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TERMS OF REFERENCE FOR THE JUDICIAL CONDUCT TRIBUNAL ON COMPLAINT LODGED BY #UNITEBEHIND AGAINST JUDGE T A N MAKHUBELE OF THE GAUTENG DIVISION OF THE HIGH COURT

COMPOSITION

1. A Judicial Conduct Tribunal (Tribunal) is hereby appointed in terms of section 19 of the Judicial Service Commission Act No 9 of 1994 (JSC Act).
2. The Tribunal is composed of Justice F D J Brand, a retired Justice of the Supreme Court of Appeal, as the Tribunal President, Judge S S D Moshidi, a retired Judge of the Gauteng Division of the High Court, and Ms N Maduba-Silevu, a practising attorney, as members of the Tribunal.

PURPOSE

3. The Tribunal is appointed to investigate and report on a complaint lodged with the Judicial Conduct Committee (Committee) by #UniteBehind against Judge T A N Makhubele (respondent) of the Gauteng Division of the High Court. The essence of the complaint is that the respondent allegedly 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 Passenger Rail Agency of South Africa (PRASA) in 2018 undermining judicial independence and the general prohibition against Judicial Officers holding an office for profit provided for in section 11 of the JSC Act. The complainant also alleged that during that period, and acting in her capacity as Chairperson of PRASA, the respondent engaged in certain conduct that constitutes gross misconduct as envisaged in section 177(1)(a) of the Constitution.
4. The Judicial Service Commission (JSC), following a recommendation made by the Committee decided in terms of section 19(1) of the JSC Act, to request the

Chief Justice to establish a Tribunal to investigate and report on #UniteBehind's complaint.

5. The Tribunal shall investigate, make findings and report on:

5.1 Whether the respondent 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, and in doing so rendered herself guilty of gross misconduct as envisaged in section 177 of the Constitution; and

5.2 Whether the respondent's conduct as Chairperson of PRASA was incompatible with the office of a Judge in that of all the cases that PRASA was involved in she paid special attention only to those of Siyaya; that 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; that 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" 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; thereby rendering herself guilty of gross misconduct as envisaged in section 177 of the Constitution.

PROCEDURE OF THE TRIBUNAL

6. The Tribunal may appoint a member of the National Prosecuting Authority, as evidence leader, after consultation with the Minister for Justice and Correctional Services and the National Director of Public Prosecutions.

7. The Tribunal shall conduct its investigation by, amongst others, –

7.1 collecting evidence;

7.2 conducting a formal hearing;

7.3 making findings of fact; and

7.4 making a determination on the merits of the allegations levelled against the respondent.



8. The Tribunal President shall within five days of his or her appointment cause a notice of hearing to be served on both the complainant and the respondent specifying the date, time and place of the hearing.
9. The respondent is entitled to attend the hearing and to be assisted by a legal representative, but the Tribunal may commence or continue with a hearing, in whole or in part, in the absence of the respondent, or the respondent's legal representative, or both of them, if the Tribunal is satisfied that the respondent was properly informed of the hearing and there is no just cause for their absence.
10. The Tribunal may subpoena any person in possession of any information or documents relevant to the hearing to appear before it and to give evidence under oath or affirmation and to produce the documents.
11. Any hearing of the Tribunal shall be held in private, however, the Tribunal President shall have discretion to determine, if it is in the public interest and for the purposes of transparency, whether all or any part of the hearing shall be held in public.
12. The Rules and Procedures before Tribunals promulgated in terms of section 25 of the JSC Act shall apply to the Tribunal to enable it to conduct its work in a meaningful and proper manner.
13. The Tribunal has, subject to the provisions of the JSC Act, the power to regulate and protect its own proceedings.
14. The Tribunal shall complete its work within a period of three months from the date of hearing and must submit its report to the Commission within a period of one month after the date on which the Tribunal completes its work.
15. These terms of reference may be added to, varied or amended from time to time.

Dated 16 February 2021

