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IFAA Research Memorandum – #UniteBehind Ethics Committee Complaints

Introduction

- 1 President Ramaphosa addressed Parliament in a letter dated 24 June 2022. He that Parliament must not wait for him to produce a plan to implement the recommendations from the report of the Commission of Enquiry into Allegations of State Capture (“The State Capture Commission”). Parliament is compelled to “engage in its own process on the recommendations that affect it directly.”¹
- 2 Parliament’s Joint Committee on Ethics and Members’ Interests (‘the Ethics Committee’ or ‘the Committee’) is the primary body dealing with misconduct of Members of Parliament (MPs). Recognising this, #UniteBehind brought six complaints to the Committee against MPs whose conduct had been impugned in the State Capture Commission’s report.
- 3 #UniteBehind’s main campaign focuses on improving South Africa’s ailing commuter rail service, run by the Passenger Rail Agency of South Africa (PRASA), a state-owned entity (SOE). Thus, our complaints focused on MPs whose conduct or position related to PRASA.

¹ Emsie Ferreira. 04 July 2022. “Ramaphosa tells parliament to act on Zondo’s findings on the State Security Agency.” *Mail & Guardian*. Online: <https://mg.co.za/politics/2022-07-04-ramaphosa-tells-parliament-to-act-on-zondos-findings-on-the-state-security-agency/>

- 4 Four of our complaints were dismissed, one complaint was partially successful, and one is still being processed. Our experience with the Ethics Committee's complaints procedure left much to be desired, as is covered fully, below. We were met with a lack of action, delays, a lack of information, ineffective investigation, and an insubstantial decision regarding our one partially successful complaint. We have challenged, in court, the delay and secrecy in dealing with our complaints. We are considering bringing a judicial review application challenging some of the Committee's findings. This matter is current, ongoing, and is constantly changing, reacting to legal events.

Legal Framework

- 5 In this legal framework, I set out the relevant aspects of the Joint Rules of Parliament, which creates the Ethics Committee. I then set out the aspects of the Code most relevant to our complaints. I will only discuss those clauses relating to complaints on the basis on the breach of the Code's ethical principles, not the clauses dealing with the registration of members' financial interests. Thereafter, I lay out the constitutional context within which the Code is situated.

The Joint Rules of Parliament

- 6 The Joint Rules of Parliament govern its functions and its joint committees. The Ethics Committee is created in terms of Joint Rule 121. Joint Rule 124 provides that the Committee's functions are to:

“(a) implement the Code of Conduct for Assembly and permanent Council members set out in the Schedule;

(b) develop standards of ethical conduct for Assembly and Council members;

(c) serve as an advisory and consultative body, both generally and to members, concerning the implementation and interpretation of the Code;

(d) regularly review the Code and make recommendations for its amendment; and

(e) perform the other functions and exercise the other powers reasonably assigned to the Committee in the Code and in terms of resolutions adopted in both Houses.”

- 7 Joint Rule 147 holds the default position that committee meetings should be accessible to the public.

47. Admission of the public

(1) Meetings of joint committees and subcommittees are open to the public, including the media, and the member or members presiding may not exclude the public, including the media, from the meeting, except when —

(a) legislation, the Joint Rules or resolutions adopted in both Houses provide for the committee or subcommittee to meet in closed session; or

(b) the committee or subcommittee is considering a matter which is —

(i) of a private nature that is prejudicial to a particular person;

(ii) protected under parliamentary privilege, or for any other reason privileged in terms of the law;

(iii) confidential in terms of legislation; or

(iv) of such a nature that its confidential treatment is for any other reason reasonable and justifiable in an open and democratic society.

Parliament's Code of Conduct

8 The Code applies to all MPs – members of the National Assembly (NA) and delegates of the National Council of Provinces (NCOP). “The Code outlines the minimum ethical standards of behaviour that South Africans expect of public representatives, including upholding propriety, integrity and ethical values in their conduct” (clause 2.1). The Code further holds that its purpose “is to create public trust and confidence in public representatives and to protect the integrity of Parliament” [clause 2.3]. Members of Parliament must accordingly adhere to various principles in terms of clause 2.4 of the Code:

8.1.1 Selflessness: take decisions solely in terms of public interest and without regard to personal financial or other material benefits for themselves, their immediate family, their business partners, or their friends;

8.1.2 Integrity: steadfastly avoid placing themselves under any financial or other obligation to any outside individual or organisation where this creates a conflict or potential conflict of interest with his or her role as a Member of Parliament;

8.1.3 Objectivity: in carrying out public business, including making public appointments, do so only on the basis of merit and in accordance with Constitutional imperatives;

8.1.4 Openness: Members should be as open as possible about all decisions and actions, bearing in mind the constitutional obligation for openness and transparency;

8.1.5 Honesty: Members must declare private interests relating to public duties and resolve any conflict arising in a way that protects public interest; and

8.1.6 *Leadership: promote and support ethical conduct by leadership and example.*

9 Clause 4 of the Code provides that the Members must:

4.1.1 *abide by the principles, rules and obligations of this Code;*

4.1.2 *by virtue of the oath or affirmation of allegiance taken by all elected Members, uphold the law;*

4.1.3 *act on all occasions in accordance with the public trust placed in them;*

4.1.4 *discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests;*

4.1.5 *maintain public confidence and trust in the integrity of Parliament and thereby engender the respect and confidence that society needs to have in Parliament as a representative institution; and*

4.1.6 *in the performance of their duties and responsibilities, be committed to the eradication of all forms of discrimination.*

10 Clause 5 provides for the resolution of conflicts of interest and together with other clauses proscribes MPs using their position for their own or their family's or friends' personal benefit.

11 Clause 10 deals with "Breaches of The Code of Conduct and The Investigation Procedures". It provides that: "*The Code is meant to encourage ethical conduct ..., and the Committee must champion and enforce compliance with the Code. The Code sets out what constitutes a breach, how it is dealt with, what powers are available, and where ultimate responsibility for action lies.*"

12 Clause 10.1.1 provides for what conduct constitutes a breach of the Code. "A Member breaches the Code if the Member – ... contravenes clauses [*inter alia*] 4.1, 5.1, [and] 5.2." Complaints may be lodged by any person or body to the Registrar of the Committee.

13 The process is as follows:

13.1 On receipt of a complaint, the Registrar must inform the Member concerned personally of the complaint, including all the relevant information relating to the alleged breach available to the Registrar or Committee, and inform the Member of

the consequences of a failure to respond (clause 10.2.2.4). The Member must respond within seven days of being informed of the complaints (clause 10.2.2.6). If the Member fails to respond, the Committee may proceed with the investigation, regardless (clause 10.2.2.7).

13.2 Thereafter, the Registrar is required to assess the complaint (clause 10.3). Clause 10.3.4 of the Code provides that: “all documents, evidence and information in the possession of the Registrar must, up to this stage, remain confidential.” Having assessed the complaint, the Registrar must make a recommendation to the Committee (clause 10.4). There is no stipulated time period by which the Registrar must provide her recommendation. The Committee must then consider the Registrar’s recommendations at a meeting (clause 10.5).

13.3 It is only after the Committee has received the Registrar’s recommendation that it may deal with the complaint. It is then empowered to take a number of actions (clause 10.6) including:

13.3.1 accepting the recommendation with or without amendments, and finalising the matter;

13.3.2 rejecting the report in whole or in part;

13.3.3 determining if any matter requires further investigation, and if so on what terms and parameters; and

13.3.4 determining that a hearing be held.

14 Up until the Committee makes a decision, clause 10.6.12 of the Code provides that “the proceedings remain confidential until this stage.”

15 Clause 10.7.1-10.7.5 provides that hearings must be held where facts are in dispute and provides for the procedures of the hearing and the appointment of a sub-committee for these purposes. Clause 10.7.6 requires the Committee to make a finding and give reasons. To find that a Member of Parliament breached the Code, the Committee must be satisfied of such on a balance of probabilities. The findings and reasons must be made public.

- 16 The Code requires the Committee to make a recommendation, to be voted on by the House, on what penalty is appropriate for the breach or breaches of the Code pursuant to a complaint (in clause 10.7.7). Such penalties include a formal reprimand by the House, a fine not exceeding 30 days salary, the reduction in wages not exceeding 30 days salary, and suspension from Parliamentary duties.
- 17 Harsher penalties may be imposed if the Committee finds that the Member has breached the ethical principles listed above (clause 10.7.7.2). There are no limits on the penalties that the Committee may recommend pursuant to this clause.
- 18 Finally, it is important to note that clause 10.7.10 of the Code requires the Committee to continue its investigation to make a finding even if a Member of Parliament resigns or leaves parliament after a complaint has been made.

Constitutional Context

- 19 The only limits on membership to the NA are that members must be South African citizens who are not disqualified from being eligible in terms of section 47(1) of the Constitution. In particular, unrehabilitated insolvents (section 47(1)(c) and people who has been “convicted of an offence and sentenced to more than 12 months’ imprisonment without the option of a fine” within the previous five years (section 47(1)(e)).
- 20 There are no such eligibility requirements for delegates of the NCOP. The NCOP consists of delegates from each provincial legislature in terms of sections 60 and 61 of the Constitution.
- 21 Section 45(1) of the Constitution empowers the NA and NCOP to make joint rules of Parliament, such as the Code of Conduct. Both Houses must make such rules “with due regard to representative and participatory democracy, accountability, transparency and public involvement” (sections 57(1)(b) and 71(1)(b) of the Constitution). Both the NA and NCOP are required to “facilitate public involvement in the legislative and other processes... [of the NA, NCOP and their committees] (sections 59(1)(a) and 72(1)(a)). Both Houses “may not

exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society” (sections 59(2) and 72(2)).

- 22 The Constitution gives everyone the right to procedural fairness during a process leading up to administrative action (section 33(1)). Legislation, such as the Promotion of Administrative Justice Act 3 of 2000 (PAJA) – gives effect to this right. This has been extended by our courts. In light of the principle of constitutional legality, based on section 1(c) of the Constitution, all exercises of public power must be procedurally fair. Procedural fairness includes: Furthermore, public powers coupled with a duty must be exercised with a reasonable time and constitutional obligations must be performed diligently and without delay (section 237 of the Constitution).

Summary of Our Complaints

- 23 PRASA has been mismanaged into a state of almost total ruin. Since 2015, many reports have detailed the deep state capture, corruption and maladministration that has completely destabilised the state-owned entity (SOE). These reports are from the Public Protector, the Auditor-General, National Treasury, Werksmans Attorneys, and now State Capture Commission. A host of state officials and politicians are implicated in corruption and maladministration at or relating to PRASA. However, rather than being punished, many have been elevated to- or have retained positions in Parliament. On 12 September 2023, we submitted complaints regarding such MPs: Sfiso Buthelezi, Dikeledi Magadzi, Dipuo Peters, Joe Maswanganyi, Fikile Mbalula and Mosebenzi Zwane. A summary of each complaint is detailed below.

Sfiso Buthelezi – Previous Chair of the PRASA Board, now Chair of the Standing Committee on Appropriations

- 24 Buthelezi was Chair of the Board of PRASA in its worst years of corruption. He signed-off on hundreds of corrupt contracts, such as the Swifambo ‘tall trains’ contract worth R3.5 billion. As accounting authority of PRASA, being Chair of the Board, he must take ultimate responsibility for the corruption and maladministration under his watch.

- 25 Particularly, in relation to Swifambo, the South Gauteng High Court declared the contracts invalid and the Supreme Court of Appeal confirmed the ruling.² Buthelezi's company supplied Swifambo with services through a contractor and received R99m. He did not disclose his financial interests.
- 26 The State Capture Report recommends that the National Director of Public Prosecutions considers instituting a prosecution against Buthelezi, in terms of section 86(2) of the Public Finance Management Act (PFMA).³ He was on the Committee that approved the payment of corrupt contracts, in particular the Swifambo and Siyangena contracts worth around R9 billion.
- 27 In 2017, the Department of National Treasury investigated 216 contracts between PRASA and other entities. Investigative reports into 30 of the contracts recommended that Buthelezi should be criminally charged for his involvement and, specifically, contravening the PFMA.⁴ He was also found to have breached the PFMA and to be guilty of maladministration and improper conduct relating to various tenders by the Public Protector in her 'Derailed' report in 2015.⁵
- 28 Buthelezi is now "responsible not just for allocating funding to government departments, including SOEs like PRASA, but also for ensuring compliance with the Public Finance Management Act and other procurement legislation."⁶ Given that various reports have implicated Buthelezi in breaches of the PFMA and outright corruption, calling for his prosecution, it is unfathomable that Parliament continue to allow him to operate in his current role.

Dikeledi Magadzi – previous Chair of the Transport Portfolio Committee

- 29 The State Capture Commission found that Magadzi is "undeserving of being ... [a member] of a public oversight body."⁷ She vilified the only working, non-corrupt PRASA Board in the

² *Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa* 2020 (1) SA 76 (SCA)

³ The State Capture Commission Report, Part V Vol II, Para 2191.5, pg.852.

⁴ Lucas Nowicki. 10 Nov 2021. "Sfiso Buthelezi, the MP who derailed PRASA." *Daily Maverick*. Online: <https://www.dailymaverick.co.za/article/2021-11-10-sfiso-buthelezi-the-mp-who-derailed-prasa/>

⁵ Public Protector. August 2015. "Derailed." Report no. 3 of 2015/16. Online: https://www.gov.za/sites/default/files/gcis_document/201508/publicprotectorinvestigationreportno3of201516pra_sa24082015a.pdf, pp. 28-38, for instance.

⁶ Nowicki – see footnote 4

⁷ Ibid.

last decade – chaired by Popo Molefe from 2014 to 2017. She worked against the Board, actively trying to negate its good work.

- 30 #UniteBehind made several submissions to Magadzi during her time as the Chair of the Transport Portfolio Committee. She did not respond adequately to our submissions and ignored the advice we gave her. She took no concrete steps to arrest the rot and corruption at PRASA and allowed the SOE to be eroded.
- 31 The State Capture Commission finds that Magadzi's has a "total lack of understanding of how corruption of procurement is uncovered or the nature of the irregularities committed during the tender process for the locomotives contract."⁸ It further concludes that she and her Portfolio Committee "failed to properly execute their oversight function over the Executive in regard to PRASA"⁹

Dipuo Peters – previous Minister of Transport, now a Member of the Standing Committee on Appropriations

- 32 In the State Capture Commission Report, Peters was identified as being neglectful of her ministerial duties in failing to appoint a permanent Group CEO of PRASA in her tenure as Minister of Transport. She dismissed the Molefe Board for trying to end state capture. The dismissal was overturned in the High Court,¹⁰ who found her conduct to be "irrational", "unreasonable" and "unlawful."¹¹ Peters also attempted to stop investigations, initiated by the Molefe Board, into corruption at PRASA.¹² Further, she did not investigate clear cases of corruption such as when businessman Auswell Mashaba used funds gained from a contract with PRASA to fund the ANC. The State Capture Commission Report states that Peters was "under a duty to ensure that corruption was rooted out from public entities. In this [she] failed."¹³

⁸ State Capture Commission Report Part V Vol II, Paras 2170-3, pp. 842-3

⁹ Ibid.

¹⁰ State Capture Commission Report Part V Vol II, Para 1800, pp.656-7

¹¹ *Molefe and Others v Minister of Transport and Others* (17748/17) [2017] ZAGPPHC at 120

¹² State Capture Commission Report Part V Vol II, Para 1793, p.650

¹³ State Capture Commission Report Part V Vol II, Para 2031, p.778

- 33 As Minister of Transport, Peters used PRASA infrastructure and assets for the benefit of the ANC, seemingly without payment was made at all or proper procurement processes.¹⁴
- 34 Peters attempted to influence procurement proceedings through pressuring the PRASA CEO and Board of Control simply because of the nationality of the tender applicants. She demanded changes to the procurement proceedings despite PRASA having obtained a legal opinion stating that the changes would be “in breach of the procurement laws of the country and provisions.”¹⁵

Joseph Maswanganyi – previous Minister of Transport, now Chairperson of the Standing Committee on Finance

- 35 Maswanganyi was Minister of Transport from March 2017 until February 2018. He “continued to attempt to thwart the operations of PRASA and prejudice its attempts to address” reports of corruption at the SOE.¹⁶ Mr Maswanganyi never met with the PRASA Board under Dr. Popo Molefe and weakened the Board by not appointing members to it so that it became inquorate – hamstrung and unable to make decisions.¹⁷ Further, “Mr Maswanganyi, too, did not do the necessary to have a new GCEO appointed. ... This meant that for three years PRASA operated without a permanent Acting Group CEO’s only.”¹⁸
- 36 Maswanganyi did not renew the Molefe Board’s tenure, effectively dismissing the Board. He failed to timeously appoint a new permanent one and, in the period without a Board, Maswanganyi attempted to negotiate unlawfully with China to develop the Moloto Rail Development Corridor at the price of about R57 billion.¹⁹ Fortunately, he did not succeed in this endeavour.

¹⁴ State Capture Commission Report Part V Vol II, Para 2044, p.783

¹⁵ Statement by Tshepo Lucky Montana, Former PRASA CEO, Parliamentary Inquiry Into Corporate Governance at ESKOM (Cape Town: 30 January 2018), p.22

¹⁶ Fin24. 31 July 2017. “Popo Molefe lashes out at minister, as PRASA loses its board.” *News24*. Online: <https://www.news24.com/fin24/popmo-molefe-lashes-out-at-minister-as-prasa-loses-its-board-20170731>

¹⁷ State Capture Commission Report Part V Vol II, Para 1804 pp.657-8

¹⁸ Para 2077, p.797

¹⁹ “PRASA signs agreement to build Moloto Rail Development Corridor”, Citizen, <https://citizen.co.za/news/south-africa/1277474/prasa-signs-agreement-to-build-moloto-rail-development-corridor/>, accessed 30 October 2019

- 37 Maswanganyi thereafter unlawfully appointed an interim Board, headed by Justice TAN Makhubele. She simultaneously held judicial office and chaired the PRASA Board, contrary to the Judicial Services Act. #UniteBehind has initiated a complaint at the Judicial Services Commission, which led to the suspension from judicial duties by Justice Makhubele.
- 38 During her tenure as Chair, Justice Makhubele and her Board not only tried to settle corrupt contracts and disable PRASA from recouping corrupt payments, against the public interest, but also tried to stop investigations through the unlawful suspension of PRASA's legal panel. Maswanganyi was complicit in all these actions, especially because, after #UniteBehind launched two cases on this matter, first in December 2017 and then in March 2018, he did not suspend or remove Justice Makhubele and her Board from office.
- 39 #UniteBehind also asked that Maswanganyi be investigated for his failure to address or recover the R79 million received by the ANC as a part of the corrupt R3.5 billion Swifambo contract related to locomotives that were too tall for South Africa's rail infrastructure.

Mosebenzi Zwane – Former Chair of Portfolio Committee on Transport

- 40 Zwane's corruption and promoting of state capture has been widely covered in the media. He has been implicated in severe corruption and maladministration at ESKOM, while he was the Minister of Mineral Resources, and the State Capture Report has recommended that he be criminally prosecuted for this.²⁰ The Report also recommended that he be investigated over the Vrede dairy farm project. Further, "Zwane and Magashule should be sued to recover money [R280m] lost as a result of their alleged conduct in relation to the alleged scam."²¹

Fikile Mbalula – Former Minister of Transport

- 41 Minister Mbalula was corrupt in his former role as Minister of Sport and Recreation and he has continued his unlawful activities at PRASA.

²⁰ Junior Khumalo. 29 Apr. 2022. "Rampant corruption': Mosebenzi Zwane, Rajesh Gupta and ex-Eskom bosses must be prosecuted – Zondo." *News24*. Online: <https://www.news24.com/news24/southafrica/news/rampant-corruption-mosebenzi-zwane-rajesh-gupta-and-ex-eskom-bosses-must-be-prosecuted-zondo-20220429>

²¹ Karyn Maughan. 23 Jun 2022. "Zondo says Magashule, Zwane pushed 'Gupta agenda' with Vrede project, recommends criminal probe." *News24*. <https://www.news24.com/news24/southafrica/news/zondo-says-magashule-zwane-pushed-gupta-agenda-with-vrede-project-recommends-criminal-probe-20220623>

- 42 Mbalula was found by the Public Protector to have contravened the Constitution and the Executive Ethics Code regarding a vacation he and his family took in 2016, which was paid for in-part by a supplier of the Department of Sport and Recreation. Mbalula was Minister of Sport and Recreation at the time.²² Further, as Minister of Transport in 2021, Mbalula was found to have irregularly appointed and remunerated his advisers, which constituted improper conduct and maladministration, according to the Public Protector.
- 43 As Minister of Transport, he dismissed the Board of Control in December 2019 and appointed an administrator to preside over PRASA's operations. There is no provision for this decision in law. PRASA's own legal compliance division told Mbalula that his decision was unlawful and contrary to the Legal Succession Act and PFMA. Despite this, it took litigation by #UniteBehind to have the situation rectified. In the ensuing judgment, Justice Erasmus stated, "It is clear that the Minister had no power to place the entity under 'administration' and appoint an 'Administrator.'"²³ The court declared Mbalula's decision unlawful and set it aside. Mbalula had to pay #UniteBehind's legal costs.²⁴
- 44 Thereafter, the Public Protector also found that Mr Mbalula acted unlawfully in appointing Mr Bongisizwe Mpondo as the PRASA administrator who in turn appointed his coterie of "special advisors."
- 45 Mbalula then appointed a new Board of Control, chaired by Leonard Ramatlakane, who was a member of Ms Magadzi's delinquent and obstructive Portfolio Committee, discussed above. The PRASA Board, specifically Mr Ramatlakane, has attempted to flout a High Court judgment in the Siyangena Technologies matter to the tune of about R4 billion by trying to settle the case unlawfully. There was even an initial agreement to extend Siyangena's contract by a further R500 million. Resultedly, #UniteBehind was required to expose these attempts and intervene in the Supreme Court of Appeal, where Siyangena had appealed the High Court ruling. These actions stopped the settlement process from going ahead. The outcome of the case is expected in the next few months. Mr Mbalula failed to remove Ramatlakane and the Board for blatantly unlawful conduct.

²² Public Protector Report No. 24 of 2018/19

²³ *#Unitebehind v Minister of Transport and Others* 2020 4 All SA 593 (WCC), at 55

²⁴ *#Unitebehind v Minister of Transport and Others* 2020 4 All SA 593 (WCC)

46 Minister Mbalula is directly involved in the Swifambo/Stadler Rail matter where once again Ramatlakane and his Board are attempting to flout a court order, this time by the Supreme Court of Appeal. In this matter, contracts for the procurement of locomotives worth R3.5 billion were declared unlawful and set aside. Instead of reclaiming the money, Ramatlakane and the Board are trying to have the defunct contracts enforced by having the locomotives built and delivered, despite the exposed corruption and court order setting aside the contracts. Previous locomotives delivered under the contract were not-fit-for-purpose and unusable on South Africa's railways.

Summary of Proceedings After Complaints Submitted

47 After submitting our complaint, we asked for updates from the Registrar at the end of September and in early October 2022. We sought to find out whether our complaints were being processed according to the timeline set out in the Code. All we were told is that "internal processes are underway." On 5 December 2022, we sent a letter of demand to the Registrar, copying the Speaker of the NA and the Chairperson of the NCOP. We stated:

Resolving the complaints is essential to ensure that "the premium that the Constitution places on accountability" is realised, the integrity of Parliament is restored, and that, the ill-fate of commuter rail services is reversed. #UniteBehind therefore demands:

- 12.1. *that the consideration of the complaints, in terms of art. 10.3 of the Code of Conduct, is expedited,*
- 12.2. *an update on the progress that has been made with the complaints, and*
- 12.3. *an update on the progress that has been made with the complaints to the Committee, in terms of art. 10.4 of the Code of Conduct.*

48 We requested a response by 25 January 2023.

49 On the same day, we sent letters to the Chief Whips of all the major political parties requesting their assistance in obtaining updates on our complaints and having them processed with urgency. Up until this point, we "and the country at large remain[ed] in the dark regarding the investigation." We received no response to this letter.

50 The Speaker of the NA responded to our letter of 05 December 2022 on 16 January 2023. She affirmed that the Registrar could not give a timeline by which our complaints would be processed.

“This was because of the many matters before the Committee, some of which were complex and required more time to complete. However, the matters relating to your complaint(s) were on the agenda of the Committee meeting of 7 November 2022. It is anticipated that the matters will be further processed from about March 2023.”

51 The Speaker also contended that *“the Committee conducts its business on a confidential basis.”* She stated *“that the Acting Registrar will correspond when the need arises.”* The purpose for which they were on the agenda, and what came of them, were not disclosed.

52 In response, on 01 February 2023, we accordingly instructed our attorneys (Lopes Attorneys) to address a letter to the Co-Chairpersons of the Committee, as well as the Registrar’s office and the Speaker and Chairperson dated 1 February 2023.

53 Lopes Attorneys explained that there had been a *“failure properly to process [the] complaints in terms of Parliament’s Code of Conduct”* with reference to the time periods provided for in the Code that I have already dealt with above. The letter pointed out that while the

Code of Conduct does not prescribe an absolute time period by which a recommendation must be made, all exercises of public power must be taken without ‘unreasonable delay’ [which is] ‘reinforced by the fact that the complaints procedure is ‘based on and intended to be guided by the principle of promptness, fairness and consistency.’

54 Lopes Attorneys called on the Registrar to make a recommendation by 12 February 2023, failing which the applicants would bring legal proceedings against the Registrar, the Speaker, the Chairperson and the Co-Chairpersons.

55 The Co-Chairpersons of the Committee responded to our letter on 09 February 2023. They accused us of making “counter-productive comments” and “unfounded negative conclusions” about the Committee and the Registrar. They complained that we had “been very demanding since [we] lodged the complaints last year, to the extent that, they fail to appreciate that there are other matters as well before the Committee.” The Committee

informed us that the next Committee meeting was on 06 March 2023 but made no explicit undertaking to deal with the complaints at that time.

56 After receiving this letter, we again sought the assistance of parties represented in Parliament. We addressed a letter to the Chief Whips of the ANC, DA, EFF, Inkatha Freedom Party and Freedom Front + on 17 February 2023. After setting out a full and detailed background to the complaints and the process so far, we sought their assistance concerning: (1) the status of our complaints; (2) the number of and status of the other complaints before the Committee including those lodged between February 2022 and February 2023 and the alleged violations; (3) the procedures of the Ethics Committee; and (4) the records of decisions by the Committee. The letter was accompanied by a petition signed by over 5 000 individuals. We received no response to this letter.

57 A period of two-months went by without any further update or indication from the Committee or the Registrar concerning the processing of our complaints.

58 Accordingly, on 6 April 2023, Lopes Attorneys addressed a further letter to the Committee and Registrar pointing out that we had not received a response and that our complaints were not being processed in accordance with the prescripts of the Code or within a reasonable time. It also pointed out that it had been a month since the Committee's meeting on 6 March 2023. The Committee was requested to provide the following information by 14 April 2023:

“Pursuant to the above, we request the following to be provided to our offices by no later than Friday, 14 April 2023:

6.1. An update about the complaints including concerning the Committee's meeting that was scheduled for 06 March 2023. A month has since lapsed without a response being forthcoming;

6.2. A response on whether our client's complaint was discussed in the above-mentioned meeting, and if so what the resolution (if any) to our client's matter was; and

6.3. If our client's complaint was heard, what was the recommendation made by the Acting Registrar to the Committee.”

59 On 11 April 2023, the Registrar responded in an email stating:

“Please be informed that the Ethics Committee was unable to attend to the matters at its 6th March 2023 meeting. The matters stood over from the agenda of 6 March 2023. It is anticipated that the matters will be dealt with in the meeting on 17 April 2023.”

- 60 To sum up, we consistently asked for updates concerning the processing of our complaints, including whether recommendations had been made by the Registrar and whether the Committee had made a decision. We asked for this information over a lengthy period of time from a number of persons, including the Speaker, the Co-Chairpersons of the Committee, the Registrar and the leaders of the major political parties. We received no substantial information or updates on the processing of our complaints.
- 61 Thus, we felt that it was necessary to launch an application to compel the Registrar and the Committee to process our complaints in terms of clause 10 of the Code. We also challenged the constitutionality of the confidentiality or secrecy clauses in the Code. We submitted this application on 18 April 2023.
- 62 On the same day but after we submitted the complaint, we received a notification from the Registrar that the Committee had dismissed four of the six complaints:
- 62.1 Regarding Buthelezi, the Committee ruled that our complaint is beyond its jurisdiction as the conduct we complained of was before he became an MP.
 - 62.2 Regarding Magadzi and Mbalula, the Committee ruled that, because they had resigned as MPs in March 2023, the Code does not apply to them.
 - 62.3 Regarding Zwane, the Committee ruled that he became the “Chairperson of the Portfolio Committee on Transport in 2019 after the problems at PRASA became evident.” Thus, it found no merit in our complaint.
- 63 The Committee was still processing our complaints regarding Maswanganyi and Peters.
- 64 On 13 June 2023, The Registrar informed us that the complaint against Maswanganyi had succeeded. The Committee found that he had breached the Code because he “failed to appoint the PRASA Board after Parliament dismissed the Board.” The Committee will, accordingly, recommend to the NA that Maswanganyi “be suspended from his seat in all parliamentary debates and sittings, and from committee meetings and committee related functions and operations from 10 October 2023 to 1 December 2023.” The letter also stated that Maswanganyi did not provide a response to our complaint until 05 May 2023. The Registrar did not provide a date by when the House will vote on this recommendation.

65 The Committee provided a report on the Maswananyi Decision on 14 June 2023.²⁵ The Maswanganyi decision did not deal with important aspects of our complaint against him, such as the R79 million embezzled to the ANC through the Swifambo contract.

66 We are considering our options regarding a judicial review on the decisions by the Committee.

Problems and Gaps

67 From the above, the following problems with the Ethics Committee complaints process and gaps in the Code are evident.

68 Nebulous principles. Does not speak to efficiency or diligence.

69 Standards of ethical conduct do not speak directly to duties of oversight, upholding the constitution, generally – focuses on placing public interest above own interests. Should also state that they must uphold constitution and fulfil constitutional obligations. a

70 After the stipulated deadlines by which the complaints should have been communicated to the respondent MPs and by when they should have replied, there are no timelines for

70.1 the Registrar to make a recommendation on the complaints,

70.2 for the Committee to undertake an investigation,

70.3 for the Committee to make a finding or recommend a sanction, or

70.4 for the House to vote on the Committee's recommendation.

71 The Committee takes an extremely long time to make a decision. In our case, the Committee did not meet for more than four months (between November 2022 and March 2023). Not meeting for a third of the year defeats the principle of 'promptness' stipulated in the Code. The first decision only occurred eight months after we submitted the complaints. One decision is still outstanding, ten months after the complaints were submitted. Although Maswanganyi's response to the complaint against him was six months after the stipulated deadline, the Committee still entertained this response. It may have waited to make its decision until it received his response, even though.

²⁵ Parliament of South Africa. 14 June 2023. "Announcements, Tablings and Committee Reports no. 84 of 2023." Pages 46-53.

72 To come to their decisions, it appears that no thorough investigation was made by the Committee. It seems that the Registrar presented her recommendations at meetings of the Committee and then the Committee ruled on her recommendations in the same meetings. Further investigation and a hearing are both provided for in the Code, but the Committee seems to have expended as little effort as possible deciding the outcome of our complaints. The Committee stated at various points that its members had various other parliamentary matters to attend to. It seems that its members do not treat the work of the Committee with adequate seriousness, efficiency, or urgency.

73 The entire process was kept secret or confidential. We were kept in the dark about the status of our complaints. We only received notification of the Committee's decisions with scant reasons. We may receive the record of the Committee's decision-making process through our potential review application. However, without this mechanism or a request for information (which would likely be denied) through the Promotion of Access to Information Act, it is unlikely that we will understand how our complaint was decided. The Code is unconstitutional:

73.1 The Constitution requires that the National Assembly and National Council of Provinces and their committees (including joint committees) conduct their business in an open meeting and hold their meetings in public and may not exclude the public from sittings of their committee unless it is reasonable and justifiable to do so in an open and democratic society.

73.2 In other words, the Constitution provides for a default position of openness and public access, which may only be limited with proper justification.

73.3 The Joint Rules of Parliament recognise this by providing that meeting Committees are public unless they decide it is necessary to hold a meeting in a closed session.

73.4 The impugned provisions of the Code are inconsistent with the Constitution's requirements of openness and public access as well as the Joint Rules as they adopt an immutable default position that documents, information and evidence remain confidential until a certain point.

73.5 Additionally, the provisions unjustifiably limit complainants' and the public's rights to procedurally fair administrative justice and right of access to information as informed by the constitutional principles of accountability, responsiveness and openness. The provisions are also arbitrary and overbroad as they would preclude

a complainant and the public from being kept abreast of developments in respect of the complaint, with no apparent purpose and thus further violate a complainant's administrative justice rights and the rule of law.

74 The Committee believes that the Code only applies to Members' conduct when they are in Parliament. It believes that it does not apply to their conduct before joining. It is probably correct. The following considerations become relevant:

74.1 It seems that conducted committed before joining Parliament would only disqualify unethical MPs from membership if it was judged a criminal offence within the preceding five years.²⁶ Thus, unethical conduct committed before joining Parliament that is not criminal, has not yet been adjudged to be criminal, or could not be proven beyond a reasonable doubt would not incur any sanction by Parliament.

74.2 Perhaps this is correct: while the NA's oversight powers extend to the national executive and all organs of State, in terms of section 55(2) of the Constitution, the Code is perhaps not fit for purpose to adjudicate individual's conduct before becoming an MP. Oversight over past misconduct is perhaps better enforced through the courts via *inter alia* the Public Finance Management Act, PAJA, and the Prevention, Combating of Corrupt Activities Act. However, such action incurs an expense of resources that is beyond most civil society organisations or individuals.

74.3 This causes a problem. For example, Sifiso Buthelezi is widely known to have committed corruption at PRASA during his tenure as Chair of its Board of Control. He has been recommended for criminal investigation and charges by National Treasury investigations and the State Capture Commission of Inquiry. The criminal investigation into the corrupt Swifambo 'tall-trains' contract was reported to be "90% complete" in 2021.²⁷ No criminal charges have been brought against him, however. He presided over the destruction of PRASA.

74.4 Should Parliament not have its own mechanism to deal with such unethical conduct? Should we not require a higher standard of ethical conduct from our public representatives? Should Parliament not be allowed to issue sanctions for past misconduct, which it can decide on a balance of probabilities? Or would this open

²⁶ Section 47(1)(e) of the Constitution.

²⁷ The State Capture Commission Report Part V Vol II, page 662, para 814.

the door for the conglomeration of judicial power in the legislature, reminiscent of apartheid legislatures and parliamentary sovereignty?

75 The sanctions recommended by the Committee are often too weak.

75.1 The Committee had many options to sanction Maswanganyi. However, it only recommended his suspension for about two months. It did not *inter alia* recommend that his pay be deducted for this time, did not recommend the imposition of a fine, or recommend an official reprimand in the House. He is essentially having a two-month holiday. Maswanganyi contributed a great deal to PRASA's instability, potential for state capture and corruption, and terrible performance of the SOE. His misconduct goes far beyond the basis of the Committee's finding, above. The Committee should have recommended a stronger sanction against Maswanganyi.

75.2 Many of the Committee's decisions have similarly been too weak. A full discussion of this statement is beyond the scope of this paper. However, the following are cases in point:

75.2.1 On 08 March 2023, more than five years after a complaint against him was submitted, Mosebenzi Zwane was found to have breached the Code for various instances of egregious unethical conduct (separate from the conduct that we included in our complaint against him). He was suspended from Parliamentary processes and duties for a year. However, he was only fined five days salary. He also had to issue apologies.

75.2.2 On 15 November 2022, Pinky Kekana was accused of receiving kickbacks. Her reasons seem to be lacking in justification for the money she received. It is not possible to evaluate the reasons effectively as much of the information was kept confidential on request of Kekana. The Committee only recommended that she be reprimanded by the House.

75.2.3 On 28 March 2019, Thabang Makwetla was found to have breached the Code. He did not disclose registrable interests and "allowed a company that was contracted to his Department to conduct work at his private residence, which was not paid for."²⁸ He was fined thirty days salary and made to issue an apology. He was not suspended or sanctioned further.

75.3 Parliament cannot disqualify or dismiss members or potential members for non-criminal offences as this would be unconstitutional in terms of section 47(1) of the

²⁸ <https://pmg.org.za/taled-committee-report/3798/>

Constitution. However, the Committee should take stronger action against those who are guilty of breaching its Code of Conduct.

76 The Code has only been used a few times to submit complaints regarding corruption, maladministration, or a serious failing in constitutional duties. It was likely not intended for this use. To my knowledge, there is no other recourse for Parliament to sanction such misconduct, however.

Recommendations

77 The Code must be amended to include timeliness or deadlines for all aspects of the complaints process. The Code should include openness as a default position. Only particularly sensitive or private information should remain confidential. Complaints regarding information already in the public domain and/or relating to the performance of constitutional or legislative duties should not be kept secret.

78 The Committee should be instructed to impose greater penalties, within its powers. Further, an additional breach of the Code should be added. Chief Justice Zondo stated, in the State Capture Commission Report:

Many professions have bodies that exercise oversight over their members. Examples are lawyers and doctors. Should a member deviate quite radically from what is expected of a reasonable member of that body, he or she can face malpractice proceedings. The term political malpractice has been recently coined. Given the extent to which certain public representatives failed to exercise their power, and the resultant massive losses to the fiscus and the suffering cause to vulnerable members of the public, in respect of PRASA-related matters, and the premium that the Constitution places on accountability, perhaps it is time for South Africa to ensure that its public representatives fulfil their obligations by introducing a form of sanction for what may be termed constitutional and political malpractice.²⁹

79 Parliament should adopt this recommendation by including ‘constitutional and political malpractice’ as a breach of the Code, incurring higher sanctions than are currently recommended by Committee.

²⁹ The State Capture Commission Report Part V Vol II, para 2180, pg. 846.

80 It may be prudent to create a separate office of an independent investigator who would assess, research, and provide a factual finding to the Committee on allegations within complaints. This would reduce the burden of investigation on the Registrar, who is intimately connected with the Committee, and on the Committee itself. Further, the party politics that are ineluctably involved, given that the Committee is proportionally representative of Parliament, in the investigation of Complaints would be somewhat removed, providing for a more objective investigative process. The Registrar is not adequately removed from party politics.

Conclusion

81 #UniteBehind's experience of the Ethics Committee's complaints procedure was fraught with problems. We experienced stonewalling, excessive delays, inadequate consideration of our complaints, and an insubstantial sanction recommendation. We have challenged the Code as being unconstitutional. We are considering our position and will likely review many of the decisions made by the Committee on our complaints.

82 I recommend that the Code be amended to add timelines and deadlines for all aspects of the complaints process, to remove secrecy as the Committee's default position, and to allow for greater sanctions. Further, the Code should adopt an additional form of breach for 'constitutional and political malpractice.' Lastly, the Code should create an independent investigative office to increase efficiency and remove party politics from the majority of the process.

83 It is recognised that the Code is perhaps not best suited to ensuring accountability for corruption or maladministration. However, the Code and the Ethics Committee play an important role in achieving some level of justice and accountability for Parliamentarian's malfeasance or inadequate performance of constitutional obligations.

84 Civil Society would not have to resort to the Code's complaints process if South Africa's criminal and administrative bodies worked. If investigations and prosecutions for corruption, state capture, maladministration and other forms of malfeasance were carried out with diligence and efficiency, accountability for MPs' misconduct would be achieved. However, this is not the case. The Code's complaints process should accord with our political reality.

We need Parliament to step in to ensure proper oversight over its own members where other relevant bodies are unable, inept or otherwise unable to do so.