekly allocations for Term 1 2018.

14 On **1 January 2018**, the Respondent did not commence duties as a Judge of the High Court.

15 On **22 January 2018,** the JP addressed a letter to the Minister of Justice and Constitutional Development in which inter alia the following is stated:

1. The purpose of this letter is to notify the Hon. minister that newly appointed Judge, Madam Justice T. A. N Makhubele has requested a deferral of appointment as a Judge of the Gauteng Division of the High Courts.

*2. Madam Justice T. A. N Makhubele approached me after I had notified the Ministry of the appointment date of all newly appointed Judges of this Division. She will require a few more months to fulfil all her tasks as Chair of the Water Tribunal and has kindly requested me that her date of appointment be amended to commence on **01st April 2018**, instead of on **01st January 2018**.*

16 In the same letter, the JP requested the Minister to replace the Respondent by appointing Adv B Wanless SC and Ms S Mia as acting judges for the first term of 2018.

17 The Complainant, by way of a letter dated **26 January 2018** to the JP raised the issue of the Respondent holding office as Judge as well as acting as the Chairperson of **IBOC** at the same time.

18 The JP responded by confirming receipt of the Complainant's letter. He informed the Complainant that he had already forwarded a letter to the Minister to request the President to "revoke" the appointment of the Respondent from 1 January 2028 and had requested that he appointment take effect from 1 April 2018.

19 On **6 February 2018**, the Parliamentary Portfolio Committee on Transport subpoenaed the Respondent to appear before it, due to her failure to report to the committee timeously as Chairperson of the Board of PRASA.

20 On **12 February 2018**, the Complainant directed further correspondence to the President, the Chief Justice and other including the JP alleging that the Respondent was in breach of the separation of powers as chairperson of **IBOC**.

21 On **22 and 24 February 2018**, the Respondent met with attorneys Edward Nathan Sonnenberg (ENS). The Respondent as Chairperson of IBOC commissioned an opinion from ENS which was furnished to the Board of **IBOC** on **28 February 2018**.

21 On **13 March 2018**, the Respondent stopped practising as an advocate.

22 On **16 March 2018**, the Respondent resigned from her position as Chairperson of **IBOC**.

23 On **6 April 2018**, the Chief State Law Advisor's opinion was provided to Mr Vusi Madonsela, the Director-General of the Department of Justice and Constitutional Development for the attention of Adv JB Skosana (Deputy Director-General: Court Services).

24 The question the opinion sought to answer was whether the Respondent's date of assumption of judicial office could be revoked. The opinion seems to suggest that:

The President was *functus officio* after appointing the Respondent.

The President would have to bring a review application against his own appointment.

25 Furthermore, the author of the opinion was of the view that it would not be in the public interest for the President to delay the appointment of the Respondent and more specifically that it would not be in the public interest to refer the matter to a court for self-review; and

"the extension of the date does not affect the fact that Advocate Makhubele has been duly appointed as a Judge". In other words, the appointment of the Respondent as a judicial officer was entailed by the comprehensive process by the JSC and deferring the date of appointment would not be appropriate."

26 The Minister of Justice and Correctional Services, Advocate T M Masutha then addressed a memorandum to the President to request the amendment of the date of the Respondent's appointment.

27 The Respondent requested that the date of her appointment be amended as “she required more months to fulfil her tasks as Chair of the Water Tribunal”.

28 In spite of the legal opinion mentioned *supra,* the President purported to revoke the Respondent’s appointment from **1 January 2018** and substituted it with an appointment from **1 June 2018**.

29 The President then signed an appointment which is undated. The Respondent took the oath of office on **8 June 2018**.

On **21 and 22 February 2023**, the Tribunal received the *viva voce* evidence of the JP and then in the following year from the Respondent in addition to volumes of documents which related to this issue.

MR JUSTICE DUNSTAN MLAMBO JP

30 The **JP** had deposed to an affidavit dated **12 July 2022** in which he briefly set forth the circumstances under which the Respondent was appointed as a Judge of his Division and what transpired thereafter. In particular, he dealt with the event which took place in the second week of January 2018 following upon the failure of the Respondent to come to take the oath of office. This meeting of the JP and the Respondent took place in the presence of Judge Aubrey Ledwaba, the Deputy Judge President of the Division (**DJP**).

Judge Mlambo exhibits Vol 7:1 – 8

The **DJP** had also deposed to an affidavit dated **2 September 2022** which corroborated the version of the JP. The DJP's affidavit is to be found in **Volume 17: 185 – 188.** The DJP's affidavit was furnished by the Tribunal to the Respondent long before the commencement of the proceedings against her in February 2023.

31 The JP testified that before the JSC interview after the Respondent had been shortlisted, she approached him regarding the starting date of her appointment. He advised her that it was divisional policy that candidates recommended in October should wind up their practices to assume permanent judicial office on 1 January of the following year.

Judge Mlambo evidence Vol 6:58

32 The Respondent then informed him that she may not be able to start on **1 January 2018**. When asked for the reason, she said that it was because she was the Chairperson of the Water Tribunal. The JP did not accept that, indicating that there was no conflict in her doing that work as the Chairperson as that was judicial work, and if she was to be appointed, he would arrange to give her time to attend to whatever outstanding work there would be.

Judge Mlambo evidence Vol 6:58

33 He then caused his directive to be sent on **19 October 2017 (Vol 7: 12 - 14)** which has been referred to *supra.* The idea behind sending the directive was to alert successful candidates to the need to wind up their practices so that when they start as permanent judges, “they start clean”, in the sense, that they have nothing else from an income earning perspective when they start.

In addition, he indicated to the newly appointed judges where he was going to place them. In the case of the Respondent, he was going to place her in Pretoria. She confirmed her acceptance of placement.

Judge Mlambo evidence Vol 6: 58 -59

34 The JP started to prepare the draft duty roster which included duties to be allocated to the newly appointed judges, which was circulated in the first week of December **(Vol 7: 15 – 30) by email on 6 December 2017 (See paragraph11 supra).**

Judge Mlambo evidence Vol 6: 60

35 The JP confirmed that he received the email of **20 October 2017 (Vol 7: 9)** from the Respondent requesting to have further discussions about the starting date of her appointment. The JP confirmed that he responded on **23 October 2017** in an email referred to *supra.*

Judge Mlambo evidence Vol 6: 64

36 He acknowledged receiving the Respondent's email of **4 December 2017** which has been referred to *supra*. He could not recall if there were any meetings between them during the period **23 October to 4 December 2017.**

Judge Mlambo evidence Vol 6: 65

37 The JP could not recall if there were any further email discussions following upon the Respondent's email dated **7 December 2017** which is referred to *supra.*

38 The JP recalls calling her in the **second week of January 2018** as she was the only newly appointed judge who had not come in to take the oath of office. The purpose of his call was to find out why she had not come in to take the oath of office and when she would come in to do so.

Judge Mlambo evidence Vol 6: 66

39 The Respondent stated that she would not be starting on **1 January 2018.** The JP informed her that based on the reason she had given him, he had not approved it and that he expected her to be there. He instructed her to come in and take the oath of office. The Respondent then asked to have a meeting with the JP to discuss the matter. He arranged a meeting in his chambers.

Judge Mlambo evidence Vol 6: 66

40 The JP was not able to recall the specific date of the meeting which took place in **January 2018**. He requested the DJP to be present at the meeting. The Respondent arrived and they discussed the matter. He again asked the Respondent why she had not come in because she was on the duty roster. He expected her to take the oath so that everything was in order. The Respondent again gave him the explanation that she could not start because of her duties at the Water Tribunal.

Judge Mlambo evidence Vol 6: 66 - 67

41 The JP told her that he had rejected that reason because there was no conflict between her job as Chairperson of the Water Tribunal and judge. The Respondent persisted that she would not be able to start. He and the DJP pressed her for the true reason why she would not start because the Water Tribunal reason had been rejected.

Judge Mlambo evidence Vol 6: 67

42 The Respondent simply said she could not come. He then broached the issue of her Chairpersonship of the Interim Board of PRASA. He asked her whether she was not able to come because she had accepted a position which he had read about in the media. It was then that she acknowledged that this was so. The JP voiced his disappointment that she had accepted this appointment knowing that in early October she had been recommended for permanent judicial office. His disappointment arose from the fact that there were several PRASA matters in the division which involved alleged corrupt activities.

Judge Mlambo evidence Vol 6: 67

43 He specifically questioned how she could join an organization which was featuring in the division where she had been appointed as a judge, which was not being cast in a good light in the public domain because of what was happening there. The Respondent stood her ground and maintained that she was not able to start on **1 January 2018** and that she had accepted the appointment. He and the DJP tried to reason with her. The DJP questioned whether she would not get out of PRASA because it was still early. In response thereto, **the Respondent replied that she did not want to disappoint the minister.**

Judge Mlambo evidence Vol 6: 68

44 In response to a question from the Tribunal, the JP testified the first time the issue of her involvement with PRASA was raised was by himself during this meeting in **January 2018**. Prior to this meeting, the Respondent had not raised it.

Judge Mlambo evidence Vol 6: 68

45 When he and the DJP realized that they were unable to persuade the Respondent because the PRASA appointment stood in the way, the JP then said he would write to the Minister to request that her appointment date be deferred which he did in a letter which was dated **22 January 2018**, which is referred to in **paragraph 15 *supra*.**

Judge Mlambo evidence Vol 6: 68 - 70

46 In answer to a question from the Tribunal, as to whether the reason for the Respondent not coming in was limited to her outstanding responsibilities at the Water Tribunal, the JP testified that she may have mentioned one or two other matters in which she was involved as counsel but could give no dates of enrolment.

Judge Mlambo evidence Vol 6: 71

47 Questioned by the Tribunal as to the DJP's response, the JP agreed that he too had expected the Respondent to come to report on duty in Pretoria soon after **I January**, as the expectation was that the newly appointed judges would come in to take the oath. The JP was adamant that the Respondent had not raised the issue of PRASA with him.

Judge Mlambo evidence Vol 6: 73

48 The JP testified that he had read media reports but having read them, he did not call the Respondent as he thought she was prudent enough to understand that she was taking on a judicial appointment and could not have anything to do with an appointment like that. That is why he raised it at the meeting with her and she confirmed it there.

Judge Mlambo evidence Vol 6: 75

49 In the letter of **22 January 2018** to the Minister, the JP requested that two acting judges be appointed to take up her duties because the Respondent was not going to be there.

Judge Mlambo evidence Vol 6: 74

50 The JP testified that he had a meeting with the Minister who raised the issue of deferral and said that the JP was seeking to revoke her appointment. The JP expressed his disquiet that if it was revoked the Respondent could not start on **1 April 2018**, and saying that she would have to go for another interview with the JSC. The JP pointed out that in his letter he was requesting a deferral of the starting date and did not challenge her appointment as such. It was agreed that the Department was going to seek an opinion to properly advise the Presidency about what to do.

Judge Mlambo evidence Vol 6: 74 – 75

51 Prior to receipt of the opinion to which reference is made *supra,* the Respondent wrote to him to say she had resigned all her positions and that she was ready to start on **1 April 2018**. He informed her that he had requested a deferral but had not received a response. He had been told that an opinion was being awaited. He could not allow her to come back until that part of the matter was resolved.

Judge Mlambo evidence Vol 6: 75 – 76

52 The Respondent voiced her concern that she was going to be sitting without income as she had resigned from all her positions. The JP said that he was not able to do anything about it.

The situation was addressed in **May 2018** when the Presidency sent another appointment certificate with a minute.

Judge Mlambo evidence Vol 6: 66
Judge Mlambo exhibits Vol 7: 42

53 In answer to questions by the Tribunal, whether it would have been better having found out about PRASA to refer her appointment to the JSC considering his busy position, the JP testified that it had never crossed his mind. He explained that once the JSC has recommended persons to be permanently appointed, the focus of communication becomes the Ministry and the respective Judge President. The ministry would enquire from a Judge President when are the newly appointed judges starting. It had never happened before this occasion that a newly appointed judge was not able to take up an appointment.

Judge Mlambo evidence Vol 6: 77 - 79

54 The JP was adamant that in his view the Respondent was a judge before the President's Act 97 was signed in **May 2018**, that is, from **1 January 2018.** In his view, what had changed was the date upon which she was going to assume and start to perform the duties of a judge, that is, on **1 June 2018**.

Judge Mlambo evidence Vol 6: 77 – 81

55 The JP was referred to the provisions of **section 174(6) of the Constitution of the Republic of South Africa.** In his view, there is a three-stage process. The first stage is the recommendation of the JSC. The second stage is the appointment by the President of a judge. The third stage is when the appointed person takes an oath.

The purpose of the oath of office is that until you take the oath of office you cannot perform any judicial functions irrespective whether you are appointed or not. Such a person cannot sit on a case or adjudicate.

Judge Mlambo evidence Vol 6: 83 – 86

56 Questioned as to his views on the obligations imposed upon judges arising from Article 12 of the Code of Judicial Conduct, he opined that upon being recommended for permanent appointment by the JSC, it was incumbent upon a successful candidate to sever all links with private professional business, that is, to wind down whatever one is doing in a private capacity because when one becomes a judge, one becomes subject and answerable to the Constitution. Such a person can only have one income.

Judge Mlambo evidence Vol 6: 86 - 89

57 A paragraph of an affidavit deposed to by the Respondent was put to the JP for comment which seemed to suggest that she had verbal discussions and meetings with him and the DJP and that both were willing to assist her with a date for judicial appointment which would accommodate her needs. He testified that there was only one meeting

at which he met with her and the DJP. He denied that he was willing to assist her if it applied to previous discussions. What was correct was that when he and the DJP failed to persuade her to start like the newly appointed judges and take the oath in January 2018, that is when they decided to write to the Minister.

Judge Mlambo evidence Vol 6: 89 - 91

58 In regard to the issue of the request by the Respondent to start in April, the JP testified that the only reason the Respondent gave for starting in April was that she wanted to continue her work with the Water Tribunal which he did not agree with.

Judge Mlambo evidence Vol 6: 94

59 The Judge President was referred to his email of **6 December 2017** to the Respondent which is referred to *supra.* In answer to the question whether he had met the Respondent the week after next, he replied that he had not. They had not met. That is why he called her to ask why she had not come to take the oath.

Judge Mlambo evidence Vol 6: 95 - 96

60 In respect of the letter of **29 January 2018** which he addressed to #Unite Behind in response to their letter to him on **26 January 2016,** he testified that he had referred to her as Madam Justice Makhubele because she had been appointed as a judge already.

Judge Mlambo evidence Vol 6: 96 - 97

61 In answer to a question by counsel for the Respondent that she had made no secret of her desire to start on **1 April 2018,** the JP replied that she had concealed her PRASA commitment.

Judge Mlambo evidence Vol 6: 101 - 102

62 Asked whether he regarded it as something which affected her suitability to occupy the office of a judge, the JP replied that he had voiced his displeasure in the meeting because he held the view that she had rendered herself unsuitable by joining a litigant who was featuring in the courts in the division.

Judge Mlambo evidence Vol 6: 102

63 When he was questioned about why he had not mentioned in his letter to the Minister about the PRASA appointment, the JP testified that the official reason the Respondent had given for starting in April related to her chairpersonship of the Water Tribunal. The PRASA issue had to be extracted from her and it was something that told them that she did not want to talk about. The JP denied the suggestion by counsel that the reason he did not disclose it in his letter was because it was not a concern as to her suitability to serve as a judge.

Judge Mlambo evidence Vol 6: 104 - 106

64 It was put to the JP that the Respondent did not claim a salary because she did not regard herself as a judge. This elicited the response from the JP that that was her view. He added that a small correction needed to

be made because at the end of March she was ready after her discussion with **Adv Skosana (the Director General of Justice)** to submit forms to start getting a salary.

Judge Mlambo evidence Vol 6: 107 -1 08

65 The JP was asked, if he regarded the Respondent as a judge, why did he not allow the Respondent to start now that she had resigned from all her positions in the private sector. His response was that the President had fixed a date for her appointment, and she had not come on that date. It was not open for him or the Respondent to come up with a new date especially after she had requested him to ask for the starting date to be deferred.

Judge Mlambo evidence Vol 6: 108 - 109

66 Questioned about the certificate appointing the Respondent with effect from **1 June 2018**, the JP maintained his view that the Respondent was appointed in **November 2017** as a judge. She remained as a judge for her date to be deferred and when she asked for her date to be deferred, she did not start but remained a judge.

Judge Mlambo evidence Vol 6: 64

67 It was put to the JP that when the Respondent was appointed as the Chairperson of IBOC on **19 October 2017** nothing stopped her from doing so. The JP disagreed with this proposition because, in his view,

the Respondent had been recommended for a permanent position. He went on to add that taking on a new appointment goes contrary to a standing recommendation.

Judge Mlambo evidence Vol 6: 128 – 129

68 Asked if there was a meeting with the Respondent after his email of **6 December 2017** to the Respondent where he was responding to her email of **4 December 2017** referred to supra, the JP said he could not recall if there was a meeting. Counsel then stated:

Judge Makhubele has instructed me to indicate that you met with her at your office after this email.

The JP repeated that he could not recall if that was so but would not dispute that a meeting took place.

Judge Mlambo evidence Vol 6: 130 – 134

69 The JP was asked when had he become aware that the Respondent had accepted the appointment as the Chairperson of PRASA. He said he thought there were media reports in November or December linking to the Chairperson of PRASA. He had not taken it up with her because he thought she would take the initiative and take him into her confidence. Even during the meeting, she never mentioned it. He and the DJP had to extract it out of her.

Judge Mlambo evidence Vol 6: 139 – 140

70 It was suggested to the JP that there was a possibility that the President might not confirm the starting date of **1 January 2018**. The JP pointed out that whenever the President signs, he makes the appointment with effect from the date we (the Judge Presidents) have given him. The JP determines the starting date as the head of the court.

Judge Mlambo evidence Vol 6: 143 - 144

71 The JP corrected a concession he had made earlier that it could happen that the President would sometimes not act on the recommendation of the JSC. The JP testified that he went back to look at the Constitution (obviously with reference to **section 174(6))**. According to him, the section was clear, The President must (make the appointment) on the advice of the JSC. He has no legal room once the candidate is recommended. Without exception, the Ministry writes to the heads of courts to ask when you want the candidates to start.

Judge Mlambo evidence Vol 6: 147

72 It was put by counsel for the Respondent:

My instruction on this and should put this to you in fairness. That Judge Makhubele did approach you and raised the question of her difficulty to take office effective 1 January 2018.

The JP responded by saying:

Ja, mentioning the Water Tribunal, yes.

Yes. We spoke on several occasions.

I think the first time as I said it yesterday was before the interviews, to say. "In case I am successful, when is the likely date?" and I mentioned 1 January 2018.

That was the first time.

I would not put it more than three times.

Judge Mlambo evidence Vol 6: 151 - 152

73 The President of the Tribunal asked further questions to clarify this point to which the JP responded as follows:

The Respondent had approached him before the interviews, he told her that it was a divisional policy that newly appointed judges start on **1 January** of the following year. He recalled her saying she might not be able to start on **1 January** and that was when she mentioned the Water Tribunal. He repeated his evidence that the Water Tribunal responsibilities were judicial in nature and there would be no conflict. He added in his view that most of the responsibilities were administrative responsibilities.

Judge Mlambo evidence Vol 6: 152 -153

74 Asked by the Tribunal if she came back after that to say anything else, the JP said he did not think she had said anything to him before the directive of 19 October 2017 was sent. After the Respondent's email of 4 December 2017, he still expected her to come and take the oath because the reason on record for not being able to start was her Water

Tribunal responsibilities. The JP had decided that all those “appointed” by the JSC in October 2017 would start on 1 January.

Judge Mlambo evidence Vol 6: 153 - 154

75 The JP testified that in the email of **4 December 2017**, the Respondent does not say why she cannot start on **1 January**. He had already made the recommendation and the President had already made the appointment by **4 December**. She had already been appointed on **1 November**.

Judge Mlambo evidence Vol 6: 157 - 159

76 Counsel for the Respondent placed the following on record:

Judge Makhubele has asked me to place this on record and ask you to comment.

That when she talked to you about the inability to take office as of 1 January 2018, she did indicate that she was also involved in a matter where she was senior counsel, leading a junior in the Constitutional Court.

The JP responded she had mentioned that, but the main reason was the Water Tribunal. When he asked if there was a date, he told her that if there was no date this would not prevent her starting, she had to give over the brief.

Judge Mlambo evidence Vol 6: 160 – 161

77 Counsel for Respondent then put the following instruction which he received from the Respondent:

Judge Makhubele has asked me to place this on record that when she met you in December, you did talk to her about the question of the court roll that you had prepared or will be preparing. Do you recall the discussion between you and her in December on the question of the court roll?

The JP responded that he could not recall talking about the court roll then.

When she testifies, she will deal with her recollection of the meeting of December 2017. Where according to her, you talked about the court roll and she would indicate that on that discussion you did reassure her that you will rearrange the court roll.

The JP responded emphatically that there was no issue of him rearranging the court roll. Her name was on the roll, and he expected her to come and take the oath. There was no indication on the papers that she had asked him to rearrange the court roll.

Judge Mlambo evidence Vol 6: 161 – 162

78 He only arranged for acting judges and rearranged the court roll in January. This was after the meeting that he had to call her and asked why she had not come to take the oath, which took place in the second

week of January, and **after he had met her and got the clearest demonstration that she was not prepared to do her work as rostered.**

Judge Mlambo evidence Vol 6: 162 – 163

79 The JP was questioned about the relationship between the duty to declare registrable interests and taking the oath, he responded that there was no relationship. The duty to declare arises when the appointment happens.

Judge Mlambo evidence Vol 6: 166 - 169

80 In answer to questions by the Tribunal:

The JP confirmed that there was a shortage of judges and that was why he had to request the Minister to appoint acting judges to do the duties which had been allocated to the Respondent.

Judge Mlambo evidence Vol 6: 193

Regarding the issue referring her appointment to the JSC, he was of the view that the JSC was *functus officio.* The Respondent was already aware that her name was up for consideration for appointment to the Interim Board. Any person coming up for permanent judicial appointment would have found it important to mention that, for the JSC to grapple with that. But it did not happen.

Judge Mlambo evidence Vol 6: 192

Had she written in her email to him of **20 October 2017** before her appointment by the President, he would have written to the Ministry to

request that the recommendation for her appointment be put on hold so that the matter could be referred to the JSC because there was a matter that JSC needed to consider relating to her suitability for appointment.

Had he known about the PRASA issue at that time, he could have referred the matter to the JSC because the appointment had not been set in motion. The issue had never been raised at all. It was something that only became public knowledge after the JSC interview.

Judge Mlambo evidence Vol 6: 194 - 195

THE RESPONDENT

81 The version of the Respondent is with respect utterly disjointed and what follows is an attempt to distil the salient features of her version and to identify and deal with the conflicts between the two versions as they appear from the evidence.

82 Early on in her evidence, the Respondent who was responding to an attempt on the part of the Tribunal to get some clarity on her version that she was not a judge on 1 January 2018, testified that **her defence was that she was not a judge and there was never any intention that she would start on 1 January 2018**. Instead, the anticipated certificate should have borne the date 1 April 2018 and for that reason the JP actively undertook the process to rectify that.

Makhubele evidence Vol 16: 131

83 She testified that when she went to the JP's office the last time, they had a meeting and **"he just said here is the envelope here. These are certificates and I cannot give yours. …….He said I cannot give this certificate because what am I going to do with it? It is not yours. It is not valid. I am taking it back. I am sending it back and that is what he did – exactly that. It came back with the date of 1st. Well, we had anticipated 1 April and, but then the President had to get a legal opinion whether he–can redetermine the date of the appointment and the opinion was saying to him you should know the date of commencement that is between the JP and the Minister. It is an administrative issue. It has nothing to do with the JSC."**

Makhubele evidence Vol 16: 131

84 In answer to further questions by the Tribunal to get clarity, the Respondent agreed with the suggestion that she was saying she did not commence her duties as a judge on 1 January 2018 **because she had an arrangement with the JP.**

Makhubele evidence Vol 16: 134

85 In response to a further question by the Tribunal, arising from the direct evidence of the JP that she was told by the JP that she was to start on **1 January 2018** because she was on the roster to do duties in the High Court in January 2018, **the Respondent denied that this was so**.

Makhubele evidence Vol 16: 138

86 The Respondent then referred to the draft roster of 7 December 2017, and in this regard introduced this evidence:

We, and then he is saying. He then says my evidence is before the final roster was made on the, sometime after, because my meeting request with him was on 14 December. I think was a day before the end of term and we met. That is when he told me that he was going to arrange a replacement for me so I was not expecting to be in the final roll or to be reporting for duty when terms begins.

Makhubele evidence Vol 16: 138 - 139

87 The Respondent went on to say:

….what I am saying and what I would say and emphasise is that when we finished our consultation it was clear that I am not expected to come and report for duty.

Makhubele evidence Vol 16: 139

88 The Respondent then gave notice that she would be calling a person who was supposed to be my clerk had she commenced duties who called her "***because she did not, she saw that, I believe the same draft roster that, or to say I have your file (sic). That was at the end of term or maybe I cannot remember well and I said:***

Look, I am not coming beginning of term. Please talk to JP Mlambo. He will tell you where to redirect these files.

Makhubele evidence Vol 16: 140

89 The Respondent then clarified that she requested a meeting on **14 December 2017,** and that she thought the meeting took place the following day. ***We finalized the confirmation by telephone. I have it here. It is one of ….. it is an email actually. The email is on record to say Judge President please, with regard to, I am answering the question of the draft duty roster to say do not confirm my name until we finalise our discussion.***

Makhubele evidence Vol 16: 140

90 According to the Respondent, at this meeting the JP had told her ***he is writing to the Minister, taking back that certificate. I should not come, come when terms begins. So, there was no expectation from anyone for me to report for duty and where the telephone calls come in that is <u>where I am surprised by his evidence</u> when he says first week of January, second week of January he called me.***

Makhubele evidence Vol 16: 141

91 Later, when questioned by the Tribunal to deal with the crux of the matter as to why she had not taken up her duties on 1 **January 2018**, the Respondent repeated her evidence that at her last discussion with the JP in December, she repeated in substance what she had said earlier in her evidence. However, she added that there was only one meeting with the JP and Judge Ledwaba but that did not take place in January. She testified:

That meeting was some time in February or beginning of March because we were arranging for my starting in April.

Makhubele evidence Vol 16: 147

92 The Respondent explicitly denied the evidence of the JP that she had a meeting with him in early January. She went on to state:

Because that meeting with the DJP Ledwaba. DJP Ledwaba was responsible for recess duty and the intention was for me to do recess duty, to do recess so that, because it then falls in my 1 April date and JP Mlambo is the one who stopped me from assuming duties on there. There is a letter that I am going to refer to you.

Makhubele evidence Vol 16: 147

93 She testified that she never met the JP in January and only met him after that because they were anticipating that the President was going to sign the certificate for **1 April**. The first time she communicated with the JP was via a text message on **26 January 2018** when he requested her to forward her email address because he had a letter that he had to bring to her attention. This was the letter of the complainant of **26 January 2018.**

Makhubele evidence Vol 16: 147 - 148

94 The Respondent testified that when she was completing her questionnaire for the purposes of the JSC application, she had meetings with the JP and informed him that she had a challenge because she had been appointed as Chairperson of the Water Tribunal in 2015 for a four-year term which would have ended in 2019. She had served only two years. She said to him she could not just leave abruptly because the Tribunal had previously collapsed because the Chairperson had left without giving notice.

Makhubele evidence Vol 16: 170

95 According to the Respondent, the JP was amenable to her starting in April having given four months' notice to the Minister. He even agreed to speak to the Minister to give her more time.

Makhubele evidence Vol 16: 171

The Respondent then added:

Then in passing, we were just discussing that maybe when he talks to the Minister, there may not be a prohibition for me to continue with being a judge and Chairperson of the Water Tribunal, but his view, I think he repeated that in this Tribunal, that <u>being Chairperson of the Water Tribunal is administrative duties.</u> That is, it is not administrative duties, but that was just a discussion in passing. We had already agreed that he can give me four months.

Makhubele evidence Vol 16: 170 – 171

96 The Respondent also mentioned that during these meetings with the JP she mentioned to him that she had matters in court, one of which had been set down to be heard in 2018 and that the JP had no problem with her finalizing her matters. She made it clear in her evidence that this discussion and the ensuing agreement between herself and the JP that she was only going to start on 1 April was settled before her interview with the JSC took place in October. She had asked him that the appointment certificate should say **1 April 2018.**

Makhubele evidence Vol 16: 171 – 175

97 The Respondent testified that she had not applied for the position at PRASA. As practising counsel, she was forever giving out CVs to anyone known to her to get any work. Her neighbour knew that she needed work and he would give her information. Her neighbour informed her that the Minister of Transport was under pressure to appoint boards for all the entities under him. Her neighbour asked if she was interested. She responded by saying she was done with practice and already filed her application to the JSC, and if interviewed, and was successful ***would rather be a judge than walking around as counsel.***

She agreed to give her CV to him on being reassured that it was a short-term thing. She never heard from anyone that her CV was being considered nor was she called to an interview. On **19 October**, she was made aware of her appointment as the Chairperson of IBOC when she received congratulatory messages.

Makhubele evidence Vol 16: 176 – 178

98 The Respondent testified:

No one had spoken to me and that was it. Then I received a letter from the Department of Transport. Then I spoke to them. I spoke to the Minister to say: Look I am still waiting for feedback from the recommendations of the JSC, because by then there were no appointments yet and that if I am appointed, and if I were to go to do this, I only have three months. I will. I can stay until March, and that was the understanding with the Minister. *Then the next day or two, the directive of the Judge President came.* ***But this*** **(referring to the JP's directive of 19 October)** ***came later.***

Makhubele evidence Vol 16: 178

SUBMISSIIONS IN RESPECT OF THE FIRST COMPLAINT

99 In respect of the first complaint, there can be no doubt that the Respondent was the Chairperson of IBOC during the period **1 January 2018 to 16 March 2018**, and that she was a judge of the High Court with effect from **1 January 2018.** The evidence is unchallenged that the President appointed her as a judge on **2 November 2017 with effect from 1 January 2018**. This was communicated to the Respondent not only through the media but also through emails from the JP.

100 As early as **4 or 5 October 2017**, the JP had communicated to her that she was a successful candidate and he later confirmed this in his directive dated **19 October 2017**, congratulating her on her elevation as judge permanently. This was also confirmed in his email to her on 6 December 2017.

101 The Respondent must have known at least by the morning of **5 October 2017** that the JSC had recommended that she be appointed as a judge. According to the JP's unchallenged evidence, he informed her himself that she was successful.

102 The Respondent was a thoroughly unsatisfactory witness. She would have this Tribunal believe that it was not a forgone conclusion that once the JSC had made a recommendation, she was destined to be appointed permanently as a Judge of the High Court. She resorted instead to giving testimony relying on the fact that Madam Justice Maya had not been appointed as the Chief Justice despite the recommendation of the JSC to the President. Her understanding of the provisions of section 174 at best for her ought to be found wanting. At worst,

the inference is inescapable that she resorted to this excuse amongst numerous others to explain away her failure to assume her duties as a judge when she was duty bound to do so.

Makhubele evidence Vol 16: 484 – 487

103 The JP's evidence is clear and satisfactory in every material respect. There is no reason to reject it. From the summary of his evidence (*supra*), his version was not challenged in any respect whatsoever. The instructions put by counsel on behalf of the Respondent were not aimed at calling into question the reliability or the credibility of the account he gave.

104 On the other hand, the Respondent gave evidence which, in material respects differed from JP's version. These include the following:

The Respondent testified that:

- The evidence of the JP that he called her in to take the oath in **January 2018** which led to the meeting with him and the DJP in the second week of January **was not true.**
- There was an agreement in place between herself and the JP as far back as **June/July 2017** that in the event her being appointed that she would only commence her duties as a judge on **1 April 2018.**
- The JP informed her on **15 December 2017** that her appointment was invalid and that he was returning the appointment certificate to the Minister.

- Her meeting with the JP and Judge Ledwaba only took place in **March 2018** when it was agreed that she would be allocated recess duties in **April 2018**.

105 Not one of these disputes were put to the JP when he testified. In view of the failure to challenge his evidence, Judge Ledwaba was not called. However, it is patently clear that had he been called he would have testified according to the version set forth in his affidavit to which he had deposed. The Respondent was unable to account for why these two senior judges should falsely claim that the events of **January 2018** had taken place.

106 On any objective view of the events as they unfolded, the Respondent's claim that she only had a meeting with the JP after **26 January 2018** and not in the second week of **January 2018** ought to be rejected based purely on the probabilities.

107 The JP had made it patently clear to her in his email of **6 December 2017** that the appointment had been made with effect from **1 January 2018**. With that in mind, he sent a draft duty roster on **7 December 2017**, which included duties being allocated to the Respondent during the first term of 2018. That is further confirmed by the email from **Ofentse Komane** which was addressed to **Judge Makhubele** on **21 December 2017** which included a comprehensive list of her duties for the first term. There is no evidence that the Respondent responded to this email to the JP or Ms Komane. The Tribunal was told that Ms Komane was to be called to support the Respondent's version. She was not called. The inference is inescapable that if called she would not have supported the Respondent's version.

108 What is not sufficiently clear on any reading of the Respondent's version is why, having informed her that her appointment was invalid on **15 December 2017,** the JP would have done a *volte face* to include her in the **final roster** for the first term within days of this so-called meeting. In any event, the Respondent's version has elements of unreality about it. The Tribunal would have to be driven to conclude that a JP verily believed that a recommendation of the JSC meeting at which he was a leading participant had resulted in an invalid appointment.

109 The Respondent's version of events also fails to account for the letter by the JP to the Minister which he sent on **22 January 2018**. According to the JP's unchallenged evidence, it became clear to him that the Respondent was not prepared to do her work.

110 The JP was thus under an obligation to approach the Minister not only to mitigate the effect of her failure to report but to make alternative arrangements for acting judges to be appointed to take over the duties which she would have been required to perform.

111 The Respondent would have the Tribunal believe that it was only the letter from #UniteBehind of **26 January 2018** which precipitated a meeting between herself and the JP. The advent of the enquiries by #UniteBehind clearly set out their concerns which led to the correspondence by SMS which the Respondent claims was the catalyst of the meeting with the JP which she says was the first to take place after **15 December 2017**. However, this version was never put to the JP. The actions of #UniteBehind did not stop there. Further correspondence was directed to the President, the Chief Justice, the JP, and others on **12 February 2018** which made it plain that the Respondent was in

breach of the Constitution because she was holding office as a judge as well as serving the executive as Chairperson of IBOC. This further complaint no doubt came to the knowledge of the Respondent.

112 On **22 and 24 February 2018**, the Respondent met with attorneys from **Edward Nathan Sonnenberg (ENSAfrica**). The Respondent as Chairperson of the Board of PRASA commissioned an opinion from ENSAfrica on three questions:

- Was the Minister of Transport's appointment of the Respondent to the Board of PRASA lawful?
- Was the Respondent at the time (late February 2018) a judge?
- Was the Interim Board of PRASA lawfully constituted?

113 On **28 February 2018**, ENSafrica provided its opinion to the Respondent. It advised the Respondent *inter alia* that:

- The taking of the judicial oath of office is a prerequisite for a judge to perform their duties as a judge but it is not determinative of an individual's status as a judge.
- No judge may perform any other office for profit.
- The Respondent was a judge with effect from 1 January 2018.
- Therefore, the Respondent may not with effect from 1 January 2018 perform any other office for profit regardless of whether she was receiving a salary as a judge.

114 The Respondent sought through the Board to distance herself from this opinion by claiming that ENSafrica had somehow misguidedly exceeded its mandate by opining on matters in respect of which its opinion was not being sought. In this respect too, the Respondent proved to be a thoroughly disingenuous witness.

In the light of the exchanges between various members of IBOC as appear from pages **54 to 62 of Vol 17** (**JM 3: 10 -18),** it is manifestly clear that the request for a review of the opinion was not based on the so-called tangent that ENS was alleged by the Respondent to have gone on.

115 It was the Respondent who must have felt beleaguered at that time as is apparent from other communications which she relies upon. It is not clear who other than the Respondent herself would have required clarity on her position at PRASA. Unfortunately for her, the opinion did not suit her. The opinion incidentally accorded with the opinion offered by the State Law Advisor.

116 What emerges from the acceptable evidence placed before the Tribunal is that the Respondent understood **she had been appointed as a judge with effect from 1 January 2017.** Her appointment was published in no uncertain terms on **2 November 2017**. From that date, the Respondent would be expected to conduct herself in a manner becoming of a judge.

117 The Respondent had a duty **upon permanent appointment to immediately sever** all professional links and organise her personal business affairs to **minimise conflicts of interest** as required by **Article 12 of the Code of Judicial Conduct adopted in terms of section 12 of the JSC Act, 1994 (the Code).** This she did not do. Instead, when it was obvious that she was on the

brink of taking up an appointment as a judge which constituted the pinnacle of her forensic career, she accepted a position at PRASA on the very day that the JP had issued his directive to all the newly appointed judge, being **19 October 2017**.

118 Having regard to the unchallenged evidence of the JP, the Respondent could hardly have been blind to the potential conflict of interest between her role as a judge in the Gauteng North Division and her role as Chairperson of IBOC, given the number of matters which came before the court of that division involving allegations of corruption.

119 **Article 5 of the Code** requires that a judge **must always,** and not only in the discharge of official duties, **act honourably, and in a manner befitting judicial office.** The question which requires an answer is whether the actions of the Respondent deserved respect in the sense that she conducted herself honestly, conscientiously, scrupulously and in an upright manner.

120 In this regard, the Respondent's conduct fell woefully short of what was required of her. It must have been clear to her that she had a problem as of **19 October 2017** as she was with receipt of the directive of the JP and, according to her version, the totally unexpected announcement of her appointment as Chairperson of IBOC. Instead of being upfront with the JP in her email of **20**

October 2017, by mentioning the PRASA appointment as the reason why she wanted to delay the assumption of the office of a judge, she simply stated that she wanted a discussion about the starting date. She suggested disingenuously that somehow the directive followed a few days after the PRASA appointment and when she met the Minister of Transport was not sure at that time whether she was going to be a permanent judge.

121 However, in her **4 December 2017** email to the JP, she was equally less candid with the JP as to what the true reason for her reluctance to commence with her duties as a judge on 1 January 2018. The so-called challenges she was allegedly facing could have been spelt out in no uncertain terms which would have included mentioning her commitment to PRASA. She did not mention it.

123 The two emails mentioned *supra* made no mention of the claim by the Respondent that as early as **June/July 2017** she had made it clear to the JP that she would only be able to start on **1 April 2018**, and that he had agreed to such an arrangement. This also appears to inconsistent with what is contained in her letter to the Minister of Justice dated **13 May 2018** where she stated:

I wish to place on record that I requested a change of my date of assumption of duties from 01 January 2018 to 01 April 2018 as far back as November 2017.

Makhubele exhibits Vol 17: 347

124 The version tendered by the JP as supported by the version of Judge Ledwaba as recorded in his affidavit accords with the probabilities. The JP had been made aware of media articles that the Respondent had been appointed as the Chairperson of PRASA but had not questioned her about it. The Respondent gave evidence under oath that no such articles existed thereby suggesting that the JP had falsely claimed that he had read such articles, but later retracted this claim.

125 Matters came to a head when the Respondent did not turn up to take the oath of office as all the other newly appointed judges had done. When asked why she did not assume office, the Respondent responded that she was tied up with the Water Tribunal and had outstanding briefs to attend to. It was only when her appointment at PRASA was raised by the JP that the Respondent admitted that this was so.

126 The conduct thus described can hardly be considered as honourable. The Respondent in effect made a series of misrepresentations which she knew to be false. In her evidence, the Respondent made much of the level of trust to be expected of officers of the law (in the context of her dealings with Botes). Her omission to inform the JP of the true reason for her reluctance to commence on 1 January 2018 constituted a serious act of misconduct no less serious than an officer of the court making a misleading statement before a court of law which he knows to be not entirely true.

127 To exacerbate matters, when pressed by the JP and Judge Ledwaba to desist from continuing at PRASA, the Respondent declined to do so stating that she did not want to disappoint the Minister (meaning the Minister of Transport). Under cross-examination, the Respondent somewhat proudly pointed out that she served three ministers, one of them being the Minister of Justice. If this is indeed the mindset of the Respondent, grave questions need to be asked whether she will be able to comply with **Article 4 of the Code**.

128 The Respondent has in not so many words accused the two most senior judges of the division to which she had been appointed of perjuring themselves by testifying that the meeting at which this exchange took place did not happen. It is instructive to note that the readiness with which the Respondent was prepared to serve the executive as opposed to the Constitution is manifested in two other instances:

- According to the Respondent's own evidence, despite the JP's assurance that there was no conflict of interest between her duties on the Water Tribunal and the office of a judge, she did not want to let the Minister (of Water and Sanitation) down by resigning prematurely.
- The Respondent wrote the following WhatsApp to the JP on **4 April 2018 (JM2 Vol 21: 31 – 34)** which contained the following statement:

  As I reported to you & DJP Ledwaba, I met and discussed the matter with JB at their Parliamentary Office in Cape Town on 07 March.

  I only learnt on 06 March from Minister Masutha that he and former Minister Maswanganyi discussed my continued stay at Prasa and they agreed that the former should let me go.

Minister Masutha as Cabinet member is part of decision to appoint the Interim Board.

I don't want this matter to go to an extent where he will be forced to disclose the discussions at Cabinet level and between him and Maswanganyi.

I sent Maswanganyi a note on 08Feb and advised him that I'm resigning with immediate effect. ***He pleaded with me for time to advertise vacancies.*** *He was removed just before the closing date of nominations.*

Nzimande readvertised after his appointment.

This is one of the reasons why I resigned earlier than end of March because I realized that the politicians don't want to address the issue of the status of the Interim Board while I continue to be battered by the media.

129 At the time when she was a judge, the servility which the Respondent displayed towards members of the executive branch of government is astounding. The quotation ***supra*** resonates so completely with the evidence of the JP and Judge Ledwaba that the Respondent was reluctant to leave PRASA because she did not want to disappoint the Minister.

130 There can be no doubt that the first complaint raised by the complainant is justified by the evidence placed before the Tribunal. In the light of the conduct of the Respondent, this Tribunal ought to find in respect of this charge that she held an office for profit as Chairperson of IBOC while she was a judge in active service in contravention of **section 11(1)(a) of the JSC Act**

131 Clearly, the aims/objectives of the JSC Act was to regulate judicial conduct considering the overriding principles of openness, transparency and accountability that permeate the Constitution that are equally applicable to judicial institutions **and officers**.

132 Section 177(1) of the Constitution provides that a judge may be removed from office only if-

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed by a resolution adopted with a supporting vote of at least two thirds of the members.

133 Further disturbing aspects of the conduct of the Respondent as revealed by the way she has conducted herself at the Tribunal may be set forth as follows:

Despite her insistence upon recognition of her status as a silk and a judge of the High Court, the Respondent revealed that her grasp of the law was wanting in several respects:

- She failed to grasp the challenge which she faced in explaining away why certain vital instructions were not put to witnesses by her counsel. She claimed that it was the responsibility of her erstwhile counsel to explain why her instructions were not put. The inference is inescapable that she had not told her counsel to contest vital aspects of the evidence adduced against her. She was seated next to her senior counsel throughout the proceedings when witnesses were led. There were several instances when the matter was stood down or was adjourned during which time, she had ample opportunity to instruct her counsel. Her version was a belated attempt to explain away the evidence which was against her. Equally belatedly, she resorted to the claim of attorney-client privilege which was absolutely no bar to questions being asked in cross-examination as to whether she had instructed counsel.

- As already mentioned *supra*, her grasp of the provisions of **section 174 of the Constitution** was also questionable. As a judge of the High Court who was the subject of an appointment process, the least that could be expected of her is the ability to distinguish the provisions of section **174(6)** which is precatory **(*must appoint on advice of the JSC)*** as opposed to section **174(3)** which vests in the President the power to appoint (***after consultation with the JSC et al)***, the Chief Justice and Deputy Chief Justice.

- A further Indication of the Respondent's shortcomings in this regard involved her instruction to her attorney to place on record that she wanted to cross-examination the very witness, **Ms Ofense Komane**, which she elected to call as a witness. Despite being advised that that would be irregular, the Respondent moved an application for an adjournment to seek the advice of counsel on the course open to her.

- Furthermore, somewhat surprisingly given the nature of the Tribunal and its rules which are set forth succinctly and clearly in **Rule 4 of the Rules to Regulate the Procedures before Judicial Conduct Tribunal (made in terms of section 25(1) of the JSC Act, 1994) read with Form 2 thereof,** the Respondent questioned the relevance of the Summary of Substantial Facts which were made available to her prior to the commencement of the hearing of the Tribunal.

- As will be more fully expanded upon when dealing with the second complaint, the way she acted as Chairperson of IBOC also revealed an astonishing lack of understanding of the legality of her conduct.

134 The Respondent attacked the integrity and honesty of two senior judges with whom the Respondent had worked with. The Respondent resorted to an unfounded attack upon the honesty of Judges Mlambo and Ledwaba to extricate herself from the mess which she had caused. This was conduct which was incompatible with or unbecoming of the holding of a judicial office.

135 It is therefore submitted that on a conspectus of all the evidence before the Tribunal, the Respondent was not only guilty of gross misconduct but was also shown to be grossly incompetent.

THE SECOND COMPLAINT:

Whether of all the cases that PRASA was involved in, Judge Makhubele paid special attention only to those of Siyaya; she marginalised the PRASA legal unit and terminated or caused to be terminated the mandate of PRASA's attorneys and personally appointed another firm of attorneys in their stead to represent PRASA; she negotiated with Siyaya's attorneys and entered into a confidential settlement agreement that is manifestly and materially prejudicial to the interests of PRASA relying on non-existent "major concessions" of its liability to Siyaya allegedly made by PRASA employees at the Insolvency Inquiry; and frustrated PRASA attempts to resist the enforcement of the settlement.

The following facts appear to be common cause between the parties in respect of the second complaint to be investigated and reported upon by the Tribunal:

1 **The Siyaya matter** refers to four separate actions brought on behalf of two companies **Siyaya DB Consulting Engineers (Pty) Ltd (Siyaya DB) and Siyaya Rail Solution (Pty) Ltd** in 2015 and 2016**.** Both companies are under the control of the **S Group** which was headed by one **Makhensa Mabunda**. At the relevant time in late 2017, **Siyaya DB** was in liquidation.

2 The **Passenger Rail Agency of South Africa (PRASA)** had previously entered into agreements with the **Siyaya entities**, which formed the bases of the **Siyaya** entities' respective claims.

3 The four outstanding matters which are relevant to the issues under investigation before this Tribunal are:

Siyaya DB Consulting Engineers (now in liquidation)

In respect of case number **73934/15** – the amount claimed was **R7 098 481.66.**

In respect of case number **73933/15** – the amount claimed was **R8 095 950.00**.

In respect of case number **47598/16**– the amount claimed was **R15 371 739.87**.

Siyaya Rail Solutions (Pty) Ltd

In respect of case number **47597/16** – the amount claimed was **R21 million.**

4 PRASA had resisted these claims raising in its pleadings *inter alia* the following defences:

- Siyaya entities performed work for PRASA which was never required by it.

- Persons who contracted on behalf of PRASA did not have the authority to do so.
- Siyaya was not entitled to interest on the amounts claimed because the payments were not demanded on the dates alleged; and
- Amounts claimed were not in accordance with what was agreed.

5 There were furthermore allegations that the agreements were concluded unlawfully without following proper process through supply chain management at PRASA.

6 At some point between **2016 and 2017**, PRASA and the **Siyaya** entities agreed to refer the disputes to arbitration before retired Judge Fritz Brand.

7 It was agreed that the arbitration trial would commence in **September 2017**, which did not happen due to delays caused by the **Siyaya** entities. In the end, no arbitration trial took place.

8 On **6 September 2017**, Botes sent an email to **Madimpe Mogashoa (Mogashoa) of Diale Mogashoa Attorneys**, the external firm of attorneys who had been acting for PRASA in the litigation which had commenced in 2015 and 2016 respectively. In the email, Botes claimed that PRASA did not have defences and ought to settle. Botes relied on the so-called major concessions made by employees of PRASA referred to in the **Commissioner's Interim Report of the Inquiry in terms of section 417 and 418 of the Companies Act into Siyaya DB (in liquidation) (the Krige Report).**

9 The first meeting of IBOC took place on **30 October 2017** at which one of the agenda items was a discussion of the Delegation of Authority and the Governance Framework.

The Board noted that the current Delegation of Authority had not been reviewed and the Board was advised that a process was underway to appoint a consultant to review PRASA Group Delegation of Authority and the Governance Framework.

The Board resolved that the current delegation of authority be circulated to the Directors.

There was also a discussion on the work of Werksmans Attorneys.

The Board requested Management to provide the following:

- The terms of reference given to Werksmans Attorneys:
- The letter of appointment and the process to secure their services.
- The reason for the termination of the mandate.
- A list of the Legal Panel should be submitted to the Chairperson and the relevant Committee.

The Board indicated that a meeting might be arranged with Werksmans Attorneys to present on the investigation report.

10 On **9 November 2017**, the Respondent, as Chairperson of IBOC, met with members of the PRASA legal department, **Onica Martha Ngoye (Ngoye) , (the Group Executive of Legal, Risk and Compliance) and Mfanimpela Moses Dingiswayo (Dingiswayo) (the General Manager responsible for legal services)**. **L K Zide (the Acting Group Chief Executive Officer) (Zide)** was also present at the meeting. There were two legal bodies relevant to litigation involving PRASA, being:

1. The PRASA legal department which was an internal PRASA department headed by **Ngoye**; and
2. The PRASA legal panel, which was a panel of law firms whose services could be accessed by PRASA, if necessary.

11 The purpose of the meeting was to have a better understanding of the work of Group Legal Services, in particular the forensic investigation that was undertaken by **Werksmans Attorneys (Werksmans).**

12 On **14 November 2017**, the Respondent communicated with **Francois Weideman Botes SC (Botes)**, a Senior Counsel at the Pretoria Bar and a colleague of the Respondent. Botes was acting as counsel for the Siyaya entities instructed by **Mathopo Attorneys (Mathopo)**.

13 During the same telephone conversation, the subject of the **Siyaya** litigation was discussed. Botes undertook to provide the Respondent with a bundle of documents consisting of 17 pages which included the **Krige Report** and his email dated **6 September 2017**, which he had sent to **Mogashoa**.

14 **Botes** met with the Respondent at the PRASA offices on **14 November 2017** and furnished her with the bundle of documents.

15 On **14 November 2017**, shortly after her meeting with Botes, the Respondent convened a brief meeting with **Ngoye** and **Zide**. The purpose of the meeting was to ascertain the status of the **Siyaya** matters.

16 At this meeting, the Respondent indicated to **Ngoye** that she had been given access to the **Krige report** and, according to the report, employees of PRASA had conceded that the claims by **Siyaya** entities were valid and payable.

17 The Respondent accordingly requested that **Ngoye** obtain a report from PRASA's attorneys to furnish information on the status of the **Siyaya** litigation.

18 The Respondent was provided with the report prepared by **Mogashoa** dated **21 November 2017**.

19 In an urgent memorandum dated **28 November 2017** addressed to **Zide**, the Respondent claimed that the **Krige Report** reported that "*witnesses made major concessions with regard to the liability of Prasa in the civil actions launched by Siyaya Consulting Engineers (now in liquidation). However, despite these concessions, Mogashoa Diale Attorneys appear to still want to proceed with the arbitration proceedings. They however did not address the prospects of success at the arbitration proceedings in view of the evidence that has already been led at the liquidation enquiry."*

20 The Respondent instructed **Zide** that the officials who had testified in the inquiry, namely, **A M Vermeulen, V Kobuwe and S Baltac,** be requested to submit written reports to confirm their testimony. She furthermore instructed that Ngoye was to be requested to provide her with a report "*about the involvement of her unit, in particular with regard to provision of instructions to Mogashoa Diale Attorneys on the issues I have raised above."*

21 The Respondent instructed that the reports mentioned supra as well as the report of **Zide** "*must reach me on or before 12:00 on Friday, 30 November 2017 to enable me to report to the Board of Control on 1 December 2017"*.

22 On **30 November 2017**, **Dingiswayo** provided **Zide** with a report on **Ngoye's** behalf to be furnished to the Respondent.

23 In his report, **Dingiswayo** *inter alia* pointed out that:

- He had not been provided with the insolvency inquiry report.
- He accordingly did not know what concessions had been made and could not advise on whether the concessions were “at variance to the defences”.
- The defences raised by PRASA against Siyaya were “cogent” and PRASA may have a counterclaim against Siyaya.

23 **Dingiswayo’s** report set out PRASA’s defences which were unaffected by the so called “major concessions” which included:

- Services indicated in invoices do not refer to services as per the agreement.
- PRASA denied the existence of certain oral agreements claimed.
- Certain claimed variations of agreements had not been so varied, and the underlying contracts had, in any event, lapsed.

24 In addition thereto, the Respondent was provided with reports prepared by **Kobuwe and Baltac** respectively dated **30 November 2017.**

25 On **30 November 2017**, **Mogoshoa** provided a subsequent report to the Respondent, in which the following was stated:

He had not been provided with the documents which the Respondent had received from **Siyaya’s attorneys** on **14 November 2017**.

He could not comment on how the alleged concessions would affect PRASA’s defences without sight of the documents held by the Respondent, including the interim report.

26 On **1 December 2017**, the IBOC convened being chaired by the Respondent and proceeded and the Board *inter alia* resolved that:

- The Executive Legal Risk and Compliance must hand over all the litigation files relating to contracts and/or contractor, emanating from the investigations of the Office of the Company Secretary; and
- The legal panel [of PRASA] is suspended with immediate effect.

27 The purpose of the meeting was apparently to discuss three reports by the Public Protector, the Auditor General and **Werksmans**. The Public Protector's report had made various findings of maladministration of gross irregularities in procurement and expenditure.

Part of the remedial action proposed by the Public Protector included (1) referring matters to be investigated by the Auditor General, and (2) PRASA employing its own internal investigation which was done by **Werksmans** Attorneys.

28 The **Werksmans** Report *inter alia* found that the Siyaya procurements had been irregular. The summary says *inter alia* that several nepotistic relationships were identified which may give rise to fraudulent, corrupt and overly preferential business transactions, including **Lucky Montana (Montana)**, the former CEO of PRASA and **Mr Makhense Mabunda (Mabunda**), the director of various entities in the Siyaya group and associated with other businesses which had benefitted from PRASA.

29 On **4 December 2017, Mogashoa** attended a meeting with the Respondent and **Zide** at PRASA to which he had been summoned to attend.

30 On **5 December 2017, Ngoye and Dingiswayo** addressed a memorandum to the **IBOC** setting out *inter alia* their concerns with the 1 December 2017 decisions of the Board.

31 On **15 December 2017**, the Respondent met with **Mogashoa** at which he received instructions to settle four (4) of the Siyaya matters. The instructions were contained in a letter by **Zide** addressed to **Mogashoa** dated **15 December 2017** which contained *inter alia* the following instructions:

Siyaya DB Consulting Engineers (now in liquidation)

- In respect of case number **73934/15** – the instruction was to settle the amount claimed as **R7 098 481.61.**
- In respect of case number **73933/15** – the instruction was to settle the amount claimed as **R8 095 950.00**.
- In respect of case number **47598/16** – the instruction was to settle the amount claimed as **R15 371 739.8**
- In respect of case number **74281/15** – the instruction was to pend both the file and the arbitration proceedings until receiving further instructions.
- In respect of case number **77383/15** – it was recorded that the Chairperson had been advised that a plea had not been filed as it had been agreed between the parties that the amount claimed had been paid in April 2016.

Siyaya Rail Solutions (Pty) Ltd

- In respect of case number **47597/16** – the instruction was to settle the amount due and payable as **R19 583 778.42** (including vat).

- The instruction was that the payment of interest was to be reckoned from the date of summons.
- The instruction was tender the offers as follows:
- **Liquidators of Siyaya DB Consulting** in the amount of **R30 566 171.53** plus interest.
- **Attorneys representing Siyaya Rail Solutions** in the amount of **R19 593 778.42** plus interest.
- "As discussed with the Chairperson you are to include the confidentiality Clause in the Settlement offer".

32 At about the same time, the Respondent sent a message to **Botes** in the following terms:

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

Regards

Nana "

33 **Zide's** letter to **Mogashoa** was simultaneously sent to **Botes.**

34 On **18 December 2017**, **#Unite Behind** launched proceedings against the Minister of Transport and PRASA in the Western Cape High Court, which were primarily concerned with the governance of PRASA and the failure by the Minister to appoint a quorate Board.

35 On **18 December 2017**, **Mathopo** responded in a letter to **Mogashoa** to the offers to settle tendered to them by **Mogashoa**. In the letter, the following is recorded:

"2 *Your settlement offers do not comply with the provisions of Rule 34(5)I of the Uniform Rules of Court of the High Court. You received instructions from your client PRASA to submit the following settlement offer or tender to our clients:*

2.1 *Case no.* ***47598/2016 – R15 371 739,87;***

2.2 *Case no.* ***73933/2015 – R8 095 950,00;***

2.3 *Case no.* ***73934/2015 – R7 098 481,65;***

2.4 *Case no.* ***47597/2016 – R19 583 778,42.***

Plus interest a tempore morae at 9% per annum on the aforesaid amounts, calculated from the date of service of the respective summonses, until date of payment.

3 *Your client, PRASA, did not instruct you to submit an offer or tended to our client the capital amounts only. Your client's specific and express instruction to you was to submit an offer or tender to our clients which provides for payment of interest a tempore morae at the rate of 9% per*

annum, calculated from the dates upon which the respective summonses were served on your clients."

36 The effect of the calculation of the interest added to the capital amounts mentioned *supra* which **Mathopo** claimed PRASA was liable to pay as of that date was:

- In respect of **Siyaya DB Consulting Engineers** the total amount due and payable was **R35 718 228. 79.**
- In respect of **Siyaya Rail Solutions** the total amount due and payable was **R22 227 588.50**

37 On **21 December 2017**, **Mogashoa** sent revised offers to settle the Siyaya matters in response to **Mathopo's** letter of **18 December 2017**, which now included the interest on the capital amounts.

38 At **11.21am** on **Thursday 21 December 2017, Botes** emailed correspondence in the name of **Mathopo** to **Mogashoa** in which the Respondent was copied and stated as follows:

1. *Our clients accept PRASA's Settlement Offers; and*

2. *It is common cause between the parties that interest will be recalculated (and payed (sic)) from the date upon which the respective summonses were served on PRASA.*

   Kindly effect payment of ALL amounts concerned into the Trust account of Crouse Inc, the details which were communicated to you in our previous letter addressed to you..

Our client's instructions are furthermore to request your client to expedite the payment of the amounts concerned and that it be attended to on an URGENT basis.

39 At **12:15 PM** on **Thursday 21 December 2017**, the Respondent emailed **Mogashoa** and copied **Zide** in her correspondence in which she stated:

Dear Madimpe

Thank you for the update.

Mr Zide, please attend to finalize the matter with regard to the payment part.

Regards

Chairperson

40 No payment was made which prompted **Mathopo** to address a letter dated **8 January 2018** to **Mogashoa** to confirm that the matters mentioned supra had been settled and that payment was being awaited as a matter of urgency. However, the remaining matter which pertained to case number **74281/2015** was also raised by **Mathopo** which was set down to be heard from **26 to 28 March 2018** in the arbitration hearing before Judge Brand.

41 On **13 January 2018**, the Respondent addressed a text message to **Botes** as follows:

Good day Francois

I've deleted whatsapp. Let the liquidators's attorneys handle communications on Siyaya matters.

Botes responded by sending a thumbs up sign.

42 On **17 January 2018**, **Mathopo** addressed a letter to Judge Brand advising him that settlement offers had been made in respect of the matters mentioned supra and that his client accepted the settlement offers on **21 December 2017**. **Zide** had confirmed on **27 December 2017** that all the amounts were due and payable to his clients pursuant to the acceptance of both settlement offers or tenders will be effected on **15 January 2018**. His clients accepted **Zide's** undertaking and await payment.

Mathopo went on to state that "*In the unlikely event that PRASA fails or omits to effect payment of the abovementioned amounts on or before Friday 19 January 2018, our instructions are to approach you and disclose the terms and conditions of both settlement offers to you, and to request you to make an award in terms thereof, specifically to enable our clients to initiate an application in the High Court of South Africa and to apply for an order as envisaged in Section 31 of the Arbitration Act, No 42 of 1965: and …..*".

43 At **04:37 AM on 19 January 2018, Botes** messaged the Respondent as follows:

Good morning Nana Tshepo ***(Mathopo)*** **addressed a letter to Madimpe** ***(Mogashoa)****. Madimpe's response was that he was awaiting instructions from PRASA. Judge Brand acknowledged receipt of Tshepo's letter and is on standby if we need his his assistance. Kind regards!*

At **12:28 PM** on that same day, the Respondent acknowledge receipt of this message with an emoji.

44 At **11:00 AM on 24 January 2018**, the Respondent sent a message to **Botes** in following terms:

Dear Francois

My quietness is caused by shock and disgust at the open defiance displayed by the Finance lady. There are rumours and insinuations doing the rounds but I'm waiting for a written confirmation of exactly what the problem is.

Regards

45 At **09:54 AM on 28 January 2018**, the Respondent sent the following message to **Botes**:

I want to talk to you urgently

46 At **08:03 AM on 6 February 2018,** the Respondent appears to forward to **Botes** the contact details of **Cromet Molepo (who took over as the Acting Group Chief Executive Officer) (Molepo).**

Botes acknowledged receipt of this message with a symbol denoting thankfulness.

47 On **7 February 2018, Zide** messaged **Mogashoa** as follows:

Yes, Mogashoa should confirm that the settlement be made an order and proceed with the arbitration on the one that had outstanding issues.

That's from the Chairperson.

To which Mogashoa responded:

Thank you. Done. Will send you the awards as soon as they are availed to me.

48 On **7 February 2018**, Judge Brand made the four awards in accordance with the settlement agreements. He, however, amended the date from which interest would be calculated from **22 December 2017** to **16 January 2018.**

49 On **8 February 2018, Molepo** emailed **Ramagoganye Ngakane**, following upon an email received from **Mathopo**, and instructed her to:

*Set up a meeting with Martha **(Ngoye**), LK **(Zide)**, Peter and Yvonne **(Page) (the Acting CFO**) for this afternoon to process this matter.*

50 **At 12:56 PM on 9 February 2018, Botes** messaged the Respondent as follows:

Dear Nana

Judge Brand made 4 awards on Wednesday, 7 February. Madimpe was present and undertook to advise PRASA accordingly. I managed to speak to Mr Cromet Molepo late during the afternoon and his view was that we shouldn't incur any further legal costs herein and that we should provide PRASA an

opportunity to consider the awards and make payment. The last thing I want to do is to create further disputes or animosity. Tshepo Mathopo has instructed me to prepare 4 applications as envisaged in Sec 31(1) of the Arbitration Act,no 42 of 1965. I am reluctant to do so in the event that payment is eminent ***(sic).*** *Please advise ? Kind regards,*

Francois Botes

The Respondent responded thus:

Thanx Francois for the update. I'm in a meeting. Will call you asap.

51 At **2:28 PM on 12 February 2018**, the Respondent sent a message to **Botes** as follows:

Can I call you later?

To which **Botes** responded with a thumbs up sign.

The Respondent went on to write:

Good day Francois

I was in a meeting at Prasa. We're now travelling to the airport to Cape Town. Attending the Portfolio Committee tomorrow. Call you shortly.

Botes responded thus:

Dear Nana

Thank you for the message and the update. I want to avoid an embarrassment and I don't want to step on anybody's toes. Should we proceed with an application for payment of the awards made by Judge Brand or should we be patient and await payment ? Kind regards Bon Voyage !

This elicited the following response from the Respondent:

I will talk to Zide when we get to Cape Town & revert asap.

Botes responded yet again with a symbol of thankfulness.

52 At **07:48 AM on 14 February 2018, Botes** messaged the Respondent as follows:

Dear Nana

Do you have 2 minutes to talk to me?

The Respondent answered thus:

Yes you may call

53 On **20 February 2018**, **Mogashoa** received applications for the arbitration awards to be made orders of court. **Ncebazi Mbebe of Mogashoa** emailed **Zide on 20 and 21 February 2018** forwarding revised notice of motion applications and requested instructions from PRASA whether to oppose the applications. No instructions were received. The applications were set down on the unopposed roll for **9 March 2018**.

54 On **Tuesday 6 March 2018, Ngoye** instructed **Bowman Gilfillan Attorneys (Bowman)** to oppose the applications by **Siyaya** to have the arbitration awards made orders of court. Notice of intention to oppose were filed.

55 On **8 March 2018, Mathopo** then delivered a notice to **Bowmans** in terms of **Rule 7 (1) of the Uniform Rules of the High Court** calling upon Bowmans to produce a mandate with a resolution.

56 On **8 March 2018, Bowmans** filed a special power of attorney signed by **Ngoye.**

57 On **8 March 2018, Mathopo** addressed a letter to **Bowman**. In this correspondence, it is recorded that:

"*….. we requested Adv Nana Makhubela (sic) SC to indicate whether or not the* ***Board of Prasa*** *has decided to oppose the four applications. Adv Nana Makhubela (sic) SC's response was as follows:*

"Those attorneys have no authority.

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

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

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

58 On **9 March 2018, Mathopo** requested **Bowman** to produce authority to act for PRASA. When they could not do so, Siyaya's attorneys enrolled the applications.

59 The applications by Siyaya were heard by **Holland-Muter AJ** who questioned whether **Bowmans** had instructions from PRASA. **Botes** had previously communicated with the Respondent on his mobile phone as set forth *supra*. In his address to **Holland-Muter AJ**, **Botes** informed the Court that he was in possession of an SMS received from the Respondent that **Bowmans** had no authority to act on behalf of PRASA.

70 **Holland-Muter AJ** then granted the orders sought in the applications of **9 March 2018**.

71 **Mathopo and Crouse Attorneys** immediately prepared writs of execution which were issued by the Registrar and presented to the Sheriff of Pretoria East. The Sheriff immediately attached the monies held in PRASA's bank accounts in line with the capital amounts which were made orders of court.

72 On **12 March 2018**, the Respondent, **Ngoye, Dingiswayo** amongst others from PRASA met with the Minister of Transport, **Dr Blade Nzimande**. When the tensions between the Respondent and **Ngoye's** office was brought up, the Respondent suggested that written reports be prepared by the parties for submission to the Minister, instead of discussing it then. The parties were required to submit these reports by 16 March 2018.

73 On **16 March 2018**, **Ngoye and Dingiswa**yo wrote a letter to the Minister, in which *inter alia* they accuse the Respondent of interfering in Siyaya matter.

74 On **16 March 2018**, the Respondent resigned from her position on the Board of PRASA. The Respondent left it to a member of the Board to prepare a written report to the Minister.

75 By way letter dated **28 March 2018** addressed to the Company Secretary of PRASA, Dr B E Nzimande MP, the Minister of Transport wrote as follows:

As the Shareholder, I therefore direct that PRASA must defend the Siyangena matter. I direct further that the Siyaya matter must be challenged in court, with the view of getting the judgement rescinded, and the money that I believe has already been paid to be recovered.

In respect of the second complaint, the Evidence Leader adduced the evidence of the following witnesses:

Martha Ngoye (Ngoye).

Fani Dingiswayo (Dingiswayo).

Madimpe Mogashoa (Mogashoa); and

Francois Botes (Botes).

MARTHA NGOYE:

76 Ngoye occupied the position of Group Executive: Legal, Risk and Compliance at PRASA and had been employed at PRASA since 2007. Dingiswayo was employed as the General Manager responsible for legal services at PRASA and he reported to her. The Respondent had been appointed as Chairperson of IBOC on **19 October 2017**. Ngoye had graduated with a B.Proc. degree from the University of the Western Cape and obtained an Ll.B. degree from the University of the Witwatersrand before serving articles at Edward Nathan Sonnenberg Attorneys and being admitted to practise as an attorney.

77 According to Ngoye, IBOC was not properly constituted because it did not have all the functionaries on the Board as required by the provisions of **section 24 of the Legal Succession to the South African Transport Services Act, 9 of**

1989 which regulated the composition of the Board. IBOC did not have a representative from Treasury (the Department of Finance) **(see section 24(2)(b).** This was a mandatory requirement, and if not met, IBOC would be **inquorate.** Any decision taken by an inquorate Board would not be binding and could be challenged.

Ngoye evidence: Vol 8: 6 – 9

78 Ngoye next dealt with the importance of the **Delegation of Authority (DOA)** which specifically outlined the responsibilities of the Board, the Group CEO, and various Executives within PRASA.

The DOAs would be decided upon by each Board and it would be the function of the Board to decide how powers would be delegated within PRASA. When the Board which the Respondent chaired was established, the DOA which was applicable was the one which was approved by the Board chaired by Popo Molefe.

IBOC thus would continue under the authority of the Molefe DOA until such time as the new Board finalised their own DOA. The Board chaired by the Respondent had not finalized a revised DOA.

.**Ngoye evidence: Vol 8: 9 – 26**
Ngoye exhibits: Vo 9: 64 – 70

79 Ngoye testified that the **power to institute and defend** legal proceedings vested in the legal department. In respect of legal claims, the GCEO was **accountable** to the Board in that he was responsible for reporting to the Board.

At that time, the **Acting GCEO was Zide.** The **responsibility** according to the DOA was given to the **Head of Legal (HOL)** being Ngoye herself. Under the heading **informed,** the DOA required the Board to be informed. It was the function of EXCO to prepare reports for the Board.

.Ngoye evidence: Vol 8: 27 – 35
Exhibits: Martha Ngoye: Vol 9: 1 – 70

80 The Board had the power to revoke the delegations. However, the variation had to be in writing. No such revocation by IBOC had taken place which had been reduced to writing.

.Ngoye evidence: Vol 8: 34 – 36

81 Ngoye then described the process in terms of which the Siyaya summonses which dated back to 2015 had been processed. These were brought by the respective business units within PRASA. These went to the legal department controlled by Dingiswayo who had several lawyers working with him.

Ngoye was involved monthly with the legal department, and she had a close understanding of the workings of the department. If there was no defence to a summons, the legal department would speak to the other side's attorneys to resolve the matter. However, when the legal department believed that a matter needed to be defended, it would liaise with the business unit to obtain all the information required. External lawyers were appointed from the panel to represent PRASA. In the case of Siyaya, **Diale Mogashoa Attorneys** were briefed.

Ngoye evidence: Vol 8: 36 – 42

82 When she was asked how the Board became involved in the Siyaya matters in 2017, Ngoye explained that the matters had been ongoing and been referred for arbitration. She was called to a meeting by the Respondent in her office at PRASA which took place on **14 November 2017. This was only her second meeting with the Respondent.** The Respondent raised the Siyaya issue with her and asked "why are you people proceeding with defending these matters." At her first meeting the week before with the Respondent, **she had been asked about the Werksmans' investigations "because that was a hot potato, I suppose, at the time".** Ngoye explained that the matters were being defended because PRASA had good defences. Ngoye was taken aback by being asked why PRASA was defending because she knew there were good defences in defending the Siyaya matters.

.**Ngoye evidence: Vol 8: 42 – 44**

83 The Respondent then questioned Ngoye whether she was aware that employees of PRASA had made concessions at the 417 inquiry. She responded that she did not know what the Respondent was talking about. The Respondent then said that **out of collegiality, she had received the 417 report.** Ngoye had not seen the report **and requested the Respondent to share a copy of the report with her so that she could understand what she was talking about. The Respondent refused to do so because it had been out of collegiality that she had received the report.** The Respondent wanted reports in respect of the Siyaya matters. The Respondent enquired from Ngoye what law firm was being used and was informed that it was Diale Mogashoa

who were attending to the matters. Ngoye was quite prepared to provide reports from the legal department as well as to engage with Diale Mogashoa to give the Respondent the information she required. During the meeting, Zide was present. The Respondent also enquired about Lucky Montana, Bopape, Mthimkhulu, Kobuwe, Sorin Baltac and Vermeulen who she said she had been advised had made concessions. She was not surprised about Montana, Bopape and Mthimkhulu but could not believe that executives of PRASA would have made concessions. She was startled by the information that concessions had been made and wanted the report to go through it to understand exactly what the concessions were. What she gathered from what the Respondent told her was that concessions had been made **that PRASA has got no defence to the claims of Siyaya and therefore PRASA must settle.**

Ngoye evidence: Vol 8: 44 – 52

84 After her meeting with the Respondent, **Ngoye** approached **Dingiswayo** to enquire from him why the information she had received from the Respondent had not been disclosed to her. They then contacted **Madimpe Mogashoa (Mogashoa),** the attorney who had acted for PRASA. Mogashoa informed them that he did not know about the report. They then contacted **Vincent Kobuwe (Kobuwe) and Sorin Baltac (Baltac)** to try to understand what the Respondent had communicated to Ngoye. **Kobuwe and Baltac** both denied making concessions.

Ngoye evidence: Vol 8: 52 – 53

85 As instructed by the Respondent, Ngoye requested that reports be prepared. Mogashoa provided an extensive report on **21 November 2017.** This report

was received by Dingiswayo who shared it with Ngoye. The report dealt extensively with the defences which were being raised by PRASA in response to the claims of the Siyaya companies set forth in the summonses. In paragraph 1.3 of his report and in bold print, Mogashoa stated:

Kindly be advised that this report is only intended for the purposes as indicated in paragraph 1.2 here-above, and it in no way constitutes an opinion for purposes of advising PRASA on how best to proceed in defending the matter.

Ngoye evidence: Vol 8: 54 – 57
Ngoye exhibits: Vol 9: 71 – 85

86 Ngoye explained that effectively the arbitration which was to have taken place before Judge Brand had ground to a halt and that the legal team at PRASA dealing with the litigation was having difficulty getting information and responses from the Siyaya team.

Ngoye evidence: Vol 8: 57 – 58

87 Ngoye testified as to the urgent memorandum dated **28 November 2017** which the Respondent had sent to **Zide in which she referred to her brief discussion with Martha Ngoye on 14 November 2017.** The Respondent confirmed that she had received Mogashoa's report. She further mentions that **the attorneys (sic) for Siyaya Consulting Engineers (in liquidation) on** 14 November 2017 and to receiving a report and email communications between

Mogashoa and **Advocate Francois Botes SC (Botes).** In **paragraph 8**, the Respondent states the following:

*Should the contents of the Commissioner's report be correct, it is clear that the witnesses made **major concessions** with regard to the liability of Prasa in the civil actions launched by Siyaya Engineers (now in liquidation). However, despite these concessions, Mogashoa Diale Attorneys (sic) appear still to want to proceed with arbitration proceedings. However, they did not address the prospects of success at the arbitration proceedings in view of the evidence that has already been led at the liquidation Enquiry.*

In paragraph 10, the Respondent wrote as follows:

*Please advise Mogashoa Diale Attorneys (sic) that I have read their report dated 21 November 2017 and that **we shall revert to them before the end of next week with instructions and a decision of further handling of this matter***

In paragraph 10, the Respondent instructed as follows:

The reports from you, Ngoye and the officials indicated in paragraph 9 (Vermeulen, Kobuwe and Baltic (sic)) must reach me before 12 : 00 on Friday, 30 November 2017 **to enable me to report to the Board of Control on 01 December 2017.**

Ngoye evidence: Vol 8: 57 – 58

Ngoye exhibits: Vol 9: 86 – 90

88 Ngoye was referred to various emails which she identified arose from the instructions issued by the Respondent in her memorandum. It appears that the Respondent was not happy that her internal memorandum to Zide had been shared with Mogashoa. This was after she had received the second report of Mogashoa which was dated **30 November 2017**.

In her email of **Thursday, 30 November 2017 to Zide**, the Respondent wrote as follows:

Dear Mr Zide

Please explain the reasons for sharing an internal memo with Mogashoa Diale (sic) attorneys.

There was a specific instruction that was to be communicated with the attorneys.

*Why do you need **legal assistance** to respond to internal matters?*

Ngoye evidence: Vol 8: 59 – 60
Ngoye exhibits: Vol 9: 93

89 In response to the email of the Respondent, Zide sent an email to his colleagues at PRASA in which stated inter alia as follows:

*The Chairperson is not impressed with the internal memo shared with External the lawyers, and of course **She has indicated that she will take issue with this** as the bark (sic) stops with me and I can accept that **the Board can make a recommendation that is being undermined. Equally she feels that the***

memo was not taking into account that the memo is addressed to the Chairperson and that the memo does not respond to the questions she has asked? So she is of the view that Management (and in particular me because I am at the helm) is either insubordinate or refusing a valid and a reasonable instruction.

Equally she has indicated that she will raise with the Board her displeasure in my having shared the memo with Legal and Legal having shared the same with externals.

Ngoye exhibits: Vol 9: 93

90 Ngoye then testified regarding a document which was titled **Certified Extract of Special Board Meeting Resolution made at a meeting held at 3rd Floor Boardroom, PRASA Corporate Office, 1040 Burnett Street, Hatfield Pretoria on Friday, 1 December 2017.** She was aware that a meeting had taken place. She had received a draft resolution by email from **Martha Kotu,** which included resolutions purporting to have been made by the Board, which bore on the work of the legal department**. The document had not been signed.**

Ngoye exhibits: Vol 9: 138 – 140

91 In paragraph 2 of the so-called resolutions, it is recorded that the Board had resolved:

Submission of Litigation Matters

The Executive Legal Risk and Compliance must hand over all the litigation files relating to contract and/or contractors, emanating from the investigations to the office of the Company Secretary.

The litigation files submitted should be accompanied by a progress report on the status of the matters before Court.

Ngoye exhibits: Vol 9: 138 – 139

92 **In paragraph 3**, it was recorded:

Payments made to Werskmans (sic) Attorneys

*Finance and **the Legal Department** should provide the Board with a detailed statement of account for the invoices paid to Werskman Attorneys.*

The Statement of account and/or the invoices must be accompanied by the corresponding work done and also should be linked to the objectives of the investigation as per the instruction given to Werskmans and/or the Terms of Reference.

Ngoye exhibits: Vol 9: 139

93 **Paragraph 4** provided:

The Status of the Legal Panel

Management should provide a report to the Board on the status of the Legal Panel, and provide reasons why the Legal Department still uses a Legal Panel that appears to have expired.

The Legal Panel is suspended with immediate effects (sic).

Any Legal Services sought, must be procured through SCM processes and, in consultation with the Chairperson of the Board of Control on all matters relating to the investigations only.

Ngoye exhibits: Vol 9: 139

94 **Paragraph 5** required Management to provide the Board with a signed resolution in terms of section 34 of the Prevention and Combating of Corrupt Activities Act and the rationale to pass such resolution conferring to the GE LRC the authority to transact in terms of section 34 and to provide the Board with a report whether the GE LRC has done so.

Ngoye exhibits: Vol 9: 139 – 140

95 When Ngoye realised that the Resolutions had not been signed, she requested a signed resolution. She requested it from Martha Kotu. She did not receive a signed resolution.

Ngoye evidence: 64 – 65

96 On **5 December 2017, Ngoye and Dingiswayo jointly** addressed an extensive memorandum to the Respondent in which they acknowledge receipt of **an unsigned draft Board resolution for the meeting of 1 December 2017,** and in which they raise several concerns arising from the document. The legal department was endeavouring to seek clarity on the issues raised by the purported resolutions of the Board. She testified to some of the problems which

would arise if the resolution regarding the Legal Panel was to be implemented. In the concluding paragraph of the memorandum, it is recorded that:

As stated above, we are happy to discuss these matters with the BoC or with any of the committees of the BoC. This memo is intended to be an engagement on the best interests of PRASA in the delivering of the mandate of Group Legal Services.

There was no response from the Chairperson to the memorandum.

Ngoye evidence: Vol 8: 65 – 78
Ngoye exhibits: Vol 9: 141 -155

97 In questions posed by the Tribunal relating to the allegation that the Respondent paid special attention to the Siyaya matters, Ngoye said that it was correct that she concentrated on the Siyaya matters. Ngoye referred again to the first time she had met the Respondent who wanted information about the **Werksmans** investigation. The Siyaya matters appeared to be of the most interest to the Respondent as was evident from her communications that she wanted to deal with the matters. The Respondent regarded it as her matter and anyone who wanted to deal with it had to engage with her first. This was unusual particularly in the light of the Siyangena matter which at that time posed a much greater risk to PRASA because of the monies involved. However, the Respondent appeared to waste a lot of time on the Siyaya matter at that time and judging too from the events which transpired thereafter.

Ngoye evidence: Vol 8: 78 – 82

98 Ngoye testified that during **December 2017**, Mogashoa came to PRASA and members of the legal department encountered him. They realized that they were not party to meetings between Mogashoa and the Respondent relating to the Siyaya matters. **There was no engagement between the legal department staff and the Respondent after the memorandums which they had drafted.** Ngoye raised the issue with Zide because he was present at the meetings between the Respondent and Mogashoa, and the legal department was being excluded.

She pointed out to Zide that what was happening was contrary to the policies of PRASA in relation to how legal matters were supposed to be dealt with. An external lawyer could not deal with any business of the organization without the internal lawyer being present. **Zide's response was that the chairperson preferred it that way.** She and Dingiswayo then decided to contact Mogashoa and ask him directly why he was not compliant with the rules of engagement of external lawyers with PRASA. In a call conducted on speaker phone, they questioned him why he was not talking to them. **His response was that the Respondent had barred him from speaking to the legal department.** They left it at that because they appreciated that the Siyaya matter would come to the legal department sooner or later.

Ngoye evidence: Vol 8: 82 – 84

99 Sometime later, Ngoye was no longer able to recall the date, **Yvonne Page, the Group Chief Financial Officer (Page)** approached her with a settlement agreement saying that she was required to release funds and enquiring whether she had knowledge of it. She had been provided with the document by Zide.

Ngoye advised Page that the funds had to come from the budgets of the divisions and not from the group budget. Asked by the Tribunal, Ngoye confirmed that she was being asked for advice concerning a document which was a settlement agreement between PRASA and Siyaya. She thought that took place in January or February. She told Page that she could not pay.

Ngoye evidence: Vol 8: 84 – 87

100 Ngoye was referred to an email from **Cromet Molepo (Molepo)** who had by then taken over the position of Acting GCEO from **Zide** sent an email headed **Re: SIYAYA/ PRASA** on **8 February 2018** to **Ms Ramagoganye Ngakane** to set up a meeting with *inter alia* **Zide, Page and herself. Ngoye** responded thus:

I have noted your instruction to Gogi for us to sit in a meeting today to deal with this matter. I find it difficult to be part of this transaction when the ***Legal Function was specifically excluded therefrom and the lawyers were advised we were informed by the Chairperson not to engage with us.***

In this regard, I humbly request to be excluded from this matter because I do not support the manner in which this matter was removed from us and handled.

She confirmed in answer to questions of the Tribunal that the last time she had anything to do with Siyaya was when they submitted the report in November 2017.

Ngoye evidence: Vol 8: 87 – 92
Ngoye exhibits: Vol 9: 156 – 157

101 Ngoye testified that on **5 March 2018, Dingiswayo** came to her and reported that he had received a call from a friend from outside PRASA to ask him to confirm whether it was true that PRASA had agreed to a settlement agreement, and which was going to be made an order of court.

This person's client was owed money by **Makhensa Mabunda, one of the directors of Siyaya,** and wanted confirmation that this was indeed so.

Dingiswayo was alarmed by what was being said. He was not aware that the matter had reached the court and said that they needed to act quickly. Dingiswayo contacted Mogashoa and told him that he had been made aware of what was happening and enquired whether papers had been served on him. According to Ngoye, Mogashoa informed Dingiswayo that he was greatly relieved and said that he was struggling to get instructions from PRASA. Dingiswayo requested Mogashoa to forward the documents to him. Between 8 February 2018 and 5 March 2018, Ngoye had no knowledge of what was happening with the Siyaya matter.

Ngoye evidence: Vol 8: 92 – 94

102 Ngoye was referred to emails sent by **Ncebakazi Mbebe** on behalf of **Mogashoa to Zide** which are dated **21 February 2018**, in which Mogashoa transmitted copies of the revised notices of motion applications to make the arbitration awards, made by **Judge Brand**, orders of court. Furthermore, advising that the matters were being provisionally set down for hearing on **9 March 2018,** and requesting instructions whether to oppose or not. In answer to the Tribunal, Ngoye said she did not know what was going on by **21 February**

2018. On 21 February 2018, the legal department was placed in possession of the motion court papers to deal with the applications.

Ngoye evidence: Vol 8: 94 – 96
Ngoye exhibits: Vol 9: 158 -161

103 Because Mogashoa had dealt with the settlement, they felt he was conflicted. On **5 March 2018,** they approached **Bowman Gilfillan Attorneys (Bowmans)** to act for PRASA. They requested Mogashoa to file a notice of withdrawal. Bowmans filed a notice of appearance as well as a notice of opposition.

Ngoye evidence: Vol 8: 96 – 98

104 However, Bowmans received a Rule 7 notice from **Mathopo Attorneys** to say that it had no authority to act for PRASA. It was one of Ngoye's functions in terms of the DOA to prepare powers of attorney to act on behalf of PRASA. These were forwarded to Bowmans to serve and were served. A few days before the hearing of the matter, Ngoye was summoned to a meeting at which **Molepo, Mogashoa, Zide and Dingiswayo** were present. Ngoye explained that the plan was to oppose the applications to make the awards orders of court, that Mogashoa could not act and that Bowmans had been instructed to act for PRASA. Molepo agreed and instructed them to proceed and oppose the application. The legal department felt that they had the support of Molepo.

Ngoye evidence: Vol 8: 99 – 101

105 On **8 March 2018**, at a **Group Exco meeting**, Ngoye requested a meeting with the Respondent in connection with the Siyaya matter. She made this request via Molepo. On that day, the Respondent happened to be at the PRASA office in an office next to where they were meeting. This, however, did not happen. Before departing, Molepo and Zide simultaneously said to her:

You cannot oppose this particular application that is being heard tomorrow. She requested the basis of that. They said: No, the Chairperson *was very unhappy and we cannot oppose this matter. So, our instructions are not to oppose.*

Ngoye was angered by this instruction which she branded as unlawful. She made it clear to them that PRASA did not owe the money. Present at the meeting were the executives from the two divisions involved **(Piet Sebola and Kevin Moonsamy)** in the claims by Siyaya against PRASA. Ngoye enquired from them whether they were aware of the settlement of the claims. Neither of them was aware nor had agreed to it. Ngoye left the meeting and approached Dingiswayo who revealed to her that he had just received correspondence which revealed that the Respondent had been communicating to Siyaya's lawyers, **Mathopo Attorneys,** that the legal department had no authority to brief Bowmans because Bowmans was not on the legal panel. Ngoye then telephone Mr Xolile George who was a member of the IBOC. She informed him of what had taken place. He said: "***Fight this thing. Escalate this thing. You can write to the PCOT too, write to the Minister. Escalate it."*** Ngoye instructed Dingiswayo to write to the Minister and she would write to the PCOT.

Ngoye evidence: Vol 8: 101 – 105

106 The following day, **9 March 2018, Ngoye** had sight of a memo sent to her by **Molepo** which was dated **8 March 2018.** It was headed **Re: Proposed meeting with the Chairperson of Board to discuss the Siyaya matter.** In the letter, he states that he and the company secretary (Zide) **met with the Respondent to discuss the Siyaya matter.** He went on to say:

> *2 The Chairperson was willing to have a meeting with the AGCEO (Molepo), Company Secretary (Zide), and Legal (Ngoye/Dingiswayo), provided she is advised **whether her decision to settle the Siyaya matter** is being reviewed or challenged. In this regard, **the Chairperson directed** that should it be that a decision has been taken to oppose the application of making the settlement agreement a court award, then the **Chairperson should have been engaged** to understand the rational (sic) of the opposition.*
>
> *3 **The Chairperson has indicated that she was willing** to have a meeting to ensure that all of us act in the best interest of PRASA.*

Ngoye testified that **the legal department had never been provided with the opportunity to engage with the Respondent regarding settlement agreements**. Ngoye was of the view that the letter did not make sense, in that, if you purport to be acting in the best interests of PRASA, why pay for a debt you do not have liability for,

Ngoye evidence: Vol 8: 105 – 110
Ngoye exhibits: Vol 9: 162 -163

107 Ngoye identified the correspondence to which Dingiswayo had referred, which revealed that the Respondent was in communication with Siyaya's lawyers. The letter from **Mathopo** is dated **8 March 2018** addressed to **Bowmans.** The most significant passages thereof are as follows:

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

"Those attorneys have no authority.

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

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

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

The letter goes on to quote a further message emanating from the Respondent addressed to the AGCEO (Molepo) in which the salient portion is:

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

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

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

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

I will advise board accordingly.

Ngoye evidence: Vol 8: 110 – 112
Ngoye exhibits: Vol 9: 164 – 166

108 Ngoye was referred to the letter headed **SIYAYA DB CONSULTING ENGINEERS (PTY) LTD (NOW IN LIQUIDATION)** addressed to **Mogashoa** by **Zide** which was sent to him on **15 December 2017** in which it is stated:

1 I confirm that you were instructed to defend the action ……

2 Furthermore I confirm the meeting held between yourself and the Chairperson of the Interim Board of Control on 15 December 2017, and that you were instructed as follows…..

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

Ngoye had not seen this document before and the legal department did not have it.

Ngoye evidence: Vol 8: 112
Ngoye exhibits: Vol 9: 167 – 169

109 Ngoye testified that on **9 March 2018, Dingiswayo** returned from court and reported that judgment had been granted by default in the applications by Holland – Muter AJ. Botes had produced the messages sent by the Respondent during his submissions to the Court. The Court held that PRASA was not properly before the Court. The amount involved was **R 56 million and interest** would be added to that amount. The orders were made although the power of attorney signed by Ngoye on **8 March 2018** had been sent to Bowmans. It was said to be non-existent and was found to be insufficient for Bowmans to appear on behalf of PRASA. The power of attorney was available at court in the possession of Bowmans.

Ngoye evidence: Vol 8: 114 – 117
Ngoye exhibits: Vol 9: 170 – 171

110 Ngoye dealt with the events which took place after **9 March 2018**. Having engaged with the **Minister of Transport, Dr Blade Nzimande MP**, the legal department received an answer from the Minister that he wanted a meeting with the legal department, the Respondent, and the Group CEO. A meeting took place with the Minister on **12 March 2018**. Instead of reporting then to the Minister, the Respondent requested the opportunity to submit a written report to the Minister.

The Minister then required reports to be submitted to him by **16 March 2018**. Later, they were given the go ahead by the Minister to bring an application to rescind and get PRASA's monies back. Dingiswayo wrote to Siyaya's attorneys to inform them of PRASA's intention to apply for rescission. By that time, the Sheriff had immediately executed on the orders and the monies were already attached and removed from PRASA's bank accounts. Bowmans continued to act on behalf of PRASA. The orders were rescinded and PRASA received its money back from the Sheriff who had not paid them to Siyaya. Siyaya had not subsequently pursued their claims but had instead attempted to do so by going thorugh the Minister to recover their claims.

In evidence, Ngoye identified a letter addressed to Zide dated **28 March 2018** from the Minister instructing that the Siyaya matter must be challenged in court with the view to getting the judgment rescinded and to recover the money paid over. At that time the Respondent was no longer at PRASA as she had resigned on **Friday, 16 March 2018.**

Ngoye evidence Vol 8: 117 – 136

Ngoye exhibits Vol 9: 176

111 Ngoye's attention was directed to a letter dated **28 February 2018** to the Respondent by **ENSAfrica** with the heading **ADVICE ON THE CONSTITUTION OF THE INTERIM BOARD AND THE APPOINTMENT OF THE CHAIRPERSON.** She testified that she had never seen the document before.

Asked the question whether the chairperson was currently a judge had anything to do with PRASA, she said this did not involve PRASA.

Ngoye evidence: Vol 8: 136 – 140
Ngoye exhibits: Vol 9: 177 – 192

MFANIMPELE MOSES DINGISWAYO:

112 **Dingiswayo** testified that he was the **General Manager: Group Legal Services** at PRASA. He had been admitted to practise as an attorney in 1999. He was employed in this capacity from 2013 to 2020. Six lawyers reported to him. His department provided legal advice to the group and would instruct outside lawyers when the need arose. His department acted as the conduit for all communications between internal clients, being the various divisions of PRASA and the external lawyers. The executives of these divisions were the clients of the legal department.

Dingiswayo evidence: Vol 10: 1 – 6

113 He explained that the Siyaya group of companies which was owned by one **Makhensa Mabunda (Mabunda)** had been fortunate to secure contracts with PRASA in the order of R1 billion. According to Dingiswayo, it was public knowledge that he had worked with Lucky Montana at the Department of Public Enterprises before Montana first moved to the Department of Transport and then to PRASA as GCEO.

It was then that Mabunda and his companies received contracts from PRASA. He confirmed that at the time of the Respondent's appointment to IBOC, there was pending litigation between the Siyaya companies and PRASA going back to 2015. The cumulative claims amounted to R 60 million from the 5 summonses. Because of his knowledge of the history of Siyaya, he ensured that he kept abreast of what was happening with the litigation.

Dingiswayo evidence: Vol 10: 7 – 12

114 Dingiswayo produced evidence of the amended pleas advanced on behalf of PRASA. These were framed after consultation with the internal clients of PRASA and conveyed to the external lawyers of PRASA, that is, to Diale Mogashoa Attorneys. He confirmed receipt of the request to furnish information to the Respondent. He testified that the legal department was confident of the merits of their case. There were, according to him, glaring discrepancies in Siyaya's papers which were not being amended. Some of the claims were based on oral contracts which were impermissible, and invoices were at variance with contracts.

Dingiswayo evidence: Vol 10: 13 – 21

115 Dingiswayo made it clear that the claims were settled without the knowledge of the legal department and the internal clients. He established that the Respondent had settled the matters assisted by **Zide and Molepo.**

Having regard to the technical environment from which these claims arose, those who had settled would not have known whether the services were rendered adequately.

Dingiswayo evidence: Vol 10: 21 – 22

116 According to Dingiswayo, Siyaya was unable to file further and better discovery or to respond to a request for further and better particulars which were never filed. That was the reason for the postponement of the arbitration proceedings on **11 September 2017.**

117 When Dingiswayo was questioned as to his knowledge of the section 417 inquiry, he testified that it was brought to his attention when the **managers, Kobuwe and Vermeulen** were subpoenaed to attend. There was no clarity on what exactly they should bring to the inquiry. His view was that the inquiry was a sham. Mogashoa was instructed to assist these persons at the inquiry by supporting them. **The first time, the legal department was able to see the transcript of the proceedings was in March or April 2018.** He heard that there was a report of the inquiry after Ngoye had attended a meeting with the Respondent on **14**

November 2017. He further confirmed that a report dated **21 November 2017** was obtained from Mogashoa.

Dingiswayo evidence: Vol 10: 24 – 27

118 He referred to the **memorandum from the Respondent dated 28 November 2017** as being unusual or strange, in that, it was an interrogation by a Chairperson of the Board which broached on the operational sphere of PRASA. He pointed out that there were other far more pressing matters that required the IBOC's attention such as the **Siyangena** matter and financial statements which needed to be submitted. He questioned why the Respondent was so concerned with the **Siyaya** matter which was small in comparison to other matters. He explained that Siyaya was a supplier who had initiated litigation and was unable to prosecute it and was a plaintiff whose papers were in a mess. The Respondent would have known that there were allegations that there was a corrupt relationship between the supplier (Siyaya) and PRASA. **Makhensa Mabunda** was one of the names which would come up. In answer to the question by the Tribunal, what did the legal department do when the Respondent interfered in issues which she should not have done, Dingiswayo said they just watched until they were approached by the CFO about payment, and they instructed her not to pay. **Dingiswayo evidence: Vol 10: 27 – 38**

119 Dingiswayo referred to email communications between himself and Kobuwe dated **30 November 2017** from which it is evident that **the**

Respondent had not shared the Interim Report of the Inquiry upon which the Respondent placed much reliance.

Dingiswayo evidence: Vol 10: 38 – 43
Dingiswayo exhibits: Vol 11: 69 – 70

120 Dingiswayo submitted a comprehensive response to Zide to the memorandum of the Respondent. In his memorandum, he pointed out that **he was not in possession of a copy of the report.** He dealt extensively with the material defences raised by PRASA and opined that they were cogent.

He referred to the possibility that the agreements were entered into with Siyaya were vitiated by material fraudulent misrepresentations. He concluded by stating that the legal department would be available on **Friday (1 December 2017)** to answer any questions of the Board.

Dingiswayo evidence: Vol 10: 44 – 46
Dingiswayo exhibits: Vol 11: 75 – 80

121 Dingiswayo was referred to the Certified Extract of the Special Board Meeting of **1 December 2017.** He too expressed the view that the decision of IBOC to suspend the legal panel was strange and pointed to the unsuccessful attempts in the past to secure external legal services through the procurement process. He testified that in the wake of the litigation launched by #UniteBehind in Cape Town, **Zide, (then the**

AGCEO of PRASA) had deposed in an affidavit that the resolutions purportedly made by IBOC were not resolutions.

The legal panel was thus not suspended, and the legal department continued to utilize the services of the attorneys on the legal panel.

Dingiswayo evidence: Vol 10: 49 – 53
Ngoye exhibits: Vol 9: 138 – 140

121 During early **December 2017**, according to Dingiswayo, Mogashoa came to PRASA and informed him that he was meeting with the Respondent. This meeting took place without the legal department being present. On **15 December 2017**, Dingiswayo was concerned about what was happening with the Siyaya matters. He telephoned Mogashoa to enquire about the Siyaya matters and was told by Mogashoa that **he was barred by the Respondent from talking to him about these matters.**

Dingiswayo evidence: Vol 10: 53 – 54

122 Dingiswayo's next involvement in the Siyaya matters occurred in **January 2018** when there was a push for payment which had been directed to the CFO (Yvonne Page). Dingiswayo received an email from **Rose Manyosa dated 16 January 2018,** to which he responded thus on **18 January 2018:**

The matters of Siyaya were handled by Group Legal Services and we were preparing ourselves for an arbitration as we believed that we had good prospects of success. When the Board was appointed, ***the Chairperson of the Board indicated to us that she had some knowledge of the matter and indicated that she would from that point on, handle the matter herself and communicate to the lawyers herself. The Chairperson has not shared the information that was in her possession with us. We were therefore excluded from the matter and believe that we were barred from dealing with the matter as we held a view that was different from the Chairperson on the prospects of success on the matter.***

In the circumstances, the only time we can be able to be involved in this matter is when the Chairperson of the Board has indicated that we can be involved in the matter. We therefore cannot be of assistance at this point.

The measure that was employed by the legal department was to warn persons not to make irregular payments arising from a settlement which was reached under dubious circumstances.

Dingiswayo evidence: Vol 10: 54 – 56
Dingiswayo exhibits: Vol 11: 83 – 85

123 On **5 March 2018**, Dingiswayo received a call from a friend who was acting on behalf of a client who was expecting a payment from **Makhensa Mabunda.** This caused him to contact **Mogashoa** who expressed some relief that he was calling as he had been trying to obtain instructions from **Zide.** Mogashoa informed him that applications were to be made on **9 March 2018** to make the awards orders of court. He

requested Mogashoa to share the applications with him. When he received the documents sent to him by Mogashoa he was shocked by the terms of the settlement. He spoke to Ngoye who was then attending an EXCO meeting together with two executives, **Piet Sebola, the CEO of PRASA Tech and Kevin Moonsamy, the Group Executive of Strategic Asset Management. Neither of these two executives had any knowledge of the settlement.** The decision was made to oppose the applications. The following day, the notice to oppose was filed by **Bowmans** which prompted the letter dated **8 March 2018** addressed to Bowmans from **Mathopo Attorneys.**

It was clear from the correspondence that **the Respondent was communicating with the lawyers acting for Siyaya** informing them that Bowmans were not authorised to act for PRASA and conveying message that she had sent to **Molepo (the AGCEO of PRASA)**.

Dingiswayo evidence: Vol 10: 56 – 59
Ngoye exhibits: Vol 9

124 Dingiswayo referred to the correspondence of Molepo dated **8 March 2018**. He confirmed that it had been agreed with Molepo that Mogashoa would withdraw and that PRASA would oppose the applications.

Dingiswayo evidence: Vol 10: 60 – 61
Ngoye exhibits: Vol 9: 162 – 163

125 Dingiswayo described what transpired at court on **9 March 2018**. At court, he and PRASA's lawyers met with **Botes. Botes** questioned why the matter was being opposed because there was a Board resolution authorising settlement of the matters. Upon being asked to produce it, Botes left for his chambers and returned **with the letter of 15 December**

2017 addressed by Zide to Mogashoa. Dingiswayo said that he had never seen this letter before but counsel for Siyaya had the letter.

Dingiswayo then referred to the letter addressed by **Mathopo to Mogashoa dated 18 December 2017 (Ngoye exhibit Vol 9: 167 – 169)** in which they point out to Mogashoa that he was not acting in accordance with his instructions. Botes had the actual copy of Zide's letter to Mogashoa dated **15 December 2017**. At the hearing of the matters, Botes handed up **the letter of Mathopo dated 8 March 2018 (Ngoye exhibit Vol 9: 164 – 166) containing the messages of the Respondent that Bowmans were not authorised to represent PRASA.** In the face of the power of attorney and delegation of authority, which had been filed in response to Mathopo's Rule 7 Notice, being handed to **Holland-Muter AJ** by counsel acting for PRASA**, Holland-Muter AJ granted default judgment against PRASA.**

Dingiswayo evidence: Vol 10: 61 – 66

126 Dingiswayo wrote to Mathopo on **12 March 2018** requesting them not to execute on the judgment as PRASA intended to bring an application to rescind the orders made by Holland-Muter J. In his letter, Dingiswayo pointed out *inter alia* that:

The lack of authority of the acting chairperson to conclude an agreement or settlement or make an offer of settlement of the matters.

Prasa had not accepted the claims of the applicants. This is evident when the unauthorised settlement offers were made without admission of liability. The Public Finance Management Act (PFMA) prohibits useless and wasteful expenditure by institutions such as PRASA. Inasmuch as PRASA does not accept liability any offer or agreement to pay your clients would be contrary to the terms of the PFMA and should be set aside.

The request was ignored. Instead, a few days later, PRASA's bank accounts were attached, and **R 56 000 000.00 was removed from the bank account. This caused pandemonium because there were two pay runs at PRASA on the 15th and at the end of the month. Effectively, the bank accounts of PRASA were emptied.**

Dingiswayo evidence: Vol 10: 66 – 69
Dingiswayo exhibits: Vol 11: 86 – 92

FRANCOIS BOTES:

127 The salient features of Botes' evidence insofar as they are relevant to the issues which require resolution by the Tribunal are as follows:

- Botes repeatedly emphasized that he had a ***very good, honest, transparent, cordial relationship with the Respondent.***

Botes evidence Vol 12: 3

- **In November 2017,** he was aware that the Respondent had been recommended by the JSC to be appointed as a judge. He was, however, unaware that she had been deployed at PRASA.

Botes evidence Vol 12: 9

- During the first (or second) week of November, he received a call from the Respondent. The first call appears on the call records to have taken place on **13 November 2017 (Evidence bundle 16 part 1 Vol 20: 522)**. He congratulated her on her recommendation. **The conversation was steered in the direction of whether I was aware or involved in the Siyaya companies' litigation.**
- The Respondent immediately directed his attention to the pending litigation involving PRASA **which should have been settled or sorted out long time ago.**
- **The Respondent indicated to him that she got the impression that "*some of the attorneys who acted on behalf of PRASA was exploited (sic) and personnel within the legal department of PRASA undermined the authority of seniors, board members including, but not limited to herself and she furthermore indicated that she preferred, regard being had to our long established relationship, to discuss and ventilate these matters with me. And she in so many words indicated to me that she did not trust the attorneys acted on, at the time, on behalf of PRASA and she also indicated to me that***

according to her PRASA was captured by certain of its own employees and certain contractors."

Botes evidence Vol 12: 10 – 11

- It had been agreed between himself and his attorneys that should he receive any correspondence or communications with the Respondent which he appreciated could cause problems because he was engaging with her, he would share these with them.
- In addition, there were **numerous telephonic conversations** between him and the Respondent which were **to the point, cordial, and a bona fide and genuine attempt to settle** the pending disputes.
- **It was the Respondent who expressly asked him** to indicate to her the status of the four matters and he agreed to do so.

Botes evidence Vol 12: 12

- **Botes** prepared a bundle of documents of 17 pages so that the Respondent could read it and ascertain for herself as to the status of the matters. This included the Commissioner's Interim Report in terms of section 417 and 418 of the Companies Act. (**Mogashoa exhibits Vol 15: 50 – 60).** The bundle also included email communications between him and Mogashoa on **6 September 2017 (Mogashoa exhibits Vol 15: 23 – 28).**

Botes evidence Vol 12: 13

- **On 14 November 2017, Botes** went to the headquarters of PRASA at Hatfield and met with the Respondent and provided her with the bundle of documents he had prepared.

Botes evidence Vol 12: 13 – 14

- After leaving PRASA's offices, **Botes had further interactions with the Respondent which culminated in correspondence in terms of which an offer to settle was made. Botes** testified that there were numerous WhatsApp messages, SMSs and calls between them. He referred to what he described as an important WhatsApp message which the Respondent sent to him on **19 December 2017** (the day after the Mathopo letter to Mogashoa querying him as to his instructions) in which the Respondent wrote:
- ***I've forwarded the letter to PRASA with instructions to enquire from Mogashoa if he received this and to forward the same ASAP.***
- ***Our instructions were transparent hence <u>I forwarded a copy to you…</u>….***
- ***The principal is acceptable and those were the instructions.***

Botes evidence Vol 12: 24
Ngoye exhibit: Vol 9: 220

- Mogashoa had only tendered an offer to settle **the capital amounts** in respect of the four matters. However, **through his communication with Respondent,** PRASA was not only prepared to settle the capital amounts but **also the interest** which the letter of Mogashoa did not provide for.

Botes evidence Vol 12: 25

- **His advice to the plaintiffs was that they should not reject the formal offer to settle on the capital amount only and make a counteroffer that they were prepared to settle for the capital and interest which PRASA might reject.** Botes did a calculation of the interest at the rate of 9 per cent over a period of 27 months and arrived at an amount which concerned the interest only of **R 5 520 057. 27.** He was of the view that they should not take the risk. He advised that a **"friendly letter"** (the letter of Mathopo of 18 December 2017) should be addressed to Mogashoa to enquire whether his instructions were correct. That is what elicited the WhatsApp message from the Respondent. In answer to questions from the Tribunal, he made it clear that **from his private discussions with the Respondent,** a settlement had been raised which included the capital amount and interest. **That was the first time he heard it was from the Respondent. He told those instructing him how to write it. He appreciated it was a dangerous game to play.** Even before Mogashoa made the initial offer**, he knew 100 % from his private discussions with the Respondent** that PRASA was going to settle**.** He had advised

Mathopo that the offer made by Mogashoa was not in accordance with the instructions given to Mogashoa as set out in the letter from Zide dated **15 December 2017. He, in fact, had found a hard copy of the letter either in his pigeon hole or at the door of his chambers.**

- On **21 December 2017**, formal tenders were submitted by Mogashoa in accordance with Rule 34(1) of the High Court Rules which reflected exactly what was contained in the Zide's letter to Mogashoa dated **15 December 2017**. He had sight of the settlement offers, verified them, and was satisfied. He proceeded to prepare draft awards in accordance with the settlement offers for consideration by Judge Brand. On **7 February 2018**, the awards were made by Judge Brand. Mogashoa was present and confirmed that these were his express instructions from PRASA.

Botes evidence Vol 12: 40 – 45

- He made the Respondent aware that the awards were made when payment was not forthcoming.

Botes evidence Vol 12: 45 – 46

- He testified that after the notices of intention to oppose the applications to make the awards orders of court were served, **he immediately engaged the Respondent** by SMS to understand exactly what had transpired.

He enquired whether PRASA had decided to oppose the four applications. This elicited *inter alia* the following response from the Respondent in an SMS to him:

Those attorneys have no authority. PRASA legal panel has been suspended since 1 December 2017. We are using SACAA panel

Botes evidence Vol 12: 46 – 52

- **Botes submitted** in his address that counsel for PRASA had "no written resolution" or some form of authority (despite the power of attorney which had been filed). As an officer of the court, he assured Holland-Muter AJ that he had an SMS from the Chairperson of PRASA **"in which the Honourable Judge Makhubele"** confirms that Bowmans have no authority. Holland-Muter accepted Botes' address and asked counsel for PRASA **"how on earth can you persuade me that you have a mandate, or you have authority to oppose these applications".** According to Botes, no answer was forthcoming. That ended his involvement in the Siyaya matters.

Botes evidence Vol 12: 52 – 54

MADIMPE MOGASHOA

128 Mogashoa was a director of **Diale Mogashoa Incorporated Attorneys (DM Attorneys). DM Attorneys** had been instructed by Dingiswayo on behalf of PRASA since the inception of the litigation in 2015 involving Siyaya with instructions to defend in five matters. He confirmed the evidence given by Dingiswayo as to the progress of the matters including the agreement to refer the matters to arbitration by Judge Brand which were scheduled to be heard between 11 and 22 September 2017.

Mogashoa evidence Vol 14: 1 – 10

129 He confirmed that he had been instructed to attend to a watching brief during the section 417 inquiry at which three PRASA employees were subpoenaed to testify. **He was not placed in possession of the report of the Commissioner and had not seen the same up to the stage at which he was testifying before the Tribunal. Neither had he been placed in possession of the transcripts of the inquiry.**

Mogashoa evidence Vol 14: 10 – 15

130 Mogashoa testified that after he had received Botes' email of **6 September 2017,** the arbitration did not take place on the dates in September 2017. He had taken instructions from client and had prepared reports or summaries which he provided to PRASA.

He could not clearly recall whether concessions had been made by employees of PRASA at the section 417 inquiry. However, **in his interaction with the Respondent,** it was raised that PRASA employees may have conceded to some of the issues that had to do with the Siyaya claims. He went on to testify in answer to questions by the Tribunal that **he did not recall any concessions being made which had an impact on the matters which were being defended. The reports which he furnished arose from the requirement that there would be further engagements between PRASA and the Siyaya group of companies.**

Mogashoa evidence Vol 14: 16 – 22

Mogashoa exhibits: Vol 15: 23 – 28

131 Mogashoa testified that he met with the Respondent on **4 December 2017.** By that time, he had submitted two reports, that is, on **21 November 2017 (Ngoye exhibits Vol 9: 71 – 85)** and **30 November 2017 (Mogashoa exhibits: Vol 15: 29 – 34).** The latter report arose from a request by Dingiswayo to respond to the memorandum of the Respondent dated **28 November 2017**, which was addressed to Zide **(Ngoye exhibits Vol 9: 86 – 90).** In his report, Mogashoa clearly states:

To date our office has not been placed in possession of any or all of the documents that may have been made available to <u>the Chairperson of the Interim Board.</u>

To this end, it is not certain to us under which context the Chairperson concludes that these assertions may not be entirely correct. **Mogashoa evidence Vol 14: 22 – 35**

132 Mogashoa was summoned to a meeting with the Respondent at PRASA on **4 December 2017**. Present at the meeting was the Respondent and Zide. Mogashoa was accompanied by Ms Mbembe, his candidate attorney. Members of the legal department were not at the meeting. **The Respondent indicated that he had come into possession of a document (her urgent memorandum) which was internal and private, and that it was not supposed to have been passed onto him.**

The instruction to come up with the second report was not meant for him. **PRASA would take the view whether there are instructions for the firm to continue with the matters, and what those instructions would be was the note on which the meeting ended. The Respondent pointed out that <u>she was not going to accept the report of 30 November 2017.</u> The Respondent voiced her displeasure that he had been in receipt of the internal memo.**

The Respondent said she was in possession of the interim report of the inquiry, and she was not sure how PRASA was going to deal with the report at the arbitration proceedings which had been postponed to March 2018. He made the point that his firm had not been placed in possession of the report.

Mogashoa evidence Vol 14: 35 – 44

133 Mogashoa was called to a meeting at PRASA on **15 December 2017.** Present at this meeting were the Respondent and Zide. The Respondent indicated to him that PRASA had considered its options about litigation and that it might be in the best interest to settle some of the matters. He was taken through the cases. In answer to a question by the Tribunal, he stated that he had been informed that he had been invited to the meeting so that they share with him what PRASA had resolved to do about some of the matters. The advice to settle had not come from him. The Respondent did not indicate what aspects of the evidence given by the PRASA employees had made her unhappy. He was given the amounts by the Respondent in the four matters which were to be settled. **The instruction came from the Respondent to settle.** It had not been raised before the meeting of **15 December 2017.** This was the first time PRASA had expressed the wish to settle. He was also instructed to include a confidentiality clause in the settlement offer and that the offer was being made without admission of liability. He requested that the instructions be made in writing, which was sent to him by Zide.

Mogashoa evidence Vol 14: 44 – 54

134 After the meeting, he communicated with Dingiswayo who enquired what the meeting was about. He conveyed to Dingiswayo that one of the matters raised at the meeting that **the Siyaya matters were to be the responsibility of the Board and that PRASA's Board was going to take responsibility for the further conduct of the matters.** This meant

that he was not to interact with PRASA's legal department as to the further conduct of the matters. Any communications to his office would come through the office of the CEO. In answer to questions by the Tribunal, he stated that **he had been given the instructions by the Respondent not to engage with the legal department regarding the Siyaya matters.** The legal department was simply cut out. Mogashoa was not comfortable with the situation, but carried out the instructions which he had been instructed to carry out.

Mogashoa evidence Vol 14: 54 – 58

135 During the course of the same day he received the written instructions from Zide in the letter dated **15 December 2017 (Ngoye exhibits Vol 9: 167 -169).** He prepared offers of settlement which were sent to Mathopo, the attorneys representing Siyaya in which an offer to settle the interest was not included. This evoked the response of the letter dated **18 December 2017** from **Mathopo in which it was pointed out to him that he was not complying with his instructions (Ngoye exhibits Vol 9: 245 – 249).** He sent the revised settlement offers **(Ngoye exhbits Vol 9: 250 -254)** to Mathopo after he had received the approval of Zide per **the email of 21 December 2017 (Mogashoa exhibits Vol 15: 35).** The settlement offers were accepted as appeared from the **email of Botes of 21 December 2017 (Mogashoa exhibits Vol 15: 36). At 11:57AM on 21 December 2017,** he emailed **Mathopo** that he had advised his client of the acceptance of the offers and that the request for payment to

be effected on an urgent basis. At **12:15PM on the same day, the Respondent emailed him as follows:**

Dear Madimpe

Thank you for the update.

Mr Zide, please attend to finalize the matter wrt payment part.

Regards

Chairperson

Mogashoa evidence Vol 14: 58 – 72

136 Mogashoa went on to deal with the communications with Mathopo culminating in settlement offers being made awards by Judge Brand on **7 February 2018 (Botes exhibits Vol 13: 7 – 14).** Regarding receipt of notices of motion of Siyaya's intention to make the awards orders of court, he confirmed that attempts were made to obtain instructions from Zide with no response. He received a call from Dingiswayo that he had heard applications were being made to have the arbitration awards confirmed in the High Court. Dingiswayo requested to have the applications sent to him. He confirmed that Ms Mbembe sent the papers to Dingiswayo. He attended a meeting at PRASA on **8 March 2018.** At this meeting, Ngoye informed Molepo that the settlement proposals were on the instructions of the Respondent, which the Respondent was not authorised to enter into on behalf of PRASA. He gathered that there was some intention to oppose the applications which were to be heard on **9**

March 2018. Ngoye's assertion that the Respondent had no authority to settle was made in the presence of Zide who did not respond to it. As he was conflicted, he withdrew as attorney for PRASA in respect of the matters which had been settled.

Mogashoa evidence Vol 14: 72 – 93

THE CASE FOR THE RESPONDENT

137 The witnesses who testified in respect of the second complaint were cross-examined at great length. Pertinent and highly material disputes of fact which arose from the evidence of the Respondent were never put to the witnesses. The Respondent was seated next to her counsel throughout the proceedings and would at times be afforded the opportunity to consult with counsel either at the behest of counsel or during the numerous breaks which punctuated the proceedings.

138 The failure to put a proper version to all the witnesses poses a major problem to the Respondent's defence. It is trite that if the Respondent wished to contradict the evidence of witnesses, to draw a negative inference or imputation about that witness, that version must be put to the witness in cross-examination to allow him or her an opportunity to respond.

President of the Republic of South Africa v SARFU
2000 (1) SA 1 (CC)

138 It was incumbent upon the Respondent to have ensured that her counsel was given the necessary instructions to challenge the evidence of witnesses in respect of those aspects of their versions which differed from hers. The lack of any challenge to numerous damaging aspects of the evidence of the witnesses effectively meant that the Respondent was to be taken as having accepted that evidence.

139 Clearly, after the evidence of the witnesses called by the evidence leader had been led, the Respondent must have sensed the difficulties posed to her by the evidence. In her evidence, the Respondent sought to tailor her evidence to meet the challenges to an acceptance of her version. By way of contrast to the evidence presented against her, the Respondent tried to account for her involvement in the settlement of the Siyaya claims. This consisted in simply denying the unchallenged evidence of witnesses and attributing the failure to challenge evidence to her erstwhile counsel whom she claimed had been properly instructed by her. This was plainly not the truth. Given her training and experience, it is hardly likely that the Respondent would have meekly abdicated and have remained silent in the absence of her unequivocal version being put.

Whether of all the case that PRASA was involved in, Judge Makhubele paid special attention only to those of Siyaya; she marginalised the PRASA legal unit or caused to be terminated the mandate of PRASA's attorneys and personally appointed another firm of attorneys in their stead to represent PRASA.

139 The Respondent's version was that it was Botes who had been the driving force in the settlement. Botes contacted her first, a claim he denied. It was he who informed her that the Siyaya matters had been referred for arbitration. Botes testified it was she who had first raised the Siyaya matters. This allegation was never challenged by her counsel. His evidence was that it was she that had told him that she could not trust the internal or external lawyers and this evidence was also not challenged.

He alerted her as to what had happened at the insolvency inquiry that PRASA witnesses had made concessions. She entertained a visit from Botes when she received the report of Krige and an email exchange between Botes and Mogashoa. Botes clearly jumped at the opportunity to advance the interests of his clients. She continued according to Botes to be in constant contact with him either by way of calls, SMSs or WhatsApp.

Makhubele evidence Vol 16: 269 – 271

140 Curiously, she claims despite her firm view that she did not expect of counsel to lie, she branded Botes as one who presented hearsay evidence and forged documents as manifested by the letter dated **18 March 2018** by Mathopo to Bowmans relying on messages sent by the Respondent to Botes and the AGCEO. This, she described as unethical behaviour. She claimed that she distanced herself from him. She went so far to say that he was abusing her. Firstly, none of this was put to Botes by her counsel when he testified. To the contrary, during his cross-

examination there was an attempt to try to get him to give answers favourable to the Respondent's case. Second, the very exchanges which the Respondent relies on to bolster her case, namely those placed before the Tribunal **(Makhubele exhibits Vol 17: 176 – 184 and Vol 18: 76 et seq)** reveal that she had extensive communications with him long after she claimed to have distanced herself from in **January 2018**.

Makhubele evidence Vol 16: 292 – 295

140 However, even those aspects of the evidence which were not belatedly challenged paint a very different picture of the extent of her involvement, and which show the falsity of her claim that it was not her decision to settle. The Respondent testified that if she was the one who ordered the settlement why would she have left the paper trail. The answer to that question is simple. The paper trail such as exists was the product of her disregard of and not a little ignorance on her part of the proper processes which were required of her as Chairperson at PRASA. That much was evident from her ignorance of the powers conferred on the Board according to the very Delegation of Authority, which she had claimed all along was the one which was binding on the Board.

141 This was mirrored in her demeanour when she testified and in her conduct towards the Tribunal. She unfortunately presented as a truculent and at times unduly aggressive witness particularly in response to questions posed by members of the Tribunal which were put to maintain some semblance of relevance in the proceedings.

142 The record of her evidence is replete with examples of the evasive feature of her evidence. The Respondent was not prepared to address any question posed by the Tribunal with a simple pithy reply when such a reply would have been sufficient.

Example 1: Asked by the Tribunal: Is it that the witnesses are all lying against you – that they are all making up stories against you. Is that what we must accept?

Makhubele evidence Vol 16: 286 – 291

Example 2: Asked by the tribunal: Botes taking advantage of the you. Am I right?

Makhubele evidence vol 16: 291 – 296

Example 3: Asked by the Tribunal: As the updates were coming from Botes, you realized that he is now no longer giving you information that is in the best interest of PRASA, you still did not think it prudent to rope in legal? Or am I incorrect to say that.

Makhubele evidence Vol 16: 304 – 308

Example 4: When the Tribunal tried to direct the Respondent to the second complaint, the Respondent continued to insist on dealing with the first complaint which led to the intervention of Judge Moshidi to bring some order to the proceedings.

Makhubele evidence Vol 16: 325 – 335

143 In her evidence, the Respondent testified thus:

Let me see what I have left here, and what I can say when you say, you say the four attorneys, can they lie. <u>They lied</u> because the talk about non-existing reports. <u>They lie</u> because they say non-existing concessions.

Makhubele evidence vol 16: 301- 302

Later in her evidence, the Respondent testified:

And I am saying, taking it from there, it means that I must answer the question that was put to me that if, why would these people lie against me and I say there are reasons why they would lie against me.

Makhubele evidence Vol 16: 337

144 Firstly, this a clear misrepresentation of what the witnesses testified to. Their evidence was they had not been made privy to the contents of the Krige report. This allegation by **Ngoye, Dingiswayo and Mogashoa** was never challenged by counsel when they testified. From the emails and reports quoted previously, it is clear from the contemporaneous expressions of these witnesses that they were deprived of assessing for themselves whether the so-called concessions impacted upon the prospects of PRASA's defences in the litigation.

145 In response to the allegation that she had settled the Siyaya claims, the Respondent claimed that she had simply offered her expertise as a lawyer in assisting Zide as the AGCEO to settle the matters to save PRASA from proceeding with needless and costly litigation.

146 Second, under cross-examination, when the Respondent was asked whether it was fair to argue that witnesses were lying when they have not been given an opportunity to hear her version where her version was not put. The Respondent testified thus:

I did not argue in a vacuum that a witness is lying, and I have never used the word lie in this forum.

Number one I have never used that word.

I can, I have answered the question by saying someone is lying.

Makhubele evidence vol 16: 462 – 464

147 The Respondent claimed that the relationship between the Board and the legal team broke down after the suspension of the legal panel after the so-called resolution of **1 December 2017** had suspended the legal panel.

Makhubele evidence Vol 16: 337 – 344

148 This evidence is inconsistent with the evidence of Botes who stated that as early as the first call **(13 November 2017)** he had with the Respondent **that** she did not trust the legal department. (**See: paragraph 127 supra)** This evidence was not disputed when Botes testified. Under cross – examination, the Respondent belatedly claimed:

Everything Botes is saying is actually the opposite. He is actually the one who said it. If you look at our SMS communication which is part of these records he is the one when we were conversing throughout, he is the one who would be telling me PRASA employees are undermining me.

Makhubele evidence Vol 16: 616 – 617

This was never put to Botes when he testified. From the numerous exchanges between Botes and her which she relies on in support of claim, there is no evidence of abuse.

Vol 20: 186 - 207

149 According to the uncontroverted evidence of **Ngoye and Dingiswayo,** that there were only two meetings between the legal department and the Respondent, that is, on **9 November 2017** at which **Ngoye and Dingiswayo** attended, and on **14 November 2017,** which **Ngoye** attended. Ngoye testified that the legal department welcomed the Respondent's appointment as Chairperson of IBOC believing that she

would understand the challenges which PRASA faced. At the first meeting, the Respondent made enquiries about the **Werksmans' report**. At the second meeting, she raised the Siyaya matters with Ngoye after her meeting with Botes on the same day.

150 In response to the claim that she had settled the Siyaya litigation herself and had not marginalized the legal department, the Respondent testified that:

I told you I was assisting. I was mandated to assist the CEO *who according to the delegation of authority had that power, financial limit (sic)* to settle the matters to save PRASA from proceeding with needless and costly litigation. It was not clear from her evidence who had mandated her. No resolution of the Board was produced.

Makhubele evidence Vol 16: 603

151 This evidence was inconsistent with the clear assertion of **Mogashoa** that the instruction to settle came from the Respondent (**See: paragraph 133 supra).** The Respondent's version was not put to Mogashoa for him to deal with it.

When pressed in cross-examination, she appeared to blame her counsel for the failure to challenge Mogashoa's evidence on this score. Her evidence read thus:

There is attorney client privilege information, unless Maluleke (sic) was here then he would either waive that or allow me to tell the

Tribunal that we spoke about in our consultations but for now I think we should respect that.

Clearly, the Respondent's belated reliance on attorney-client privilege is misguided.

Makhubele evidence Vol 16: 605

152 The Tribunal pressed Botes to get clarity on who settled the matter. Botes referred to the WhatsApp message he received f**rom the Respondent at 13:44 PM on 19 December 2017 (Ngoye exhibit Vol 9: 220) in which the Respondent forwarded the instruction to make a settlement offer to Mogashoa. The effect of the instruction was that PRASA simply capitulated or "*they just rolled over".***

Botes was pleasantly surprised. He was not involved in any settlement negotiations. The Tribunal pertinently asked who it was at PRASA who gave the instruction to settle, Botes simply dodged and weaved. He could not assist other than to say that the Board must have given the instructions to settle. Nor, was Botes able to assist in offering any reason why between September 2017 and 15 December 2017, the situation had changed so drastically.

Botes evidence Vol 12: 185 - 196

153 The Respondent was questioned about the letter sent by **Molepo to Ngoye dated 8 March 2018,** where it was conveyed that the Respondent required to be advised **whether her decision to settle the**

Siyaya matter was being reviewed or challenged (See: paragraph 106 supra). When the letter was raised, the Respondent appeared to be unable to respond to the questions around this letter. She resorted to being evasive before addressing the contents of paragraph 2 of the letter. When it was put to her that the words attributed to her corresponded with Mogashoa's evidence that she had instructed the settlement, she claimed that the letter contained a wrong statement that had only been concluded by her.

Makhubele evidence Vol 16: 606 – 610

154 Three witnesses, **Ngoye, Dingiswayo and Mogashoa** testified that the legal department had been excluded from participating in the process which led to the settlement offers being made. At no stage during cross-examination was this allegation challenged. The Respondent belatedly claimed that there was nothing stopping the legal department from engaging with the Board. However, Mogashoa confirmed that he had been instructed not to involve the legal department because the litigation was being managed by the Board (**See: paragraph 134 supra). The legal department only got to know of the settlement in January 2018 when demands for payment were being made (See: paragraphs 99 and 122 supra).**

155 The Respondent conceded that she had been appointed as a non-executive director on the Board of PRASA. She claimed that she had set about familiarising herself with each unit of PRASA. She accepted that she did not have the authority to deal with operational issues. She was shown the delegation of authority that she had put up with her papers. The Respondent again demonstrated that she was evasive in her responses. It is respectfully submitted that judging from the way the Respondent dealt with this aspect of her evidence, it was clear that she had not understood what was required of her as the Chairperson of IBOC.

Makhubele evidence Vol 16: 570 – 580

156 The performance of the Respondent on this score contrasted markedly with the evidence of Ngoye. Ngoye had made it clear that in respect of the Siyaya matters, neither the Board nor the AGCEO had the authority to settle the claims which did not meet the thresholds as dictated by the delegation of authority. The authority vested with the legal department in conjunction with the Chief Executives of the PRASA units (**See paragraphs 79 – 80 supra).** This evidence was not challenged by the Respondent by way of cross-examination. However, the Respondent sought to deny that this was so.

Makhubele evidence Vol 16: 584 – 590

157 In order to decide this issue, it is instructive to have regard to the various interactions and communications which the Respondent had with Botes between **13 November 2017 and late May 2018.** They are inconsistent with her claim that she was simply assisting Zide to settle the claims.

On the evidence before the Tribunal:

- She approached Botes in respect of the Siyaya matters in **November 2014**.
- She entertained a meeting with Botes on **14 November 2017** at PRASA at which she received the Krige report and his email of 6 September 2017.
- No sooner had Botes left, on that same day, she questioned Martha Ngoye why the matters were being defended and not settled which caused Ngoye to be taken aback (**Ngoye evidence Vol 8: 44).**

- **It could only have been based on the Krige report that she came so swiftly to this conclusion. She nonetheless persisted in that view despite receiving the comprehensive reports from Mogashoa, Dingiswayo, Kobuwe and Baltac. If she had had any regard, as she claims to have done, to the comprehensive reports, it is improbable that she could have persisted in her view.**
- She wrote the urgent internal memorandum of **28 November 2017** to Zide (**Ngoye exhibits Vol 9: 86 – 90).**

- She summoned **Mogashoa** to attend a meeting on **4 December 2017,** and told him that she was not accepting his response to her internal memorandum dated **28 November 2017**.
- According to her own evidence, she engaged in her own investigation with the witnesses into the so-called concessions, despite reports which had been furnished to her Mogashoa and the Legal Department, which indicated that the so-called concessions did not affect the defences which PRASA had raised.

- According to her own evidence, she invited the opposition lawyer, **Botes** to PRASA to be part of the so-called negotiations on **15 December 2017** at which **she** dictated the terms to Mogashoa, in the absence of the legal department with whom Mogashoa had been instructed not to speak to by her. Botes was unable to attend the meeting.
- She forwarded the instructions to Mogashoa dated **15 December 2017** drafted in the name of Zide directly to Botes, and the probability is overwhelming that the original copy of the instructions on the PRASA letterhead must have found its way to Chambers from her. The legal department were not favoured with a copy of the instructions.
- Armed with the very instructions **from the client (the Respondent herself) to PRASA's lawyer, Mathopo** was able

to undermine Mogashoa by pointing out in his letter of **18 December 2017** that he had **not** complied with his instructions.

- No sooner had Mogashoa sent the amended settlement offers to include interest which were accepted and had accordingly advised PRASA to this effect, **the Respondent sent an email to Mogashoa on 21 December 2017, which included an instruction to Zide to finalize the matter wrt payment part (Ngoye exhibits Vol 9: 276)**

- When payment was not forthcoming after the finance lady (Page) had engaged with the legal department in January 2018, Botes communicated with the Respondent. The Respondent sent a message to Botes on **24 January 2018** in which she explained her quietness and expressed her ***shock and disgust at the open defiance displayed by the Finance lady.***

Makhubele exhibits Vol 17: 179

- **On 28 January 2018, the Respondent** sent a message to Botes which read:

  I want to talk to you urgently.

- On **6 February 2018,** the Respondent forwarded **Cromet Molepo's** contact number to Botes.

Makhubele exhibits Vol 17: 181

- **On 7 February 2018** (the date on which Judge Brand made the arbitration awards), **the Respondent sent a message which was conveyed by Zide to Mogashoa that Mogashoa *should confirm that the settlement be made an order and proceed with arbitration on the one that had outstanding issues.***

Mogashoa exhibits Vol 15: 46

- The following day **(8 February 2018)**, **Molepo sent an email** to set up a meeting which included Ngoye **(Ngoye exhibits Vol 9: 156 – 157)**. This obviously related to demands for payment being made by Mathopo following upon the arbitration awards. Ngoye declined to take part in such a meeting because she had not been part of the settlement agreement. Her department had been excluded on instructions from the Respondent and she did not support the way the matter was handled and removed from her department.

Ngoye evidence Vol 8: 84 – 91

- On **9 February 2018**, Botes again communicated directly with the Respondent to advise her that Judge Brand had made the awards. She thanked him for the update.

Makhubele exhibits Vol 17: 182

- **On 12 February 2018, the Respondent** sent a message to Botes which read:

Can I call you later.

Botes responded with a thumbs up symbol. Later that same day, he communicated again and raised the issue of applications being made to enforce payment of the awards. She responded by saying that she would talk to Zide.

Makhubele exhibits Vol 17: 183

- **On 14 February 2018,** Botes messaged the Respondent:

  Dear Nana. Do you have 2 minutes to talk to me.

  The Respondent answered:

  Yes you may call.

  Makhubele exhibits Vol 17: 184

- These communications between Botes and the Respondent were taking place at a time when applications were being drafted to make the awards orders of court.

- By **20 February 2018, Mogashoa** had received the applications from Mathopo and these were forwarded by **Mbebe** to Zide who failed to give instructions whether to oppose the applications.

  Mogashoa exhibits Vol 17: 47

- The following direct intervention by the Respondent which culminated in the publication by Botes of a message from her that **Bowmans had no authority to act for PRASA (Vol 20: 206 –**

207), which he had received from the Respondent. This effectively blocked the attempts by the legal department to oppose the applications before **Holland-Muter AJ on 9 March 2018**, and resulted in the orders being granted by default.

Ngoye exhibits Vol 9: 165

- Finally, there was the last-ditch attempt by the Respondent to stamp her authority as was made clear in the letter dated **8 March 2018** of Molepo to Ngoye **(Ngoye exhibits Vol 9: 162 – 163)**. The sentiments in the letter clearly emanated from the Respondent from the language employed. The Respondent was simply using Molepo to carry out her instruction that the opposition to the applications be withdrawn.
- At **2:12 PM on 9 March 2018, Botes** sent the following message to the Respondent:

  Dear Nana I trust that you are well. Just to let you know that JUDGMENTS was (sic) granted against PRASA in all 4 applications, The sheriff will serve the COURT ORDERS on PRASA this afternoon. Enjoy your weekend. Kind regards Francois Botes.

Vol 20: 207

- During **May 2018**, the Respondent was still communicating with Botes to enlist his assistance describing him as “my so- called co-conspirator”. **(Makhubele exhibit *Vol 18: 98 – 103)*** These communications between them still had to do with the Siyaya

matter. This is inconsistent with her evidence that she communicated with Botes **"up until March 2018, it depends on what we are talking about but I had already informed him that he should not involve me and if you care to read my response to him I simply said thank you for the update".**

Makhubele evidence Vol 16: 631 - 635

By way of a marked contrast to her inclinations towards communicating so extensively with the representative of the opposition whose interests were at odds with those of PRASA, the Respondent had only one direct engagement with the legal department who were steeped in the litigation, and that was with Ngoye on **14 November 2017.** It is hardly surprising that in those circumstances they sought to describe the settlement of the litigation as secret. The evidence of the Respondent was manifestly unsatisfactory under cross-examination when her conduct in relation to her communications with Botes was probed.

Makhubele evidence Vol 16: 631 - 644

158 One of the few instructions which the Respondent gave to her counsel, and which was put to **Ngoye** was that the Respondent would say that she gave no instructions regarding payment. However, the email **(Vol 9: 276)** referred to supra is inconsistent with this claim. The Respondent had a rather tortuous explanation for the email which failed to satisfactorily explain why she had sent it. This was not evidence of mere

assistance to Zide. It revealed instead that it was Respondent herself who was giving the instructions, and not simply assisting Zide..

Makhubele evidence Vol 16: 627 - 630

159 The only reasonable inference which can be drawn from a conspectus of the evidence before the Tribunal is that the Respondent had usurped the functions of the executive of PRASA by instructing that settlement offers be made to the lawyers acting for Siyaya. There was no evidence from Ngoye and Dingiswayo that the Respondent took an interest in settling other litigation apart from the Siyaya matters. The Respondent herself makes no mention of other litigation being settled.

160 It is not clear why the claims had to be settled with such haste. The Respondent mentioned that an email dated **7 December 2017** was sent enquiring whether a meeting with the legal department could be held and was told that they were not available, Then, the Respondent, on her version, engaged in an enquiry with the PRASA employees who had made the concessions which she set so much store by in pushing for the settlement to be made. The Respondent had never heard of the existence of the Chief Executives of the units affected by her decision, namely, **Piet Sebola and Kevin Moonsamy. According to the Delegation of Authority, they had to be consulted. That did not happen. This was the unchallenged evidence of Ngoye (See: paragraph 105) and Dingiswayo (See paragraph 123).**

Makhubele evidence Vol 16: 596 – 600

SUBMISSIONS IN RESPECT OF THE SECOND COMPLAINT

161 The question which requires resolution by the Tribunal arising from the second complaint is whether the conduct of the Respondent described **supra** amounted to gross misconduct as envisaged by section 177 (1) of the Constitution.

162 The Respondent as a member of IBOC was bound to comply with the provisions of the **Public Finance Management Act, 1 of 1999 (the Act)**. The Respondent was a member of an**" accounting authority"** of a public entity, namely PRASA as envisaged by **section 3 of the Act.**

163 In terms of **section 2 of the Act**, the object of the Act was **to secure transparency, accountability, and the sound management of the revenue, expenditure, assets and liabilities (my underlining) of the institutions to which this Act applies.**

164 **Section 49 (1) of the Act** provides that every public entity must have an authority which must be accountable for the purposes of this Act.

(2) If the public entity –

(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity.

165 **Section 50** of the Act prescribes **the fiduciary duties of accounting authorities.** In terms of section 50 (1) of the Act, the applicable

provisions to the instant case are that the accounting authority for a public entity must –

(a) exercise the duty of utmost care to ensure reasonable protection of the assets and records of the entity.

(b) act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity.

(d) seek, within the sphere of influence of that accounting authority, to prevent any prejudice to the financial interests of the state.

166 **Importantly, the duty of care would thus involve acting with that degree of care which would be expected of a reasonable person caring for another's assets.**

Good faith means that it was expected of the Respondent that she must honestly apply her mind and act in the best interests of PRASA.

167 In terms of **section 50 (2) of the Act**, a member of an accounting authority may not –

(a) act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of this Act.

168 **Section 51 of the Act** provides for the **general responsibilities of accounting authorities.** The responsibilities which are relevant to the instant case appear to be:

(b) must take effective and appropriate steps to –

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

(c) Is responsible for the management, including the safeguarding, of the assets and for the management of revenue, expenditure, and liabilities of the public entity.

169 **Section 83 of the Act** regulates financial misconduct by accounting authorities and officials of public entities. **Section 83(1)** provides:

The accounting authority for a public entity commits an act of financial misconduct if that accounting authority wilfully or negligently –

(a) fails to comply with a requirement of **sections 50, 51, 52, 53, 54 or 55;** or

(b) makes or permits an irregular expenditure or a fruitless or wasteful expenditure.

170 **Section 83 (2) of the Act** provides that if the accounting authority is a board, every member is individually or severally liable for any financial misconduct of the accounting authority.

171 **Section 86 of the Act** provides for offences and penalties. **Section 86 (2) of the Act** is relevant to the instant case. It provides that an accounting authority is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that

accounting authority wilfully or in a grossly negligent way fails to comply with the provisions of **sections 50, 51 or 55.**

172 On any reading of the evidence adduced before this Tribunal, the conduct of the Respondent brought her within the scope of the sanctions envisaged by **section 83 of the Act** that she committed acts of financial misconduct. Moreover, there is also strong *prima facie* evidence that her conduct amounted to criminal conduct in contravention of the provisions of **section 86 of the Act.**

173 Through her unauthorised conduct, PRASA not only incurred fruitless and wasteful expenditure through the direct actions of the Respondent, but the public entity also suffered a financial crisis in March 2018 because the monies were attached as a direct result of the conduct of the Respondent. It was not as a result of any action by the Respondent that the **R 56 029 560.95** which was seized from the bank accounts of PRASA was not lost to the public purse. Had it not been for the action of the sheriff holding the monies attached in his bank account, it would have been lost. The Respondent owed a duty of care to PRASA to ensure that she acted as a good steward of PRASA's assets. In this regard, she failed.

171 There can be no doubt, that the Respondent's decision to settle the Siyaya claims against PRASA in the face of a resolute defence of the claims over a period of several years, the Respondent failed to act in the best interests of PRASA. The Respondent had no authority to settle the

claims even in concert with Zide as she claimed. The four claims individually fell below the amounts which would have justified intervention by the GCEO let alone the Board.

172 In order to settle a matter where the claim is between R 50 million and R100 million, the Group CEO may have the authority to settle such claims on recommendation of EXCO or Group Executive of the relevant department or subsidiary of PRASA (in the Siyaya matters this was PRASA's Strategic Asset Development and PRASA Tech), and such recommendation may be accompanied by an opinion of a suitably qualified and experienced external expert.

173 In order to settle a claim above R100 million, the Board of PRASA may do so on recommendation of the Group CEO accompanied by the opinion of the Group Executive Legal and Risk (Ngoye), or another opinion from a suitably qualified and experienced external expert.

174 The power of the Chair of the Board of PRASA is limited to the signing of MOU's and claims by non-executive directors of PRASA for travel, training, conferences and subsistence. The Board's function was a reflective one whereas management's function is an active operational one.

175 Neither Strategic Asset Development nor PRASA Tech were ever approached on whether they thought the Siyaya matters should be settled, despite being the relevant departments. Transparency is a pillar of good governance. In this regard, the Respondent failed to act transparently towards the abovementioned entities or GLS.

176 There is no doubt that PRASA suffered fruitless expenditure in respect of ENSAfrica opinion which the Respondent conveniently ignored because it did not suit her narrative. The Respondent interacted with her fellow board members which no doubt led to further fruitless expenditure to get another opinion.

177 The ENSAfrica opinion dated **28 February 2018** was produced after two days of consultations **with the Respondent (and others) on 22 and 24 February 2018 (Ngoye exhibits Vol 9: 177 – 192)**. The authors were quite clear that at that time (February 2018), the Respondent was a judge. This opinion aligned with the legal opinion of the Chief State Law Adviser dated **6 April 2018. (Mlambo exhibits Vol 7: 35 -41)** They also opined that during the period of **18 October to 4 February 2018, IBOC was inquorate**, which underscored the view expressed by Ngoye. During the proceedings of the Special Meeting of the Board on **1 December 2017**, Zide pertinently raised the issue **(Makhubele exhibits Vol 17: 214 – 217)**. The Board purportedly made resolutions which raised concerns with **Ngoye and Dingiswayo**, which prompted them to write their memorandum to the Respondent of **5 December 2017 (Ngoye exhibits Vol 9: 141 – 155).** They received no response from the Respondent. Dingiswayo testified that Zide had deposed to an affidavit in respect of the litigation before the Western Cape High Court that the so-called resolutions were not resolutions of the Board **(Dingiswayo evidence Vol 10: 52). This evidence was not disputed.**

178 The Respondent was pertinently made aware that the meeting was inquorate. Instead of adjourning the meeting and reconvening to properly consider the reports when the Board was lawfully constituted, the Respondent pushed the unlawfully constituted Board to adopt resolutions on the reports without adequate, rational consideration thereof.

179 The advice sought had nothing to do with the running of the entity. Clearly, the advice was sought at the behest of the Respondent because of the controversy which raged regarding her assumption of the chairpersonship of PRASA after she was required to take up her appointment as a judge.

180 In her evidence, the Respondent simply dismissed the opinion which she had sought on the basis that ENSAfrica had gone off on a tangent. In this regard, she was thoroughly disingenuous. It is instructive to note from the evidence that the Respondent produced, <u>there is no suggestion that ENSAfrica had gone on a tangent</u>. The Board member, **Natalie Scheepers in her email to the Respondent on 28 February 2018 was of the view that there were "too many Maybe's, If's and buts. The Respondent replied:**

NS I agree. Opinion must give comfort. You must be able to rely on it. Here they're noncommittal.

Makhubele exhibits Vol 17: 55 – 62

181 The Respondent's conduct on **19 March 2018** is curious to say the least**.** According to the letter from Zide **dated 22 March 2018** addressed to Mr Mbatha of ENSAfrica in which the following is stated:

Dear Mr Mbatha

PRASA Interim Board Legal Opinion – ENSAfrica

I have been instructed by the Chairperson of the Board on Monday, 19 March 2018, to formally advise you that the Board has unanimously rejected to accept the opinion given.

The reason submitted by the Board varied from the opinion having a lot of grey areas but importantly it exceeded the mandate given especially that it was meant to focus on the status of the Chairperson which in any event is a matter to be adjudicated and is before the Cape High Court.

In the circumstances the Board will seek a second opinion……

Considering that the Respondent had severed her ties with the Board by resigning on **Friday, 16 March 2018**, her actions appear to be unlawful. Given the controversy which was by then brewing around her conduct in relation to the PRASA matter, the timing of this decision to seek a second opinion appears to be a vain attempt at damage control by the Respondent. It is difficult to understand why it was necessary to seek an opinion as to her status as a judge when according to her evidence she was not a judge as of **1 January 2018.**

182 It is deeply disturbing that despite being advised that the Board was inquorate as of **1 December 2017** when the “resolutions” were passed, the Respondent saw fit to send a message to Botes shortly before the hearing of the applications on **9 March 2018** claiming that that legal panel had been suspended and that Bowmans had no authority to act for PRASA. That was manifestly untrue. The Respondent must have foreseen that, armed with such inside information from the Chairperson of the Board, Botes would have used it to his advantage by publishing it to the court if the need arose. He did so successfully, in that, it appears that this influenced Holland-Muter AJ to find that Bowmans had no authority to appear behalf of PRASA. and led to him granting the orders against PRASA by default. This act of sending such messages to Botes considering the contents thereof cannot be construed as acting in the best interests of PRASA. All communications between PRASA and Siyaya should have been between counsel representing the entity and Siyaya’s representatives.

183 In addition, PRASA no doubt suffered further fruitless expenditure in pursuing the recission of the orders of Holland-Muter AJ at great cost to PRASA on account of the Respondent’s unlawful actions. In this regard, the Respondent also failed to protect PRASA from incurring unjustified liability. The subsequent recission of the orders and the failure by the Siyaya entities even to this day to pursue claims **which the Respondent thought could not be defended** underscore the irrationality of her conduct.

184 A further infringement of the fiduciary duty which was required of the Respondent was that she act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity. Her conduct in marginalizing the legal department illustrates her failure to observe the standard of conduct which the law demanded.

185 Considered objectively, her conduct as a public official could not be considered as adequate or as satisfactory for an official in her position. On the contrary, her conduct was arbitrary and was not consistent with the rule of law. Her conduct fell far short of the standards demanded by the Constitution. Her decision to push through the settlement of the Siyaya claims made no rational business sense in the context of the interests of PRASA based on all the facts which were available to her. She accordingly failed to discharge her duties of good faith and care as a non-executive director of PRASA.

186 The **so-called major concessions** were not points of dispute in the Siyaya matter. The concessions made did not relate to the points that PRASA had made in defending the Siyaya claims. Despite this, the Respondent drove a settlement of the Siyaya matters. Much of the cross-examination of witnesses was devoted to the transcript of the enquiry, which was irrelevant irrelevant. The evidence revealed that the transcript only was available in April or March 2018. This would have had no bearing whatsoever on the Respondent's decision to settle. Clearly, the Respondent had made up her mind based purely on the report of the Commissioner so much so that she queried Ngoye why the claims were

being defended, that is, shortly after receiving the report from Botes on **14 November 2017**. Even the briefest study of the report, which she withheld from those who had a direct interest in reading it, would have revealed that far from referring to “major concessions”, there were none which could be said to have undermined PRASA’s defences.

187 The Respondent’s desire to settle the Siyaya claims was accordingly irrational – the so-called major concessions had no bearing on the prospects of PRASA’s success in arbitration proceedings - and which have not been pursued by the Siyaya entities to this day.

188 **Article 5 of the Code of Judicial Conduct** stipulates that a judge must always, **and not only in the discharge of official duties, act honourably** and in a manner befitting judicial office. It is respectfully submitted that the conduct of the Respondent on the evidence before the Tribunal cannot be said to have measured to the standard required of the holder of a judicial office. Whether the Respondent was in active service or not on active service matters not. She was not only on the brink of taking up a judicial appointment in November 2017, but she was also a judge as of 1 January 2018 when she committed the misdemeanours complained of by #UniteBehind.

189 **Article 6 of the Code of Judicial Conduct** requires that a judge must all times, also in relation extra-judicial conduct, comply with the law of the land. As has been contended supra, the Respondent was not compliant with the law of the land.

199 In the **Report of the Judicial Conduct Tribunal: In re Judge N J Motata,** the following was said which is apposite to the instant matter:

The office of a Judge is a very respectable office. So, must be those who hold it. The Judge's conduct, in and out of court, should not dishonour that high office. Impeccable moral and ethical standing is a crucial hallmark of such a public office.

200 The Respondent's conduct, in relation to PRASA as well as the way she conducted herself before the Tribunal in the full glare of the publicity afforded to this matter, has threatened public confidence in the judicial system.

201 It is thus respectfully submitted, on the aforementioned grounds arising from the second complaint, that this Tribunal ought to conclude that the Respondent is guilty of gross misconduct as envisaged in section 177 of the Constitution.

DATED at PIETERMARITZBURG this 14th day of JUNE 2024

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E HARRISON

EVIDENCE LEADER