

26 May 2021

The Chairperson: Powers and Privileges Committee
Honourable MP Mapulane

C/o Victor P Ngaleka
Procedural Advisor
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AND TO:

Mr Tyotyo Hubert James
Chairperson: Portfolio Committee on Public Service and Administration

Email: tjames@parliament.gov.za

Dear Honourable Mapulane

RE: ALLEGED MISREPRESENTATION TO THE PORTFOLIO COMMITTEE BY BRAND SA

1. We refer to the letter dated from your good-selves dated 06 May 2021, and which was sent to us by email on 10 May 2021. The letter requests us to provide Parliament with the Board Chairperson's response to the allegations raised by Dr Kingsley Makhubela (hereinafter "Dr Makhubela") as set out in the submission attached to the letter.
2. We hereby proceed to deal with the allegations, which have been raised by Dr Makhubela, only to the extent that they refer to the Board Chairperson and/or in her capacity as part of the collective that constitutes the Board of Brand South Africa.
3. To the extent that he has made reference to events which happened prior to our appointment to the Board of Brand South Africa, we respond on the basis of organisational records and advice:

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Trustees: Ms Thandi Tobias (Chairperson); Ms Loretta Jacobus; Mr Mlungisi Johnson; Ms Rachel Kalidass; Mr Andrew Madella; Ms Tebogo Mamorobela; Mr Bushang Modipane; Dr Stavros Nicolaou; Ms Sisanda Nkoala; Ms Muditambi Ravele; Dr Ylva Rodny-Gumede; and Mr Johannes Sebutela

U.T.V.

Business Day article, 10 March 2021

4. Dr Makhubela takes umbrage with the Board Chairperson as having “made half-truth and misrepresentation” in respect of the following quote which appeared in the abovementioned article:

“The previous CEO of Brand South Africa, Kingsley Makhubela, was suspended in 2019 over allegations of misconduct. An independent disciplinary hearing recommended that he be fired, but he was allowed to finish his contract, which expired at the end of July 2020”.
5. In the same vein, Dr Makhubela argues that “this presentation by Ms Tobias is factually incorrect and misleading.” However, instead of supplying furnishing Parliament with the whole truth and/or presenting factually correct and accurate information of what transpired, he calls upon “the competent parliamentary authority to investigate and prevent any future blatant abuse of power in the public entity space.” He also refers to “a document here attached.”
6. By “the document attached,” Dr Makhubela is referring to a document authored by him under the title “The Anatomy of Corruption at Brand South Africa.” The same document was availed by him to the Board of Brand South Africa with an undertaking by the Board over which I preside as the Chairperson, that the raft of allegations, which he raises therein, will be independently investigated.
7. The allegations were referred to and investigated by the Office of the Auditor-General (“AGSA”), over and above an investigation, which was conducted by BDO South Africa, an independent auditing firm appointed by Brand South Africa as its internal auditor.
8. No evidence could be found by the Auditor-General to substantiate the allegations raised by Dr Makhubela in that document. Neither did BDO South Africa find any evidence of wrongdoing as alleged by Dr Makhubela.
9. I hasten to add that the document was also handed presumably by him to the Commission of Inquiry into Allegations of State Capture (“the Commission”).
10. To the best of my knowledge, while the Commission’s investigators showed keen interest and willingness to investigate Dr Makhubela’s allegations, it has since gone silent and has seemingly lost any interest in pursuing the matter further.
11. Although Brand South Africa does not have official communication from the Commission on whether it has abandoned the investigation or is still conducting it, I am advised and agree that the allegations raised by Dr Makhubela are not only without substance, they do not fall within the mandate of the Commission.
12. It is also significant to note that the Commission has only a few months left before it is expected to conclude its work. The fact of the matter is that the last time that there was any official interaction between the Commission and Brand South Africa was late in 2019 or early 2020.
13. Dr Makhubela has also referred the same document to the Directorate for Priority Crime Investigation,

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otherwise known as the Hawks. We do not anticipate that the Hawks, just like AGSA and BDO South Africa, would find any evidence of wrongdoing.

14. Dr Makhubela has now referred the matter to “the competent parliamentary authority to investigate.” We are hesitant to caution Parliament to carefully consider whether the referral is worth spending its time and financial resources on, or whether in the same way as other state institutions referred to above, it is also not being sent on a wild goose chase.

The disciplinary process against Dr Makhubela

15. Furthermore, Dr Makhubela alleges that we “failed to disclose to the Portfolio Committee that the disciplinary process was not independent as alleged by the previous Board; the process was manipulated by Mr Stavros Nicolaou and Ms Khanyisile Kweyama ...”
16. We will refrain from speaking on behalf of the two individuals mentioned in this allegation as we do not have a mandate to speak on their behalf. We have also been advised that the Hawks have contacted them in its investigation of his allegations as they relate to them.
17. In addition, as disciplinary proceedings against Dr Makhubela were, on his own version, conducted by the previous Board, we are not certain as to how he arrived at the conclusion, which is implicit in his statement, that we knew that the process was tainted by some kind of irregularity in the appointment of the Chairperson and therefore had “failed to disclose” this matter to the Portfolio Committee.
18. That notwithstanding, we are advised that contentions around the procedural fairness of disciplinary hearings are matters which fall within the jurisdiction of such institutions as the Commission for Conciliation, Mediation and Arbitration (“CCMA”) and/or the Labour Court.
19. Lastly, internal records concerning Dr Makhubela’s disciplinary proceedings show that he was legally represented throughout the processes. The question then is: why did he or his legal representatives not challenge the alleged irregularities by making a proper referral to either the CCMA or the Labour Court?

Dr Makhubela’s dismissal

20. Paragraph 12 of the record of the disciplinary proceeding submitted to the Board by the Chairperson, Adv. S. Baloyi SC who presided over the disciplinary hearing against Dr Makhubela has the following recommendation:

“12. I do not consider the evidence of the employer that Dr Makhubela’s conduct has resulted in a breakdown of trust and has rendered continued employment intolerable in the circumstances contrived. In the event, I consider a sanction of dismissal fair.”

21. At a meeting of the Board held on 02 December 2019, the report issued by Adv. S. Baloyi SC was considered and very extensively discussed and debated. In the end, the following resolution was adopted:

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“5.1.12 Against the background, the Board RESOLVED [Resolution 12: 2019/20] THAT the recommendation of the presiding officer in the disciplinary hearing of the CEO, Dr Kingsley Makhubela, should be implemented.”

22. As is clear from paragraphs preceding the resolution of the Board, having considered the matter, the Board had noted that “it would be difficult to overrule the sanction recommended by an independent Chairperson.”
23. In order to properly close the preceding paragraphs, it must be pointed out that the recommendation of dismissal issued by Dr Makhubela was premised on a charge of failure to disclose an interest by Dr Makhubela, in a contract which was awarded to his former brother-in-law for R4 million, at his behest.
24. It is clear from the report that evidence, which was presented before Adv. S. Baloyi proved that Dr Makhubela had made a referral of his former brother-in-law Mr S. Gumede’s company – the Sporting Industry Group – to Management by indirectly recommending that Brand South Africa entered into a partnership agreement with the said company. However, as the report shows, he failed to disclose his familial relationship with Mr S. Gumede when asked by Management. Neither did he disclose his interest to the Board as the Public Finance Management Act, 1999 requires. Above all, a competitive bidding process had not been followed before the contract of R4 million was awarded to the Sporting Industry Group.
25. The contract awarded to Mr S. Gumede, his former brother-in-law, was cancelled on the instruction of the Board upon receiving an anonymous complaint to one of the Board members. However, the company concerned has since taken the matter to court in terms of which it is demanding that Brand South Africa should make a payment of R4 million for alleged breach of contract.

Role of the Executive Authority; the late Minister Jackson Mthembu (“the Minister”)

26. Even though the Board was satisfied that the sanction, which Adv. S. Baloyi SC had issued recommending Dr Makhubela’s dismissal was unassailable, and had resolved that it would implement it, it had to first obtain the Minister’s concurrence. This is in accordance with Brand South Africa’s Trust Deed, which states:

“20.1.3 The Board shall be responsible for disciplining and dismissal of the Chief Executive Officer with the concurrence of the Executive Authority.”

27. The Board accordingly sought the Minister’s concurrence. His advice to the Board in a meeting which he subsequently held with Board was that the Board and Dr Makhubela “should find an amicable resolution of the matter.” It is completely untrue therefore, that the Minister “dismissed the recommendation of guilty and dismissal” as alleged by Dr Makhubela who was not even present at the meeting. Had the allegation been true, Brand South Africa would have had no option but to reinstate Dr Makhubela as directed by the Minister.
28. The Board accordingly tried various means to part amicably with Dr Makhubela. These included an offer

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to him to submit a resignation, in return for which Brand South Africa would pay him his remuneration for the remainder of his contract term of employment. He would also be expected to desist from further engaging the media and creating bad publicity for Brand South Africa.

29. The meeting of 10 June 2020 to which he refers, was part of an attempt to find an amicable resolution, which was intended to avoid an acrimonious parting of ways between Dr Makhubela and Brand South Africa.
30. The letter to which he refers whereby the Board also made an undertaking not to refer to a finding of guilty and his dismissal was another aspect of trying to find an amicable resolution satisfactory to both sides.
31. Unfortunately, he contemptuously rejected all those attempts.
32. As his contract was nearing its end in July 2020, the Board allowed it to run its course.

R9 000 000 offer to Dr Makhubela

33. Dr Makhubela makes the following allegation: "Throughout the last three years, I have refused to accept close to R9.000.000.00 (nine million rands) from Ms Khanyisile Kweyama and Dr Stavros Nicolaou's Board in return for my silence and retrieval of documents related to corruption at Brand SA. I have since reported fraud of qualifications and corruption-related matter to the police."
34. What he does not explain is that his annual salary was over R3 million, and that the R9 million to which he refers was a settlement of the balance of his then three-year contract. We are advised that the offer was made once, and he rejected it. It is noteworthy that the Board members cited were not acting in their individual personal capacities.
35. We are further advised that there is nothing untoward from a legal point of view in such settlements as they enable each party to part amicably, and to avoid protracted and expensive litigation processes.
36. Unfortunately, that is what happened in the end when he declined this offer. Both parties engaged in expensive litigation for which only their legal representatives were the winners in terms of money paid by both to them.
37. Be that as it may, Dr Makhubela still happily accepted the R9 million in the form of monthly payments of the remuneration he continued to receive throughout the last three years of his contract, until the end of the said contract in July 2020.
38. It should be noted that the delay in the finalisation of the matter was largely caused by frequent postponements of the hearing which were mainly requested by Dr Makhubela and/or his legal representatives, as well as the six-month absence of a Board after the expiration of the previous Board's term.


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Dr Makhubela's unauthorised access to Board minutes

39. In his document (The Anatomy of Corruption at Brand South Africa), a copy of which has been circulated to various institutions and individuals including Parliament, Dr Makhubela makes bold references to a number of minutes the proceedings for which took place while he was suspended or on special leave. That is, unless he can prove that he had requested them using the provisions of the Promotion of Access to Information Act, Dr Makhubela is in unlawful possession of Brand South Africa's confidential Board minutes.
40. We are advised that unauthorised possession of such documents constitutes a criminal offence in terms of the common laws of the Republic. Parliament is accordingly hereby requested to sanction in the strongest possible terms such egregious conduct on the part of Dr Makhubela.
41. For its part, Brand South Africa will take legal advice on how he possibly came into possession of its confidential minutes, as well as what legal steps it may take in order to recover the said confidential minutes from his unlawful possession.
42. As indicated in our earlier letter dated 11 May 2021, we would appreciate being favoured with the Hansard record of the Parliamentary presentation which is being challenged by Dr Makhubela ahead of our appointment to present a comprehensive side of our story on the date that we humbly await receiving from your good-self. We still kindly request to be provided with an opportunity for the Board to give a verbal presentation with regard to this matter.

I thank you.

Yours sincerely,



THANDI TOBIAS-POKOLO
BOARD CHAIRPERSON

