

In the **JUDICIAL CONDUCT COMMITTEE**

In the complaint of:

JUDGE TINTSWALO ANNAH NANA MAKHUBELE

against

JUDGE NEIL TUCHTEN

REPLY TO "MEMORANDUM BY JUDGE NB TUCHTEN IN RESPONSE TO COMPLAINT BY JUDGE MAKHUBELE"

Introduction

[1] In terms of the JSC Act, a complaint must be on affidavit or a sworn statement. I do not know what the rules are with regard to the response of the respondent (Judge Tuchten in this case) as well as subsequent statements, including the complainant's reply.

[2] The response by Judge NB Tuchten to my complaint is not under oath or sworn statement. Under the circumstances, I decided not to reply by affidavit or a sworn statement, but also by way of a normal statement.

[3] In paragraphs 12, 13 and 14 of his memorandum, Judge Tuchten has purported to challenge my evidence under oath on the basis of what he alleges are contradictory statements in my affidavits dated 04 December 2018 and 04 March 2019 with regard to the exact date that I became aware of the matter before him.

[4] I do not understand why he says my statements are contradictory. The fact of the matter is that I was not a party in the litigation and I was never served with any notice of the various hearings, including when the matter came before him. On my own

initiatives, and after reading newspaper reports, I asked for PRASA's founding affidavit. I received this from Botes SC in May 2018. I explained what happened between May 2018 and when I heard about Judge Tuchten's judgment over the radio in November 2018. I still do not know if any other papers were filed. I was never called to file anything at any stage or informed that the matter would be heard on 27/28 November 2018. In any event, Judge Tuchten has no right to analyze my evidence under oath simply by making a statement. He must do so under a sworn statement so that I can reply thereto.

If there are any inconsistencies in my affidavits, I believe that the investigators will take that up with me. The relevant question is whether I knew that the matter would be heard when Judge Tuchten heard it. The answer is NO.

Objection

[5] In my initial affidavit I mentioned that I was not in possession of the papers that were before Judge Tuchten when he heard the matter and that I do not know whether any of the parties made any submissions in open court or not. In this regard, I requested copies of the documents and a transcript of the proceedings before Judge Tuchten.

[6] In my Supplementary affidavit I indicated that I had a copy of the Founding Affidavit deposed on behalf of PRASA in the urgent application that served before Judge Ranchod on or about 06 April 2018. I explained the circumstances under which I obtained the documents. I also indicated that I did not know if PRASA supplemented the documents or if any of the respondents filed any answering affidavits.

[7] I also indicated, and supplied proof that I was not aware of the urgent application and that I was not a party thereto. I was also not

joined in subsequent hearings (before Holland-Muter AJ and Tuchten J).

[8] The relevance of these issues is that in paragraph 19 of his judgment, Judge Tuchten has stated, as a fact according to him, that I had "*at least two opportunities ... and in the present application*" to present my side of the story. According to him, or the evidence before him, I was aware of the proceedings before Judge Ranchod, Acting Judge Holland-Muter and also before him.

[9] However, he has failed to attach any proof that I was served with notice of set down when these matters came before court on these three occasions.

[10] Judge Tuchten's failure to respond to these issues severely prejudices me because I still do not know (a) what case was before him, (b) the documents filed and by which party, and (c) whether any of the parties made any submissions in open court about my fitness to hold office as a Judge or any allegations of misconduct in relation to the matter that was heard by Holland-Muter AJ.

[11] I still persist with my request for documents and transcript of record of proceedings, particularly before Holland-Muter AJ and Judge Tuchten.

Reply to the Memorandum

Ad paragraph 2, 11 and 26

[12] The fact that he did not mark the judgment reportable or of interest to other judges is irrelevant. I have already attached news articles to show what has been presented to the public. One

publication has even reported that he has found me guilty of some wrongdoing. The Talk Show Radio discussion was also along those lines.

[13] I do not have any knowledge of the discussions between him and the Judge President , and also between him and the Deputy Judge President or the purpose of such discussions, taking into account the fact that the matter before Judge Tuchten was a rescission application and not about my fitness to hold office as a Judge. The simple question before Judge Tuchten was whether Holland-Muter AJ was correct when he refused to adjourn or postpone proceedings to allow PRASA legal representatives an opportunity to make good on the challenge regarding their authority. The fact that in subsequent proceedings to rescind that judgment someone deposed to an affidavit and made allegations against me did not make the rescission case before Judge Tuchten about my fitness to hold office as a Judge or the merits of the dispute between the parties.

[14] I do not know why the Judge President and the Deputy Judge President requested copies of the judgment or why Judge Tuchten held discussions with them, separately or together.

[15] I do not know whether it is permissible for three Judges, not sitting together as a quorum, to discuss issues that must be included in a judgment on a matter that has nothing to do with those issues, and without affording the affected person an opportunity to be heard.

[16] In any event, and to the extent that Judge Tuchten may be justifying his actions or relying on whatever discussions he had with the Judge President and the Deputy Judge President , it is only fair that their versions be placed on record to enable me to deal with any issues arising therefrom. Furthermore, Judge Tuchten must explain the nature

of the discussions, before he heard the matter, and before he delivered the judgment. He must also state the purpose the judgment was requested and the reasons it was provided.

[17] In my supplementary affidavit I indicated that the judgment was written with a sole purpose to enable Unite Behind to file a complaint against me with the JCC. If this was not the reason, the judgment should have reflected the '*authority*' that Judge Tuchten intended to refer me to as he alleges in paragraph 26 of his response. This is standard practice when a Judge has made some adverse remarks about a professional in his judgment.

Ad Paragraphs 3 and 4

[18] These paragraphs are purportedly a summary of my complaint. The summary does not capture the essence of my complaint because Judge Tuchten appears to want to focus on one issue only, that of discrimination and racial bias. I do not intend to regurgitate what I have stated in the two affidavits. I tried, to the best of my ability to categorize the complaint in accordance with the relevant articles in the Code of Conduct.

[19] My objection to being referred to as "Judge Makhubele" throughout the judgment was fully motivated. I can only remind the JCC that I was not a Judge at all material times. The deponent to PRASA's affidavit acknowledged this and she chose to call me "Makhubele" as a neutral reference. I have no problem with this. On the other hand, Judge Tuchten did not even make the distinction, creating an impression that all the alleged wrongdoings happened whilst I was a Judge. I maintain my submission that this was intended to evoke public anger and disgust against me.

[20] The Supplementary affidavit that Judge Tuchten says he finds 'difficult to follow' actually provides evidence that;

- (a) I was not aware that Prasa had filed an urgent application, and the subsequent setdown when the matter came before Holland-Muter AJ and Judge Tuchten, but only heard about the judgments or orders through media reports or enquiries,
- (b) I took steps to obtain the court documents with a view to participate in the matter,
- (c) Judge Tuchten was aware when the matter came before him that there were allegations of misconduct against Botes SC and Mr. Mathopo, an attorney representing the Liquidators. This 'evidence' is contained in the same affidavit that Judge Tuchten refers to in his judgment. Strangely enough, he only sees my name, and not those of others. The allegations in the affidavit are taken from two letters, annexed in the papers, one written by Mr. Mathopo and one by Mr. Dingiswayo. These letters constitute the whole 'evidence' against me. The author of the one letter (representing the Liquidators) alleges that he spoke to me and I told him that Bowman Gilfillan had no authority to represent Prasa. The author of the other letter (Prasa official) repeats this statement and also make allegations of misconduct against Botes SC, apparently committed during the hearing before Holland-Muter AJ.
- (d) The essence of the allegations against me is that I had a 'questionable relationship' with Siyaya lawyers. Botes SC and Mathopo are Siyaya lawyers in question. PRASA affidavit and the letters that I have referred to above state so in clear terms.

[21] Why then, would Judge Tuchten not say anything about my alleged co-accused?. They are legal professionals. In fact, at the time of the commission of the alleged crime I was still practising as an

Advocate. What is the difference between me and them? I did not generalize and say other Judges and Lawyers must be investigated. I mentioned names in the Supplementary affidavit as I had evidence that their names and nature of misconduct appear in the papers (Prasa founding affidavit) that were before Judge Tuchten.

[22] In the Supplementary affidavit I indicated that I have filed a complaint against Botes SC because the letter written by Mathopo Attorneys was simply a fabrication. I never spoke to Mr. Mathopo as alleged in the PRASA affidavit. I even attached proof that I spoke to Botes SC by SMS , but between him and his attorney the conversation was falsified into a letter. I also explained the context of the smses and specifically that there was no confidentiality about the issues relating to Prasa's legal panel. The discussion was simply twisted to suit the author of the letter and to convince Holland-Muter not to allow Prasa legal representation.

[23] I also stated that if Judge Tuchten had done the right thing, and afforded me an opportunity to state my side of the story, he would not have written a speculative judgment. Even in the face of the evidence that I identified as indicated above, Judge Tuchten does not want to talk about Botes SC and his instructing attorney, Mr. Mathopo . Why?

Ad paragraph 5

[24] The summary provided in this paragraph only serves to highlight the fact that Judge Tuchten did not understand the case before him. As a result, he raised questions that had nothing to do with what he was called upon to decide.

[25] Judge Tuchten should have separated the issues pertaining to the merits of the dispute and the interlocutory application before him.

The latter concerned the refusal , by Holland-Muter AJ to allow PRASA legal representation. These issues are captured in the two letters that I have referred to above.

[26] The merits of the dispute pertains to the settlement of the claims where I am alleged to have intervened and the circumstances thereof. This issue was not before Judge Tuchten. PRASA wanted to rescind Holland-Muter AJ's order to enable it to launch the necessary proceedings to challenge the validity of the settlement agreement. PRASA knew that before doing that, they had to invalidate Judge Brand's arbitration orders, hence in one of the letters they talked about Judge Brand being joined in the proceedings.

[27] The strangest thing is how Judge Tuchten even came to raise issues about my fitness to hold office as a Judge. There was no application before him in that regard and no one, according to the documents that I have read, raised any issue with my fitness to be a Judge. In the context of the relevant timelines, the questions raised by Judge Tuchten become even more strange.

[28] Judge Tuchten knows very well that Judges do not appoint themselves. Why he thinks that I am capable of reviewing my own appointment is even more strange. If ever I made any unlawful request, why did he not take the matter with whoever approved my request?

[29] There was no evidence before Judge Tuchten that I had refused to answer to the allegations as he alleges. I still call on him to provide the proof that was submitted to him or at least the party that alleged so.

[30] Where, according to Judge Tuchten was I supposed to clear my name of the allegations against me? Why did he not refer the judgment to the "authority" that he told the Judge President that he wanted to refer me to?

This is why in my Supplementary affidavit I maintained my stance that he was influenced by Unite Behind, an organization that was not before him, but which he refers to in his judgment anyway. This organization quickly acted on his judgment by filing a complaint against me and attached his judgment. Why else would Judge Tuchten be vocal in the judgment about me clearing my name and leave out the forum where that must happen?

Ad paragraph 6

[31] I take note that Judge Tuchten still does not want to mention the name of Botes SC or what transpired in his courtroom on the day that he decided to write a judgment about me without giving me an opportunity to be heard.

Did anyone of the parties make submissions about me in open court?

Ad paragraphs 7 and 8

[32] If I were a party to the litigation, I would have filed an application for leave to appeal the judgment. The remarks that he made are actually findings of fact, for example, (a) that I unlawfully deprived Prasa legal section an opportunity to participate in the settlement of the claims, (b) I ignored advice and sidelined an attorney that had been appointed on the matter, (c) I possibly withheld information during my interview as a Judge, (d) I refused to answer to the allegations against me when the matter first came as an urgent application and on at least two other occasions, including before him.

[33] If these examples from the judgment do not constitute an intention to harm my integrity then I do not know a better description or definition of the word.

[34] Hatred or discrimination on any ground is inferred from actions and words. In this instance the words in that judgment clearly demonstrate that Judge Tuchten feels nothing for me but hatred, anger, contempt and that if he could have his way, I should not be allowed to be a Judge.

[35] Whether or not Judge Tuchten knows me personally is irrelevant. What matters is that the allegations in the papers before him made him to lose his judicial sense such as applying the *audi alteram partem* rule. I stated in my initial affidavit that I have acted as a Judge at Gauteng Division since about 2013. This was mostly in Pretoria. I do not think that I am making a mistake when I say that I have done some matter with Judge Tuchten. It is unfortunate that I left no impression on him to at least remember me, even the name. Furthermore, as counsel, I appeared before him and there was an incident, which is irrelevant for present purposes, that I believe would not be easy to forget, no matter how insignificant he believes that I am.

Ad paragraph 9

[36] I did not suggest that he must recommend investigation of the *'Arbitrator or the judge who granted the default judgment.'*

In my initial affidavit I asked why he singled me out for criticisms under circumstances where the matter has gone through various stages, where the decision-makers could have erred, if the matter is investigated further. I mentioned the Arbitrator because he is the one who made the settlement an arbitration award. I also mentioned the judge who refused Prasa legal representation because there was

evidence on affidavit that he made the decision after hearing some hearsay evidence and letters that were obtained under prejudicial circumstances.

[37] In the Supplementary affidavit I was specific as to who should face the same criticisms or investigations as me. This is Botes SC and Mathopo (attorney). I have already explained the reasons above.

Ad paragraph 10

[38] Judge Tuchten has not explained the reasons why he referred to the organization (Unite Behind) in his judgment. Where did he see the papers that he refers to in his judgment ? This organization was not a party to the matter before him as far as I know. The papers allegedly filed at the Western Cape High Court have no bearing on the issues, and even if they were, the organization was not before him, properly. If this is not undue influence, then I do not know the meaning of the word.

Ad paragraphs 12,13 and 14

[39] I have already addressed the issue of alleged inconsistencies in my affidavits. Judge Tuchten must file a sworn statement and record what he is saying here to enable me to file a reply. Otherwise he has no right to declare that I perhaps lied under oath. The fact of the matter is that I was not aware of the hearing before him, not having been served with the papers or notice of setdown. Judge Tuchten is welcome to provide proof that this is not so.

[40] However, for the record, I wish to reiterate what I have said throughout this reply, that I was not aware of the matter coming before any of the three judges (Ranchod J, Holland-Muter AJ and Tuchten J).

I call upon Judge Tuchten to produce evidence that was placed before him or submissions made by any of the parties that I was served with court documents, including notice of setdown.

The fact that I made efforts to obtain the founding affidavit does not make me aware of the application, in the legal sense. By the time the matter was heard by Judge Tuchten there could have been many other documents filed in the record, which I still do not know of.

[41] I explained that I became aware that the matter was before Judge Tuchten when I was alerted to a discussion on Talk Radio 702 on the day or after he handed down the judgment.

At this time I was a Judge, sitting in the same building with him.

Ad paragraph 15

[42] I have already indicated that the remarks that he made in the judgment are actually findings of fact. I have given the examples and I do not wish to repeat myself. He found me to have acted improperly.

[43] Article 16 (2) of the Code reads as follows:

"Before commenting adversely on the conduct of a particular practitioner or prosecutor in a judgment, the judge must give that person the opportunity to deal with the allegation"

Note 16(ii) reads as follows:

"The reference to the appropriate authority is to be made in a neutral fashion and may not be judgmental."

[44] The recommendation that I should clear my name is actually academic because on the issues he has raised, he also gave answers, which he calls his "opinion".

[45] I have attached news articles to show that the public is being told that Judge Makhubele has done some wrong things and that Judge Tuchten has confirmed this. That was also the essence of the discussion on radio.

Ad paragraph 16 and 18

[46] Judge Tuchten still maintains in his response that I have a case to answer, but he does not say what that case is all about, and where I am supposed to answer, in response to which complaint, filed by who, when?

[47] I will give an example of applications that are often made by the Law Society against its members who are accused of having breached some or other rules of the profession. This is usually when there is a complaint of whatever nature. The Law Society may approach the court and request an order to suspend the relevant attorney pending finalization of the investigations. The court looks at the evidence, and may rule that there is a *prima facie* case that the attorney must be investigated and that the circumstances warrant that he be suspended. The identified *prima facie* case is one that the attorney will answer to either during the investigations or when charges are brought against him.

[48] Unless the application is brought on an *ex parte* basis, the attorney has a right to challenge the application and the court may rule that whilst the Law Society has a right to investigate any matter, there is no *prima facie* case for suspension of the attorney.

[49] At the conclusion of the investigations, and whilst the attorney is on suspension or not, the Law Society can then bring an application to strike off the attorney from the roll of attorneys.

[50] Judge Tuchten appears to think that the rules of natural justice or due process do not apply to me. Was there a request before him that he must consider whether there is a prima facie case against me that warrants any investigation and that whilst that investigation is ongoing I should not '*undertake any judicial functions*'? The answer is NO.

[51] Judge Tuchten would have been entitled to formulate the questions and make preliminary findings against me if there was a matter before him about my fitness to hold office as a Judge. He cannot formulate questions in a vacuum. For whose benefit? At whose instance? Is he the complainant? Can he be complainant and Judge at the same time?

Ad paragraph 17

[52] I have no knowledge of the discussions between Judge Tuchten and the Judge President.

Ad paragraphs 19 and 20

[53] The opinions expressed in the judgment are about my integrity and fitness to hold office of a Judge. These are not simple matters like opining about the weather patterns. My professional life is at stake. My reputation is in tatters. Are judges allowed to make opinions about matters not before them or not relevant for the judgment they are writing about?, particularly on matters that affect the reputations and integrity of persons who are not before them?

[54] As judges, we often read affidavits with the most crude allegations against individuals. Unless those are proven, or at least presented in argument with a request to make specific findings, writing about them definitely makes the judgment not different from a gossip

newsletter. The judgment of Judge Tuchten is not different from newspaper articles that have been written about me on this issue.

[55] I do not see the relevance of the principle of separation of powers here. The JCC was established with a specific mandate. The Code of Conduct of Judges deals with amongst other things, all the issues that I have raised, including judicial independence, fair hearing, equality, how to make fair criticisms in a judgment, etc.

[56] I don't understand why Judge Tuchten feels that the JCC lacks jurisdiction over him on this matter.

[57] I was not a Judge when the alleged misconduct or improper conduct happened. Why must I be subjected to JCC discipline when a sitting Judge (Tuchten) feels that it has no jurisdiction over him, and only courts do? The allegations against me in the affidavit that was filed on behalf of PRASA would constitute criminal conduct if found to be true. The correct forum in the first instance is the criminal court. Judge Tuchten's conduct that I am complaining of falls squarely within the Code of Conduct.

[58] Judges cannot claim protection if they breach the Code of Conduct. If my complaint falls squarely within the prescripts, I do not understand why Judge Tuchten should be let off the hook simply because the breach occurred in his written judgment. The fact that it is in a written judgment aggravates the matter because he has basically stripped me of my basic rights. That I will or may be found guilty of the issues at some future time is no excuse. As matters stand, there is a judgment about me that should not have been written in the first place.

[59] Judge Tuchten acknowledges that before making findings against a person a Judge is obliged to give that person a hearing. I have already given examples of the findings that he has made pertaining to the issues that have been raised. He must explain the issues I have raised, particularly in my supplementary affidavit, such as , why he failed to afford me a hearing, why he believes that I must be the only one investigated and impeached when there is evidence that I was part of a 'questionable relationship'.

Ad paragraphs 21, 22 and 23

[60] I do not know if Judge Tuchten include me in the category of persons that he refers to as "*misconduct on the part of the powerful..*" If he does, I take strong exception because I have not been found guilty of any misconduct and I do not know what he means by "*powerful persons*".

[61] Judge Tuchten appears to believe that he is a purebred of Judges, because he does not fall in the category of the powerful that are misconducting themselves and he is not one of the two judges with pending complaints of misconduct.

[62] I do not have the context of these statements but they are worrying because Judge Tuchten appears to believe that he has a duty to clear the judiciary of judges that are misconducting themselves. This attitude is problematic because it gave rise to the judgment that he has written, without observing basic principles of conducting court proceedings and or properly considering the effect that it would have on me.

[63] The rest of the paragraphs constitute statements that I view unwarranted under circumstances where Judge Tuchten was simply

called to respond to my complaint. I have already explained the practical procedures involved before a professional, like the ones he mentioned in paragraph 22 are brought to court to account for their misconduct.

Indeed, Judges are no exception.

The question, as I have already asked, is why Judge Tuchten failed to apply recognized due processes when confronted with allegations against me.

Ad paragraphs 24, 25, 26 and 27

[64] The irony of what Judge Tuchten is saying in relation to the applicability of art16(3) is that I was not a Judge in November or December 2017 when the alleged improper conduct happened, yet he felt that he had to treat me as a Judge and refer me for investigations and possible impeachment.

[65] The other part of this irony is that when he heard this matter, on or about 27 November 2018, I was a Judge, sitting in the same Division and building with him. He was allocated the matter by either the Judge President or the Deputy Judge President, with whatever instructions known amongst themselves, but certainly, knowing who I am. However, he did not deem it necessary to raise the matter with me, if not because of article 16(3), then in terms of the rules of natural justice or act in terms of art16(2) because I was still a practitioner when the alleged misconduct happened.

[66] If he says art 16(3) is not applicable because the allegations are raised in litigation, this is more reason why he should not have written a judgment about me without giving me a hearing. The excuse that according to him the judgment is not harmful to me is actually misplaced because that is not the principle.

Ad paragraph 28

[67] I have already objected to the fact that the memorandum of Judge Tuchten was not made under oath or in a sworn statement. Therefore, he cannot make any request for investigations against me on the backdrop of his memorandum. It has no legal effect, at least in terms of the JSC Act with regard to lodging of valid complaints.

[68] If he feels that there is a case that I must answer, Judge Tuchten must file a complaint against me in the prescribed manner and request the JCC to investigate any matter pertaining to my conduct on the issues that he would have raised in his complaint.

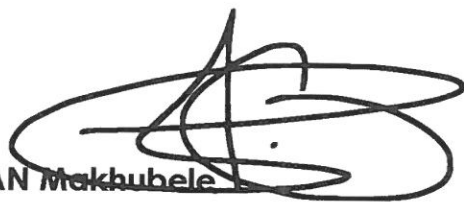
[69] On his response, I am of the view that Judge Tuchten has not raised any valid reasons that would persuade the Committee not to take action against him.

[70] The Committee is in my view empowered to take action against Judge Tuchten on the basis of the breaches of the various articles of the Code of Conduct.

[71] Judge Tuchten's views about his colleagues who he alleges are causing the judiciary to lose confidence and respect is also something that must be taken up with him. This issue has no bearing on my complaint, unless if he is of the view that by looking at me or reading about me he came to the conclusion that I am one of those Judges that are responsible for all the wrong things in the image of the judiciary.

[72] It is surprising why Judge Tuchten would talk this way about his colleagues. He does not explain what he has done about these issues.

All I can say is that it is this superior attitude that caused him to write a judgment about me, when I was not before him, and on issues that were not for him to decide, in the interim or otherwise.

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

TAN Makhubele

Judge of the High Court, Gauteng Division

30 April 2019.