

# #UNITE BEHIND

**FOR A JUST AND EQUAL SOUTH AFRICA**

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**Chairperson of the Parliamentary Committee on Transport Ms Dikeledi Magadzi (MP)**

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**Judge President of the Gauteng Division of the High Court of South Africa Dunstan Mlambo –  
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CC Justice Nana Makhubele - [nanam@law.co.za](mailto:nanam@law.co.za)

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12 February 2018

Dear President Zuma, Chief Justice Mogoeng, Deputy-President Ramaphosa, Speaker of Parliament Ms Mbethe, Minister Masutha, Minister Maswanganyi and Chairperson Magadzi

**MADAM JUSTICE T.A.N. MAKHUBELE: UNLAWFUL ROLE ON PRASA BOARD AND HER UNLAWFUL REQUEST TO THE PRESIDENT**

#UniteBehind addresses this letter to you in its capacity as a coalition of people's organisations and legal, policy, research support bodies advocating for social justice and equality. We write this letter with a very deep sense of regret but its gravity concerns a matter of constitutional importance and a breach of the separation of powers that involve all three spheres of government - the executive, the judiciary and the legislature.

The constituent bodies of #UniteBehind include, but are not limited to, Equal Education, the Rail Commuters Action Group, the Women's Legal Centre, the Western Cape Religious Leaders Forum, Social Justice Coalition, Alternative Information and Development Centre, Right2Know (Western Cape) and the UDF Veterans. These organisations consist of young people, struggle veterans, queer people, women, workers and unemployed people, who have come together to form a coalition for a just and equal South Africa.

1. State capture, corruption, a crisis of lawful governance, mismanagement and maladministration have all contributed to the virtual collapse of the Passenger Rail Service of South Africa (PRASA). In Cape Town, the Central Line servicing more than 100 000 children, women and men daily has been shut down for the fifth working week. These issues are matters of political contestation between the

PRASA Board of Control, its Executive Management and Parliament, as well as litigation matters involving PRASA, the companies accused of corruption, criminal justice agencies and people's movements. We do not expect any pronouncement from you relating to matters before our courts. We write to you only on the question of the separation of powers and the judicial conduct of Justice T.A.N. Makhubele.

2. Justice Makhubele is currently appointed as a judge of the High Court of South Africa in its Gauteng Division (Pretoria) since 01 January 2018 and she currently also serves as the chairperson of the Interim Board of Control of PRASA. We address this letter to you as a matter of urgency because on 6 February 2018, the Parliamentary Portfolio on Transport subpoenaed Justice Makhubele and the other members of the PRASA Board because they are in breach of their duties to account to Parliament.
3. Following the attached confidential correspondence with the Gauteng Judge-President, Mr. Justice Dunstan Mlambo, #UniteBehind was advised that Judge Makhubele requested that the Judge President write to the Minister of Justice to request that the President 'revoke' her appointment as a judge of the High Court on 1 January 2018, and re-appoint her on 1 April 2018. After taking legal advice and given the urgency related to the subpoena we have decided to write to you collectively because the position of Justice Makhubele constitutes an impermissible intrusion into the executive and legislative spheres of government. We set out the facts as follows:
4. On 5 October 2017, the Judicial Services Commission (JSC) formally recommended for appointment Advocate Tintswalo Annah Nana Makhubele SC as a judge in the Gauteng High Court, following her interview before the JSC.
5. On 19 October 2017, then-Advocate Makhubele was appointed by Mr. Joe Maswanganyi, Minister of Transport, as the Chairperson of the Interim Board of Control of PRASA "until further notice". The Minister seems not to have been concerned that he was appointing an Interim Chairperson who had already been recommended for appointment as a judge. We are also not aware whether Justice Makhubele at any stage advised the Judicial Service Commission that she accepted a paid appointment with PRASA before, during or after the process her appointment as a Judge by the President
6. Two weeks later, on 2 November 2017, then-Advocate Makhubele SC was appointed by President Zuma as a Judge of the Gauteng Division of the High Court, with effect from 1 January 2018.

7. Then-Advocate Makhubele SC confirmed her impending formal appointment as a judge in her report to the Parliamentary Portfolio Committee on Transport chaired by Ms Dikeledi Magadzi (MP) on 24 November 2018.
8. After the judicial appointment became effective on 1 January 2018, Justice Makhubele continued to act as a chairperson of the Board. This despite the fact that she had been allocated matters on the roll for 3 February 2018 (a copy of which is attached).
9. On 26 January 2018, #UniteBehind wrote to Judge-President Mlambo and received a reply on 29 January 2018.
10. Judge President Mlambo tacitly assured us in his correspondence with us that Madam Justice Makhubele would not sit as a judge while serving as PRASA Board Chairperson. To this day, Justice Makhubele remains Chairperson of the Interim Board of Control of PRASA. As a result of her failure to appear, a Judge of the High Court has been subpoenaed to appear before a Parliamentary committee for the first time in our democracy.
11. Based on the above facts, #UniteBehind is concerned about a breach of the separation of powers. As chairperson of the Interim PRASA Board of Control, Justice Makhubele is carrying out functions in the executive domain and is accountable to the Minister of Transport, Parliament, the Minister of Finance and the Auditor-General. Further, #UniteBehind is concerned about the possibility that the standing of the judiciary could be damaged, as one of its incoming members appears to condone and enable ill-gotten gains.
12. The Constitutional Court dealt with this question in relation to former President Mandela's appointment of Justice Willem Heath as Head of the Special Investigating Unit. In *SA Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) the late President of the Constitutional Court, Arthur Chaskalson, held the following when declaring Heath's appointment unlawful:

12.1. "Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other

executive functions, which are not appropriate to the “central mission of the judiciary.” Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive’s power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order.” (Paragraph 46)

13. As stated before, #UniteBehind wishes to place on record that we have the fullest confidence that judges in our democratic constitutional dispensation have followed the prescripts of the separation of powers, because not one member of our judiciary has since occupied post in the executive’s domain.

### **LEGALITY OF THE PRESIDENT TEMPORARILY REVOKING A JUDICIAL APPOINTMENT AND VIOLATIONS OF THE CODE OF JUDICIAL CONDUCT**

14. First, #UniteBehind has been advised that there is no constitutional or legislative power for the President to revoke, withdraw an appointment permanently or temporarily, or, to re-appoint a judge without a formal interviewing process through the Judicial Services Commission (JSC). Any such a decision to revoke an appointment whether at the request of the judge, or, at the instance of the President, must interfere with the separation of powers and the legal principle life-long tenure. There are only two mechanisms for the termination of a judicial appointment resignation or removal under section 177 of the Constitution through a process that involves the JSC and the National Assembly.
15. We wish to bring to the attention of the Minister of Justice and Correctional Services and the attention of the President that should they comply with Justice Makhubele’s request for a temporary revocation of her position as judge, then #UniteBehind will challenge the legality of the decision. Accordingly we require an undertaking from the Minister that he will not make the request and, if already made, the President will not grant the request. Unless we receive confirmation to that effect by 23 February 2018, #UniteBehind will institute an urgent application for relief.
16. Second, by agreeing to serve on the PRASA Board “until further notice” while in the process of being recommended to serve as a Judge by the Judicial Services Commission, Justice Makhubele has undermined the process of that body. This would at the very least constitute conduct unbecoming of judicial officer by Justice Makhubele. At the same time, Justice Makhubele has committed a number

of indisputable violations of the Constitution, the Judicial Service Commission Act (“The JSC Act”), and the Code of Judicial conduct including:

- 16.1. A breach of the supremacy of the Constitution, the rule of law and the separation of powers. Judicial appointments may not be interfered with except through legislation that is consonant with constitutional precepts.
- 16.2. Justice Makhubele’s continued paid service at PRASA compromises judicial independence and authority because it may be perceived as showing favour to the Executive or interests that may have captured the rail agency for criminal purposes.
- 16.3. The JSC Act requires that a judge performing active service may not hold or perform any other office of profit. Justice Makhubele is paid in her position as Board Chairperson. We have been assured by Judge-President Mlambo that she has not received payment as a judge but this is not sufficient because Justice Makhubele may be called at any time to serve as a judicial officer and in the eyes of any reasonable person she is a Judge.
- 16.4. The Code of Judicial conduct serves as “the prevailing standard of judicial conduct, which judges must adhere to” according to section 12(5) of the JSC Act and it maintains that the judiciary should conform to ethical standards that promote “public acceptance of its authority and integrity”. Justice Makhubele’s conduct and service at PRASA undermines judicial independence, authority and integrity. (Preamble and Article 4(a) of the Constitution).
- 16.5. Justice Makhubele has asked the executive for a special dispensation to continue serving as chairperson of the PRASA Board and for her appointment to be “revoked” an act that is not constitutionally permissible. Article 4(d) prohibits a request for such a dispensation.
- 16.6. The Code of Judicial Conduct states clearly (see note 4(i)) that: “Judges do not appear at public hearings or otherwise consult with an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice.” Justice Makhubele has been subpoenaed by Parliament.

16.7. In failing to resign from the PRASA Board Justice Makhubele has acted in a manner that is not honourable (as defined in Article 5 of the Code of Judicial Conduct), instead, she has created the appearance of impropriety thus undermining confidence or trust in her judicial office.

16.8. Justice Makhubele has failed upon her permanent appointment to the Gauteng Division of the High Court from 1 January 2018 to sever her professional links with PRASA. As a consequence she is accountable to Parliament in her capacity as chairperson of the rail agency; the Minister of Transport who represents government as the only shareholder in the company; she is also directly involved in PRASA litigation matters in the Gauteng Division, the Western Cape Division of the High Court and the Supreme Court of Appeal pertaining to corruption at the state-owned enterprise. In our view, Justice Makhubele has knowingly violated Article 12 of the Code of Judicial Conduct.

17. On the basis of the above, #UniteBehind asks that:

17.1. The President and Minister of Justice refuse to “revoke” the appointment of Justice Makhubele until 31 March 2018 and provides us with the requisite undertaking in this regard;

17.2. The Judicial Service Commission investigates whether Justice T. A. N. Makhubele is a fit and proper judge, as contemplated in the Constitution, the JSC Act and Code of Judicial Conduct, given the political controversy regarding state capture at PRASA and litigation involving corruption.

17.3. The Minister of Transport revoke Justice Makhubele’s appointment as chairperson of the PRASA Board because as long as she remains in judicial office, this constitutes a violation of the separation of powers.

17.4. Parliament, through the Office of the Speaker and the Portfolio Committee on Transport, recommend that Justice Makhubele be removed as chairperson of the PRASA Board.

We request responses from the President, the relevant Ministers and Parliament by the close of business on 23 February 2018. #UniteBehind reiterates the gravity with which we approach this matter and we urge government to resolve this question amicably.

Yours faithfully

**#UniteBehind Organising Secretariat**



**Zackie Achmat**



**June Esau**



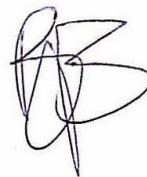
**Zelda Holtzman**



**Zukiswa Vuka**



**Nasima Badsha**



**Bruce Baigrie**



**Noncedo Madubedube**



**Barry James Mitchell**

Handwritten signature of Axolile Notywala in black ink, appearing as 'A.M. Notywala'.

**Axolile Notywala**

Handwritten signature of Phumeza Mlungwana in black ink, featuring a large circular flourish.

**Phumeza Mlungwana**

Handwritten signature of Reverend Alan Storey in black ink, consisting of a large, stylized 'A'.

**Reverend Alan Storey**

Handwritten signature of Madoda Cuphe in black ink, with a horizontal line drawn across the signature.

**Madoda Cuphe**