

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT BRAAMFONTEIN**

**CASE NO.: JR224/23**

In the matter between:

**PASSENGER RAIL AGENCY OF SOUTH AFRICA**

Applicant

and

**TOKISO DISPUTE SETTLEMENT (PTY) LTD**

First Respondent

**IMTHIAZ SIRKHOT N.O.**

Second Respondent

**MARTHA ONICA NGOYE**

Third Respondent

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**FOUNDING AFFIDAVIT**

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I, the undersigned,

**LEONARD RAMATLAKANE**

do hereby make oath and say that:

**INTRODUCTION**

1. I am the chairperson of the current Board of Control ("the Board") of the applicant, the Passenger Rail Agency of South Africa ("PRASA").
2. I have the authority to bring this application on behalf of PRASA.
3. Save where the context indicates the contrary or where otherwise stated, the facts herein deposed are within my personal knowledge and are to the best of my knowledge true and correct. Legal submissions are made on the advice of PRASA's legal



representatives. Where I quote various witness testimony, I do so from the record of the arbitration proceedings which is the subject matter herein.

4. The primary purpose of this application is to review and set aside an arbitration award of the second respondent ("the arbitrator") dated 30 January 2023 ("the arbitration award").

### **THE PARTIES**

5. PRASA is a public entity wholly owned by the government of the Republic of South Africa. Its statutory mandate is to provide *inter alia* commuter rail services in the public interest throughout the Republic and is funded by the National Treasury through allocations made to the Department of Transport.
6. The first respondent is Tokiso Dispute Settlement (Pty) Ltd with its registered address and/or principal place of business at Dunkeld Office Park, 6 North Road, Dunkeld West, Johannesburg, 2196.
7. The second respondent is Mr Imthiaz Sirkhot, an arbitrator registered as such with the first respondent.
8. The third respondent is Ms Martha Onica Ngoye an admitted attorney currently employed as PRASA's Group Executive: Legal Risk and Compliance ("the employee").

### **PURPOSE OF THE APPLICATION**

9. Part A of this application is for interim relief. PRASA seeks an order staying the arbitration award pending the finalisation of the review application contemplated in Part B of the notice of motion.
10. Part A will only be set down for hearing in the event of opposition by any of the respondents.

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11. I respectfully submit that the review application is brought in the interest of clean governance and that judicial intervention is required in the matter at hand.
12. Corruption took place within PRASA whilst the employee occupied senior positions in which she should have taken steps to avert such corruption and may well have been instrumental in such unacceptable conduct.
13. The employee was charged with primarily four very serious charges. The matter was referred for inquiry by an arbitrator in terms of section 188A(11) of the Labour Relations Act, 66 of 1995 as amended ("the LRA") after the employee alleged that the holding of the internal disciplinary hearing contravened the Protected Disclosures Act 26 of 2000 because she testified at the Judicial Commission of Inquiry into Allegations of State Capture ("the Zondo Commission").
14. The charges were brought because an employee is not granted blanket immunity against prosecution for misconduct simply because s/he has purportedly made a protected disclosure. An investigation into misconduct and a subsequent prosecution is not wrongful merely because they follow an employee having made an alleged protected disclosure. It will be wrongful if reasonable and probable grounds for prosecuting are absent and it is clear that the intention of the employer is not to obtain a conviction but to harass the employee for making a protected disclosure.
15. The subject matter of two of the charges have already determined by the Courts. These are charges 2 and 3.
16. Charge 2 relates to the notorious locomotives that were acquired by PRASA from Swifambo. Both the High Court and the Supreme Court of Appeal respectively found that Swifambo's bid did not comply with the requirements of the request for proposal in a number of material respects. The Constitutional Court dismissed Swifambo's application for leave to appeal. The employee was a member of the committee which recommended that Swifambo be appointed. Charge 5A, flowed from charge 2 and related to the employee's conflicting and misleading statements she made to the Judicial Commission of Inquiry into Allegations of State Capture ("the Zondo Commission") and to PRASA. The primary issue which the arbitrator had to determine



in respect of charges 2 and 5A was whether the employee attended the meeting of the 11<sup>th</sup> of July 2012 when Swifambo's bid was adjudicated upon. We know that the Chief Justice in his report at the Zondo Commission states that the evidence casts doubt on her version that she was not part of the process that recommended that Swifambo be the preferred bidder. He states that if indeed she attended the meeting, *"that would be very inconsistent with the way that, particularly Ms Ngoye, has put a fight against corruption at PRASA"*.

17. The subject matter of Charge 3 has also been before the High Court in *Primedia (Pty) Ltd t/a Comutanet and others v PRASA and others*. The High Court Vally J presiding found that the cession agreements which allowed PRASA, Siyathembana, and Strawberry to circumvent the careful scrutiny that arises from the application of section 217 of the Constitution were unlawful. They were designed to subvert the control process inherent in the application of section 217 of the Constitution and they succeeded in doing so. The employee signed the Strawberry agreement in her capacity as CEO. She confirmed under oath at the Zondo Commission that she was part of the process whereby Strawberry substituted Umjanji and she later conceded that the cession defeated the whole purpose of procurement, this, after the Chief Justice pointed out this fact. The arbitrator was called upon to decide what was the role of the employee bearing in mind the senior position she held.
18. Charge 1 relates to the employee's approval to condone additional business in the amount of R 58 153 296 to SA Fence & Gate. This, in circumstances where, R209 874 559 had already been paid in respect of the tender. Despite non-compliance with the provisions of section 217 of the Constitution, the Public Finance Management Act and National Treasury's Irregular Expenditure Framework, the employee approved the condonement. As with the previous charge, the arbitrator was called upon to decide what was the role of the employee bearing in mind the senior position she held.
19. Because of *inter alia* the need for finality on the merits of the main charges (that is charges 1, 2, 3 and 5A) and to avoid delay, charges 1A and charge 4 were not persisted with by PRASA.
20. A copy of the charge sheet is annexed hereto marked "LR1".



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21. On 30 January 2023, the arbitrator submitted his award and found the employee not guilty on charge 1; charge 2 read together with charge 5A; and charge 3. A copy of the award is annexed hereto marked "LR2". I submit with respect that the arbitrator failed to properly identify the dispute he was required to arbitrate, he did not deal with the substantial issues of the dispute and he reached a decision that another decision maker could not reasonably have reached.

## **THE FACTS**

22. During or around October 2020, I commenced my involvement with PRASA as part of an entirely reconstituted Board of Control (the Board).
23. I was appointed to this position by the Minister of Transport.
24. The Minister of Transport has characterised PRASA as a "broken business". This characterisation was informed largely by the systematic erosion of value and collapse in governance that the business has experienced over a number of years.
25. As the Board, it was and continues to be important that we mend this important organisation and bring order to it. Failure would be detrimental to our people, customers, employees and the economy.
26. In the words of the President of the Republic of South Africa,

*"Given the significance of the impact that fraud and corruption had in our country, the response to state capture must be a national effort... While the Commission's recommendations focus on the institutional and legislative mechanisms to tackle corruption, it is critical that we give equal attention to the responsibility of individuals – wherever they are – to act ethically and honestly. We need to ensure that we have people of integrity in the Executive, the public service and all other state organs who will execute their functions in service of the people of South Africa on an ethical basis and in accordance with the values of our Constitution."*





27. As the basis for the organisation achieving its mandate and in turning the business of PRASA around, our focus as the new Board was on: (1) Achieving stability in key management and skilled positions; (2) Strengthening good governance; (3) Ensuring the safety and security of operations and passengers; (4) Ensuring reliability and availability of rail transport; (5) Putting in place strong regional operations as centres of excellence and (6) Consequence management.
28. We further ordered an investigation to be conducted into the affairs of PRASA under the previous administrations.
29. Prior to the conclusion of the investigation, and on 29 January 2021, a decision was taken by the Board to terminate the employment contract of, among others, the employee. The reason for the employee's termination was that her employment contract had come to an end with the effluxion of time.
30. On 4 February 2021, the employee challenged the lawfulness of the decision in the Labour Court on an urgent basis. She alleged that the Board was not properly constituted. The Board opposed the application and argued that the Labour Court lacked the necessary jurisdiction to hear the matter. On 2 March 2021, the Labour Court found in favour of the employee. The Board has since petitioned the Labour Appeal Court, leave to appeal having been granted. The appeal is set down for hearing on 7 March 2023.
31. It is important to mention that, *albeit* the appeal not being relevant to these proceedings, the employee has, on numerous occasions before different platforms, alleged that the Board is treating her with "*high-handedness and callousness*" by seeking leave to appeal the judgment. Furthermore, the Zondo Commission noted in its report that, in the appeal proceedings, PRASA has not addressed the merits of the matter but has solely raised a preliminary point of law regarding jurisdiction. I submit with respect that since the matter was brought on an urgent basis, the primary issue addressed by PRASA was whether, on the facts as pleaded, the Labour Court had jurisdiction. PRASA with respect elected to raise a point in limine without pleading over on the merits. To appreciate the adjudication of the point in limine, it is important to highlight that at the heart of the appeal lies the question whether the Labour Court had jurisdiction to



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determine the employees' application brought in terms of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997 ("the Basic Conditions of Employment Act") in circumstances where their pleaded case was one of unlawfulness as opposed to breach of contract. Their case was not pleaded as one of breach (no mention was made of the terms of the agreement, the breach, specific performance, damages, repudiation etc).

32. Be that as it may, upon conclusion of our investigation, we established that the employee was part of the previous administration and played a pivotal role in among other things the awarding of contracts during her tenure in the previous administration. She was therefore charged accordingly.
33. Before concluding under this rubric, I highlight that,
  - 33.1. The employee is currently employed by PRASA as its Group Executive Legal Risk and Compliance.
  - 33.2. The employee herself testified that this role relates to compliance of the Board in respect of matters on legal and governance and relates to ensuring that the organization complies with the prescripts of the law.
  - 33.3. The employee has an LLB degree and is an admitted attorney. She started working at PRASA in 2011 and she was employed at Intersite which is a wholly owned subsidiary of PRASA. In January 2011 she was employed as an executive in the office of the CEO until August 2011. In September 2011 she became the CEO of Intersite until the end of August 2014 when she was transferred to the position, she is currently in.
  - 33.4. In December 2014 she acted as PRASA's Group CEO until January 2015. She also acted as the CEO of PRASA Rail in 2018, which is one of the biggest divisions within PRASA.

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## THE ARBITRATION

### **Charge 1 –**

34. As appears from the charge sheet, the employee was charged with the following:

- "1.1. On or about 25 March 2013, PRASA and SA Fence and Gate Investment Holdings (Pty) LTD ("SA Fence and Gate") concluded contract number HO/SCM/225/11/2011 for National Fencing and Security Project. The contract amount was R209 874 559.79 and consequently fell within the delegation of the Board of Control.*
- 1.2. During or about December 2014 and January 2015, you were appointed to act in the position of Group Executive Officer of PRASA.*
- 1.3. On or about 20 January 2015, you approved to condone business to SA Fence and Gate for the supply, storage and installation of lights on the National Fencing and Security Project in the total amount of R58 153 296.72 (VAT inclusive).*
- 1.4. You, in approving the condonation and/or extending the scope and amount of the contract,*
  - 1.4.1. Disregarded the contract amount of R209 874 559.79 and continued to escalate the amount even though processes were not followed;*
  - 1.4.2. Disregarded the variation of R47 083 730.37;*
  - 1.4.3. Disregarded the fact that there was no value for money;*
  - 1.4.4. Acted without due regard to your responsibilities and the approval processes envisaged in the Delegation of Authority and the Supply Chain Management Policy;*
  - 1.4.5. Acted beyond your authority;*
  - 1.4.6. Committed an act of financial misconduct; and/or*
  - 1.4.7. Acted in breach of your contract by inter alia ignoring PRASA's policies."*



Y.L



35. In respect of this charge, the employee testified at the arbitration that a submission was brought by the tender committee and then head of Supply Chain Management ("SCM") requesting that the particular condonation which was looked at by the CTPC be approved by the CEO.
36. It was common cause that the employee was the acting Group CEO during this period and that the submission for condonation was brought to the employee to be signed. It is further common cause that from the CTPC the submission goes to the CEO because the CEO reports directly to the board and nothing will go to the board without it going through the Group CEO.
37. Importantly she testified that a condonation has to be evaluated before it can be granted, it has to be evaluated to ensure *"that it is proper, and that the specific requirements that have got to be met before the condonation can be supported, the issues around, you know, whether there has been consequence management, whether there has been value for money within the organization and whether there wasn't any criminal liabilities, which is critical because then condonation cannot happen."*
38. In other words, it has to comply with Treasury's Irregular Expenditure Framework which provides that:

*"55. The relevant authority may, at the request of the accounting officer or accounting authority, condone the irregular expenditure.*

*56. The accounting officer or accounting authority must, as a minimum, consider the following information when requesting condonation of irregular expenditure –*

- (a) confirmation that a determination test was conducted;*
- (b) findings and recommendations of the Loss Control Function or another relevant function that conducted the determination test;*
- (c) confirmation that internal investigations were conducted in cases of identified fraudulent, corrupt or other criminal conduct;*
- (d) confirmation that a criminal charge has been laid in the case of alleged fraudulent, corrupt or other criminal conduct;*

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- (e) *findings and recommendations of a functionary that conducted the investigation;*
- (f) *confirmation that losses were not incurred and that value for money was achieved;*
- (g) *confirmation that disciplinary action was taken against the responsible employees); and*
- (h) *confirmation of remedial actions taken or being taken by the accounting officer or accounting authority to prevent the recurrence of such irregular expenditure in similar circumstances.*

39. It is clear that the employee had to consider, at the very minimum, the above information.

#### **Charges 2 & 5A**

40. As stated above, these charges relate to the notorious locomotives that were acquired by PRASA from Swifambo which could not fit into the rail line structure in our country. Both the High Court and the Supreme Court of Appeal, respectively found that Swifambo's bid did not comply with the requirements of the request for proposals in a number of material respects. The Constitutional Court found that Swifambo's application for leave to appeal bore no reasonable prospects of success.

41. The High Court held that:

*"[118] It is clear from the facts of this case that Swifambo was shown not to be an innocent tenderer. The tender that was put out was for the lease of locomotives and not the sale of them. The respondent knew this but had despite this knowledge bid for the sale of locomotives. In doing so, it brought this harm upon itself. They obviously benefitted from the award of the tender. They should not have been given the tender in the first place. There were so many irregularities that took place in the award of the tender that the inescapable conclusion is that they were not innocent.*

...



*[124] It is clear that Swifambo was disqualified from the onset and this relates to the issue of the Tax Clearance Certificate. They simply did not have one and should never have been allowed to bid. This was overlooked by the BAC.*

*[125] Corruption is a cancer that is slowing eating at the fabric of our society. If it is left unchecked it will devour our entire society. Chemotherapy is needed to curb it. The chemotherapy in this instance is an effective remedy that will nip the cancer in its bud. The remedy that the respondent is proposing will be making a mockery against the fight against unlawful tenders. It will send out a message that it pays to be involved in unlawful tenders and crime does pay. This is not the society that we fought for and should live in. There is simply no reason why the respondent should benefit from an unlawful award that was peppered with so many irregularities."*

42. The matter was confirmed on appeal by the SCA. The Constitutional Court found that Swifambo's application for leave to appeal bore no reasonable prospects of success.
43. The employee was a member of the Corporate Tender Procurement Committee (BAC) at the time. On 11 July 2012, the CTPC met and recommended that Swifambo be appointed as the preferred bidder. The employee was charged for participating in the decision of the CTPC to approve and/or recommend the appointment of Swifambo. Alternatively, when she became aware of the decision of the CTPC to approve and/or recommend the appointment of Swifambo, she failed and/or neglected to report same.

### **Charge 3**

44. The subject matter of Charge 3 has also been before the High Court. The High Court Vally J presiding found that the cession agreements which allowed PRASA, Siyathembana, and Strawberry to circumvent the careful scrutiny that arises from the application of section 217 of the Constitution were unlawful. They were designed to subvert the control process inherent in the application of section 217 of the Constitution and they succeeded in doing so.

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45. Paragraphs 3.1 to 3.6 of the charge were not in dispute. That then left paragraph 3.7 of the charge which provides that:

*"3.7. You, as the Chief Executive Officer of Intersite (as a wholly owned subsidiary of PRASA), entered into a cession agreement/s which allowed PRASA, Siyathembana, Strawberry and/or Umjanji Consortium to circumvent a 'fair, equitable, transparent, competitive and cost effective' tender process in respect of the tender on Media Advertising and Broadcasting Concession (Tender Number HO/CA/739/02/2010)"*

46. It was common cause that the employee signed the agreement between Strawberry agreement in her capacity as CEO of Intersite on behalf of PRASA. She confirmed under oath at the Zondo Commission that she was part of the process whereby Strawberry substituted Umjanji and she later conceded that the cession defeated the whole purpose of procurement, this, after the Chief Justice pointed out this fact.

#### **GROUND FOR THE RELIEF SOUGHT**

47. I submit with respect that the arbitrator failed to properly identify the dispute he was required to arbitrate, he did not deal with the substantial issues of the dispute and he reached a decision that another decision maker could not reasonably have reached.
48. The employee held very important senior executive positions within PRASA and continues to do so. In respect of the charges levelled against her, viewed cumulatively and/or individually, the evidence demonstrated that she failed to execute her responsibilities in a diligent and honest manner.

#### ***Charge 1***

49. In respect of charge 1, the arbitrator found that,

- 49.1. Because the previous administration of which the employee was part did not observe or invoke rules, regulations and procedures, the employee duly



performed her duty as the acting GCEO in condoning the irregular expenditure;

49.2. Nothing more was required of the employee because *"Accountability has to do with the fact that for the proper observance of rules, regulations and procedures...those administering the rules must be held responsible and accountable for their actions"*;

49.3. The employee's decision to approve

49.3.1. was lawfully taken;

49.3.2. was within her authority in line with PRASA's policies;

49.3.3. was not beyond her authority as the condonation was approved by the steering committee;

49.3.4. the losses PRASA suffered cannot be attributed to the employee.

50. Firstly, the fact that the previous administration was marred with corruption and failed to follow process can never relieve an employee of her responsibilities which she owed to the employer.

51. Secondly, the employee's decision to approve could not have been lawfully taken if she failed to comply with procurement prescripts. On her own version she approved the condonation of the amendment of the scope of work in the contract between PRASA and SA Fence and Gate as well as the amount. This in circumstances where there was non compliance with section 217 of the Constitution, the Public Finance Management Act and National Treasury's Regulatory Framework.

52. Thirdly, a subcommittee of the Board (Steercom) could not approve on behalf of the Board. The evidence of the employer in this regard was uncontested yet the arbitrator found that the employer did not dispute the employee's evidence that Steercom was set up because of the number of irregularities that required condonation and that



Steercom's approval constituted a subcommittee of the Board approving the condonation.

53. The employee sought to argue that she and Dingiswayo *"testified and explained that the Steercom was a special committee established to deal with irregular transactions for condonation. Dingiswayo explained that the Steercom is not a sub-committee of the Board, but rather decides condonations on behalf of the board."* This was however not put to the employer's witness Mr Rehman as reflected below:

*"MR PRINSLOO: Okay. So you would say that this amounts to the subcommittee of the board approving condonement.*

*MR REHMAN: This is what this extract says.*

*MR PRINSLOO: Subsequently this must then go to the board.*

*MR REHMAN: For approval.*

*MR PRINSLOO: And if they approve it, it must then go to national treasury. If I understand.*

*MR REHMAN: Depending on what law has been transgressed, here it was a delegation issue, it was not a prescript of legislation that was transgressed.*

*MR PRINSLOO: So where would you say it must then go?*

*MR REHMAN: And if you look at transgression, the SA Fence and Gate matter in terms of the line, PRASA has not received any benefit so, if you look at this item PRASA has not received any benefit, if there is no benefit then the item cannot be condoned because there is an element of collusion and corruption in this transaction.*

*MR PRINSLOO: So I understand what you are saying but what I am focusing on is what does this document mean? What it means from the basic reading of it, is the subcommittee of the board has approved the condonement.*

*MR REHMAN: That's what it says ja, but the subcommittee of the board did not have the delegation.*

*MR PRINSLOO: So then if I can put the following processes to you. The previous pages we referred to where the GCEO had*

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*approved the condonement, that document was then submitted to the Steercom for Steercom to approve it.*

**MR REHMAN:** *It was, ordinarily you wouldn't say for the Steercom to approve, it is for the Steercom to support and then ultimately the board approves it.*

**MR PRINSLOO:** *Chair I am going to move onto the SCM process, we will be focusing on the Swifambo transaction. If you have got volume 3 in front of you still, can you go to page 82 of volume 3."*

54. Fourthly, any further approval by the Board cannot immunize the transaction where there is non-compliance with tender law principles. Nor can it immunize the employee's conduct.
55. The condonation of R 58 million was (1) over and above the original R 209 million (2) no lights were installed but money was already paid (3) there was no value for money as per the uncontested report, PRASA only received lights to the value of R 1 644 406 of the R58 million.
56. The employee's conduct and the version she put up makes a mockery of the entire process. The employee simply failed to satisfy herself as was required of her to ensure that the additional R58 million over and above the original tender amount of R209 million was lawful and in compliance with s217 of the Constitution and Treasury Prescripts.

## **Charge 2**

57. In respect of charge 2, the arbitrator found that:

- 57.1. The documentary evidence shows that there were two meetings on 11 July 2012. The first meeting was an extraordinary meeting which was scheduled to start at 10am, there was no agenda and the only apology recorded in the minutes was for Mr Kabelo Mantsane.



- 57.2. The arbitrator however goes on to state that the meeting of 11 July 2012 which started at 10am was a "sham" as *"it is not in dispute that at the CTPC meeting on 19 July 2012, the CTPC resolved to appoint Swifambo under dubious circumstances"*. *"The decision regarding Swifambo was already taken at the meeting on 11 July 2012 there was therefore no necessity for the CTPC to meet again on 19 July 2012 to consider the same bid"*.
58. This contradicts his finding that there was an agenda for the second meeting on 11 July 2010 at 10pm which corroborates the version of Ms Ngoye that there was no agenda for the extraordinary meeting called by Mr Mbatha at 10am. But then proceeds to say that there is no list of names who attended the meeting at 10pm and that it could not be a continuation of the meeting at 10am because that meeting was finalised at 9pm.
59. The decision reached by the arbitrator is not one that a reasonable decision-maker could reach. Ms Ngoye's version before the arbitrator was improbable when one has regard to:
- 59.1. The contemporaneous handwritten notes of Mr Khuzwayo;
- 59.2. The declaration of interest and confidentiality agreement signed by Ms Ngoye dated 11 July 2012;
- 59.3. The affidavit of Mr Molefe which was filed in the high court;
- 59.4. What was stated in the disciplinary hearings by other members of the committee in respect of their disciplinary hearings that a resolution to appoint Swifambo was taken on 11 July 2012; and
- 59.5. The oral evidence of Mr Khuzwayo.
60. Furthermore, the employee's version before the arbitration contradicted her version before the Zondo Commission where she stated under oath that there was no meeting on 11 July 2012. She did not correct her version at the Zondo Commission in her

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subsequent affidavit even after having been provided with the documents which placed her at the meeting.

61. Of importance in respect of charges 2 and 5A is that the employee's version before the arbitration changed from her version before the Zondo Commission. Her version before the arbitration was that she attended a meeting of the CTPC on the morning of 11 July 2012, that the meeting was scheduled by the then chief procurement officer, Mr Chris Mbatha and that the only item that was discussed was that the members should make themselves available for the projects that are going to be brought through to the CTPC. This version however contradicts her version before the Zondo Commission where she testified that:

*"...there was not such a meeting. Forget there being a meeting with the different agenda, there was no such meeting as I understand your evidence, certainly as far as you are concerned.*

*MS NGOYE: That is correct, Chair. I did not attend that meeting, there was no such meeting.*

*...*

*You see, I am saying you were saying you did not attend a meeting on the 11 July.*

*MS NGOYE: Okay, yes."*

*"I mean, place me – if you can place me in the meeting and give me the documents that show that really I was in the meeting, give me the declaration of authority that I would have signed, declaration of interest that I would have signed. Give me the register that I would signed. Those documents are supposed to be there, Chairperson, why is that it is – because if you want to show that I was there, you would have those documents."*

62. Despite the employee having been provided with these documents, she did not correct her evidence at the Zondo Commission and made no mention of the meeting she now allegedly says took place on the morning of the 11<sup>th</sup> of July 2012 scheduled by Mr Mbatha.



### **Charge 3**

63. In respect of charge 3, the sole basis for the arbitrator's finding was that there is a difference between a cession and a concession and that because the employee was not charged for signing a concession agreement but rather a cession agreement, she cannot be found guilty.
64. The arbitrator did not however consider that paragraphs 3.1 to 3.6 of the charge sheet were common cause, that the employee signed the Strawberry agreement in her capacity as CEO, that she confirmed under oath that she was part of the process whereby Strawberry substituted Umjanji and she later conceded that the cession defeated the whole purpose of procurement, this, after the Chief Justice pointed out this fact.

### **CONCLUSION**

65. It is apposite to highlight what the courts have said about corruption:

- 65.1. Justice Francis in *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* 2017 (6) SA 223 (GJ) held that:

*"State institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution"*

*"Corruption is a cancer that is slowly eating at the fabric of our society. If it is left unchecked it will devour our entire society. Chemotherapy is needed to curb it. The chemotherapy in this instance is an effective remedy that will nip the cancer in its bud."*



- 65.2. Justice Victor in *National Director of Public Prosecutions v Botha N.O. and Another* 2020 (6) BCLR 693 (CC) (26 March 2020) said:

*"[1] Bribery and corruption in public procurement have become systemic in South African society. Corruption affects us all. It intersects at points of social, political, economic and ethical discourse with no end in sight and thus remains an elusive malignancy slowly eroding our hard-won democracy. Whilst stories of the high profile looters reach the media, the more low-key public officials who sit behind their desks committing acts of public procurement corruption with disturbing frequency may ultimately have an even greater catastrophic effect on our economy and society."*

66. The employee held very important senior executive positions within PRASA and continues to do so. In respect of the charges levelled against her, the evidence demonstrates that she failed to execute her responsibilities in a diligent and honest manner.
67. Despite this, the arbitrator failed to properly identify the dispute he was required to arbitrate, he did not deal with the substantial issues of the dispute and he reached a decision that another decision maker could not reasonably have reached.
68. The evidence is clear,
- 68.1. As the acting GCEO she approved additional business to SA Fence and Gate and approved to condone R58 million over and above R 209 million (the original tender amount) in contravention of procurements prescripts.
- 68.2. She was a member of the CTPC and the evidence places her at the meeting when Swifambo was discussed and recommended despite Swifambo being disqualified from the onset as per the judgments of the High Court, the Supreme Court of Appeal and the Constitutional Court.

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- 68.3. As the CEO of Intersite, she signed an agreement on behalf of PRASA which circumvented the provisions of the Constitution.
69. The arbitrator's reasoning is with respect unreasonable and not capable of justification. It is entirely disconnected with the evidence before him.
70. *"As a nation we have made extraordinary progress in the fight against state capture and corruption. But there is much work that lies ahead, to rebuild our institutions and the capacity of the state, to ensure accountability, to restore trust and confidence, and to rekindle our hope in a better future for all."*

**WHEREFORE** I pray for an order in terms of the notice of motion to which this affidavit is attached.



**LEONARD RAMATLAKANE**

I certify that the above signature is the true signature of the deponent who has acknowledged to me that he knows and understands the contents of this affidavit, which affidavit was signed and sworn to at \_\_\_\_\_ on this the \_\_\_\_ day of \_\_\_\_\_ 2023 in accordance with the provisions of Regulation R128 dated 21 July 1972, as amended by Regulation R1648 dated 19 August 1977, R1428 dated 11 July 1980 and GNR774 of 23 April 1982.



**COMMISSIONER OF OATHS**

**FULL NAMES:** Y. LEKE  
**CAPACITY:** Sgt  
**ADDRESS:** 13 WINTER ST  
 GOODWOOD

SOUTH AFRICAN POLICE SERVICE
GOODWOOD STATION
09 FEB 2023
COMMUNITY SERVICE CENTRE
SOUTH AFRICAN POLICE SERVICE



**IN THE INTERNAL DISCIPLINARY HEARING OF:**

**PASSENGER RAIL AGENCY  
OF SOUTH AFRICA**

**EMPLOYER**

and

**MARTHA ONICA NGOYE**

**EMPLOYEE**

---

**AMENDED CHARGE SHEET**

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**YOU, MARTHA ONICA NGOYE**, (hereinafter referred to yourself as "the Employee"), employed by **PASSENGER RAIL AGENCY OF SOUTH AFRICA** (hereinafter referred to as "the Employer" or "PRASA") in terms of a Contract of Employment, are hereby charged with misconduct.

The purpose of the proposed disciplinary enquiry is to consider the appropriateness or otherwise of a continued employment relationship in view of the serious allegations levelled against you, namely that you acted in gross breach of the relationship of trust and confidence in that:

**1A. CHARGE 1A**

**(STATEMENTS MADE BY YOU ABOUT THE CURRENT BOARD)**

You have breached your employment contract and PRASA's policies.

IN THAT:

- 1A. (1) You have made (and continue to make) disparaging statements in public and elsewhere about the current Board of PRASA which statements have led to serious relationship disturbances and breach of the trust relationship. These statements include that:



**Statements made at the Zondo Commission**  
(Transcript of 23 February 2021)

**CHAIRPERSON:** Sorry, did you say, the current board.

**MS NGOYE:** The current board Chair.

**CHAIRPERSON:** Which you say is, has been at PRASA four months?

**MS NGOYE:** It's about – ja it's four months.

**CHAIRPERSON:** You are saying your suspension by Mr Montana was ...

**MS NGOYE:** Was lawful.

**CHAIRPERSON:** A number of years ago.

**MS NGOYE:** Was lawful.

**CHAIRPERSON:** Was lawful.

**MS NGOYE:** Yes.

**CHAIRPERSON:** Why did they have to go, go to that, go back that issue of you ...

**MS NGOYE:** Well Chair ...

**CHAIRPERSON:** Understand or do you not understand.

**MS NGOYE:** Ja, I don't know. And this is why I am saying you know the bitterness invoked this thing, they couldn't hide within them and therefore they felt that they even needed to go back to you know all those issues.

**CHAIRPERSON:** And they were not there at the time?

**MS NGOYE:** And they were not there at the time. They were not there.

**CHAIRPERSON:** They don't know the facts.

**MS NGOYE:** Ja, they don't know the facts. They have never asked me, they have never engaged me. My view Chair and it's a strong view that I have and I believe that I have, is that they have been engaging with Mr Montana.

Because all these issues are issues that are arising out of the affidavit of Mr Montana, to which I have responded. You know. And they have never bothered to ask me or communicate with me in any respect. But they went to the public and my view is that the issues that they were raising in any event at the time were not in the public interest.

They terminate my contract you know and they say, I have overstayed my welcome at PRASA. As I am not sure why that is, is of public interest.

**CHAIRPERSON:** Okay. To the extent or maybe let me start so that they can hear. I was saying we need to look at how to handle this, because while it is important that the Commission gets to know

*whatever challenges whistleblowers you know face, because maybe some of the things that the Commission is looking into might not have happened if there was a proper environment for whistleblowers ...*

**MS NGOYE:** *Ja.*

**CHAIRPERSON:** *And proper protection. And it may be that the Commission will need to make recommendations with regard to the protection of whistleblowers, to the extent that her statement might be making certain accusations against certain people. The question would be whether we have notified them.*

**CHAIRPERSON:** *It may be that it is something that we should hear, but after, after that be notified that she would be, she will be here on a certain date and she will talk about the challenges.*

**CHAIRPERSON:** *To put it that way, so you, you ought to get another opportunity. But after this due process. What do you think Mr Soni?*

**ADV VAS SONI SC:** *Yes Chairperson, I would with respect we had not thought about it. I didn't understand that ...*

**CHAIRPERSON:** *Yes.*

**ADV VAS SONI SC:** *Persons would be implicated. I thought it was going to be a general statement.*

**CHAIRPERSON:** *Ja.*

**ADV VAS SONI SC:** *Hadn't seen the statement.*

**CHAIRPERSON:** *Yes.*

**ADV VAS SONI SC:** *But, but with respect Chairperson you are absolutely correct.*

**CHAIRPERSON:** *Yes.*

**ADV VAS SONI SC:** *We don't want to be accused*

*...*

**CHAIRPERSON:** *Ja.*

**ADV VAS SONI SC:** *Of the same thing that they have been accused of.*

**CHAIRPERSON:** *Ja.*

**ADV VAS SONI SC:** *It is being unprocedural – being procedurally unfair to them.”*

#### 1A.1.2

#### **Statements made to the Zondo Commission**

**(Affidavit deposed to by Ms Ngoye dated 4 March 2021)**

- *“... I believed that my unlawful dismissal was related to the work I had been doing in fighting corruption and State Capture in PRASA”;*

- "...I have referred my unlawful dismissal to the Labour Court and, if I am reinstated as I have requested from the Labour Court, I may have to work with these people";
- "When I first came to the Commission, it was after a number of attempts to unlawfully push me out of PRASA for spurious reasons had failed";
- "On 29 January 2021, the Board of PRASA and the acting Group CEO of PRASA found a spurious reason to unlawfully push me out of PRASA";
- "The stratagem employed by the Board and the acting Group CEO is one that I have advised against throughout my career...";
- "The day after my unlawful dismissal, the Board in an act that reduced PRASA to an organisation suffering from an inexplicable bout of bitterness, launched a smear campaign against me...";
- "...it appears that the Board and the acting Group CEO relied on lies that are peddled by the discredited Mr. Lucky Montana...";
- "The Board...found that my suspension by Mr Lucky Montana was lawful. Why the Board felt it necessary to enquire into this matter of the suspension...is unknown to me...the Board and acting Group CEO thought this was a matter to consider under the circumstances and made the finding that they arrived at beggars belief and betrays their mala fides";
- "I do not know whether...the Board and the Group CEO are making common cause with Mr. Montana on his hitherto lone campaign against me; I however find it instructive. The Board and the Group CEO are making common cause with someone against whom I and others have given evidence of suspected large scale corruption in court...and in this Commission...With respect, this is very unfortunate and makes the prospects of PRASA under this leadership, desperate";



- "...That the Board believes that this transaction [the Swifambo transaction] was approved in 2015 when the review application was launched betrays their haste and zeal to defame me. It also betrays the Board's ignorance of the real mischief of the Swifambo transaction";
- "...What is curious though is that I have not heard of any member of the Board deposing to an affidavit and sharing with the Commission the information that they deem material and that I am said to have withheld from the Commission. I hope that in their response, this is one of the things the members of the Board will share with the Commission under oath";
- "In my view, because I am a whistleblower, and an employee of PRASA, my employer has decided to dismiss me unlawfully, launch a smear campaign against me and refuse to pay me my dues. PRASA has thus subjected me to an occupational detriment which is prohibited in terms of the Protected Disclosures Act, 26 of 2000..."

**1A.1.3 Statement made in the Labour Court under case number J111/21 – Section 18(3) Application**  
(Affidavit deposed to by Ngoye dated 8 March 2021)

- "In other words, the application for leave to appeal and probably the opposition to this application is part of the stratagem to out-litigate us. This shows a dogged intention to ruin our careers and waste public resources and constitutes an exceptional circumstance."
- "I respectfully submit that they have abused their positions and their power to start and perpetrate an unmeritorious fight against PRASA's own employees."
- "They have betrayed their commitment to conduct the affairs of PRASA in accordance with the Constitution, the enabling legislation and the PFMA."

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- *"This innuendo, which in my respectful submission falls, is intended to tarnish our reputation is still operative"*

**1A.1.4 Statements made directly to the Board**

(Letter dated 8 April 2021 – Response to Notice of intention to suspend)

- *"I Believe that the intention to suspend me and to institute disciplinary proceedings is yet another attempt by leaders of PRASA to push me out of PRASA as per my latest submission to the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State ('the State Capture Commission'). I had thought that the new leaders will not pursue these unlawful attempts that cause PRASA to incur fruitless and wasteful expenditure. I am deeply disappointed to notice that these attempts are unrelenting even after your appointment."*
- *"It is most unfortunate that in this entity, hardworking, competent and honest employees are cruelly pushed out whilst those that have a lot to answer for are not even asked to account and are the ones that are the chief participants in ushing us out."*
- *"In order to increase PRASA'S odds to unlawfully dismiss us, PRASA has now elected to institute disciplinary proceedings against us."*
- *"The selective discipline has not abated even under your brand new leadership."*

1A. (2) Such conduct is in conflict with the accepted norms of behaviour which brings PRASA and/or the Board of PRASA's image into disrepute.

1A. (3) The above detailed conduct by you constitutes gross misconduct and leads to an irretrievable breakdown of the relationship of trust



between you and PRASA., in particular because you undermine the integrity and authority of the board.

1. **CHARGE 1**

**(re: SA FENCE AND GATE CONTRACT NO. HO/SCM/225/11/2011)**

You breached Clause 31 of the PRASA Powers and Authority of the Board and Delegation of Authority, Clause 9.6 of the PRASA Supply Chain Management Policy, National Treasury's Irregular Expenditure Framework and/or the Public Finance Management Act 1 of 1999.

IN THAT

- 1.1. On or about 25 March 2013, PRASA and SA Fence and Gate Investment Holdings (Pty) LTD ("SA Fence and Gate") concluded contract number HO/SCM/225/11/2011 for National Fencing and Security Project. The contract amount was R209 874 559.79 and consequently fell within the delegation of the Board of Control.
- 1.2. During or about December 2014 and January 2015, you were appointed to act in the position of Group Executive Officer of PRASA.
- 1.3. On or about 20 January 2015, you approved to condone business to SA Fence and Gate for the supply, storage and installation of lights on the National Fencing and Security Project in the total amount of R58 153 296.72 (VAT inclusive).
- 1.4. You, in approving the condonation and/or extending the scope and amount of the contract,
  - 1.4.1. Disregarded the contract amount of R209 874 559.79 and continued to escalate the amount even though processes were not followed;

- 1.1.1. Disregarded the variation of R47 083 730.37;
  - 1.1.2. Disregarded the fact that there was no value for money;
  - 1.1.3. Acted without due regard to your responsibilities and the approval processes envisaged in the Delegation of Authority and the Supply Chain Management Policy;
  - 1.1.4. Acted beyond your authority;
  - 1.1.5. Committed an act of financial misconduct; and/or
  - 1.1.6. Acted in breach of your contract by *inter alia* ignoring PRASA's policies.
- 1.2. The above detailed conduct by you constitutes financial misconduct alternatively gross misconduct and/or dereliction of duties.

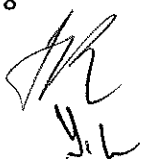
**2. CHARGE 2**

**(re: SWIFAMBO RAIL LEASING (PTY) LTD)**

You breached PRASA's Supply Chain Management Policy and/or the Public Finance Management Act 1 of 1999.

IN THAT:

- 2.1. On or about 27 February 2012, Mafori Finance Vryheid (Pty) Ltd submitted a bid for tender number HO/SCM/223/11/2011 for the provision of electric locomotives, under the company Swifambo Rail Leasing (Pty) Ltd ("Swifambo").
- 2.2. Swifambo's Bid did not comply with the requirements of the Request for Proposals in one or the following respects:



- 2.2.1. The subcontractor's letter of good standing with the relevant taxation authority in its country of origin was not submitted.
- 2.2.2. The BBBEE plan for procurement of goods and services for the duration of the contract was not submitted.
- 2.2.3. The Bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain.
- 2.2.4. There was no evidence in the Bid that supported Swifambo's assertion that it and its shareholders had previous experience in the rail industry.
- 2.2.5. Swifambo did not demonstrate in the BID that it had previous experience in the supply of locomotives nor did it show the capacity to manage a project of the size put out on tender.
- 2.3. Notwithstanding the above detailed non-compliance, the Bid Evaluation Committee recommended that Swifambo be appointed.
- 2.4. On 11 July 2012, the Corporate Tender and Procurement Committee ("CTPC") met and recommended that Swifambo be appointed in accordance with the recommendation of the Bid Evaluation Committee.
- 2.5. You participated in the decision of the CTPC to approve and/or recommend the appointment of Swifambo. Alternatively, when you became aware of the decision of the CTPC to approve and/or recommend the appointment of Swifambo, you as a member of the CTPC failed and/or neglected to report same.
- 2.6. You are responsible for the following failures committed by the CTPC:

- 2.6.1. The CTPC did not consider the procedures followed by the Bid Evaluation Committee in recommending the appointment of Swifambo.
- 2.6.2. The CTPC failed to identify that Swifambo's Bid did not comply with the requirements of the Request for Proposals.
- 2.6.3. The CTPC failed to identify the irrational scoring followed by the Bid Evaluation.
- 2.6.4. The CTPC continued to consider the issue of appointment of Swifambo despite the fact that the Bid Adjudication Committee had not met to consider the report of the Bid Evaluation Committee.
- 2.7. You in your capacity as a member of the CTPC failed to execute your duties and responsibilities in a diligent and honest manner and failed to protect the best interests of PRASA.
- 2.8. The above detailed conduct by you constitutes gross misconduct and/or dereliction of duties.

**3. CHARGE 3**

**(re: UMJANJI CONSORTIUM (PROVANTAGE) / SIYATHEMBANA / STRAWBERRY)**

You breached the PRASA Supply Chain Management Policy and/or the Public Finance Management Act 1 of 1999.

IN THAT:

- 3.1. Umjanji Consortium was awarded a tender on Media Advertising and Broadcasting Concession (Tender Number HO/CA/739/02/2010) following a tender closing date of 11 March 2010.



- 3.2. Umjanji Consortium was incorporated on 23 April 2010, a month after the closing date of the tender.
- 3.3. The tender was therefore awarded to Umjanji Consortium, an entity that did not exist at the time the tender closed and therefore did not comply with the requirements of the PFMA.
- 3.4. Subsequent to its appointment, Umjanji Consortium ceded and assigned certain rights and obligations to Strawberry and/or Siyathembana.
- 3.5. Strawberry was also a competitor in the tender to one of the constituent parts of Umjanji Consortium, Provantage, Provantage scoring 68.51 points and was the party who attended the compulsory briefing.
- 3.6. The cession agreements allowed PRASA, Siyathembana, Strawberry and/or Umjanji Consortium to circumvent the provisions of the PFMA.
- 3.7. You, as the Chief Executive Officer of Intersite (as a wholly owned subsidiary of PRASA), entered into a cession agreement/s which allowed PRASA, Siyathembana, Strawberry and/or Umjanji Consortium to circumvent a 'fair, equitable, transparent, competitive and cost effective' tender process in respect of the tender on Media Advertising and Broadcasting Concession (Tender Number HO/CA/739/02/2010).
- 3.8. The above detailed conduct by you constitutes financial misconduct alternatively gross misconduct and/or dereliction of duties.

4. **CHARGE 4**

(re: OBSTRUCTING PRASA INVESTIGATIONS / UNAUTHORISED REMOVAL OF COMPANY PROPERTY)

You breached your employment contract and PRASA's policies.

IN THAT:

- 4.1. On or around 2 November 2015, you uplifted a Corporate Tender Procurement Committee File ("the file") from PRASA's Supply Chain Department. The file contained, *inter alia*, the signed minutes of the Corporate Tender Procurement Committee of 11 July 2012 as well as the recording of such meeting.
- 4.2. To date you have failed to return the file/complete file to PRASA's Supply Chain Department.
- 4.3. As a result, the file (which contained the signed minutes and recording of the meeting of 11 July 2012 of the Corporate Tender Procurement Committee) cannot be found.
- 4.4. The removal of the file has compromised various investigations conducted in relations to the Swifambo tender.
- 4.5. The above detailed conduct by you constitutes gross misconduct.

5.A. **CHARGE 5A**

(re: STATEMENTS MADE BY YOU ABOUT SWIFAMBO RAIL LEASING (PTY) LTD) PROVISION FOR DIESEL – ELECTRIC LOCOMOTIVES TENDER NUMBER HO/SCM/223/11/2011)



- 5.A.1 On or about 8 April 2021, in your written representations to the Employer, you misled and/or deceived the Employer regarding your involvement, participation and the role that you played in the Swifambo transaction.
- 5.A.2 On or about 19 April 2021, in your letter to the Judicial Commission of Inquiry into Allegations of State Capture ("the Commission"), you misled and deceived the Commission regarding your involvement, participation and the role that you played in the Swifambo transaction.
- 5.A.3 On or about 4 March 2021, in your sworn affidavit to the Commission, you continued to mislead and deceived the Commission regarding your involvement, participation and the role that you played in the Swifambo transaction.
- 5.A.4 On or about 1 June 2021, you gave evidence under oath in the Commission, wherein you further continued to mislead and deceive the Commission regarding your involvement, participation and the role that you played in the Swifambo transaction.
- 5.A.5. Both at the Commission and in your representations to the Employer, you denied that you were present at the CTPC meeting of 11 July 2012 (which recommended that Swifambo be appointed as a preferred bidder) and/or that the said meeting took place.
- 3.A.6 Your above detailed conduct constitutes gross dishonesty and/or deceiving and misleading the Employer and/or gross misconduct and/or making false statements in public thereby bringing the Employer into disrepute.

## **6. GENERAL**

PRASA is of the view that the allegations of misconduct against you, cumulatively and/or individually, if proven, will lead to an irretrievable

breakdown of the relationship of trust between you and PRASA. In the circumstances, should you be found guilty, PRASA will request that the chairperson of the disciplinary hearing summarily dismisses you.

\*\*\*\*\*

  
yil

IN THE SECTION 188A (11) INQUIRY BY ARBITRATOR

"LR2"

BETWEEN

PRASA (PASSENGER RAIL AGENCY OF SOUTH AFRICA)

EMPLOYER

AND

MARTHA ONICA NGOYE

EMPLOYEE

---

**ARBITRATION AWARD**

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CASE NUMBER:

TCR014637

DATE/S OF ARBITRATION:

21,22,23 JUNE 2022  
6,7,8,14,15 SEPTEMBER 2022  
10,21,22, 23 NOVEMBER 2022  
26 JANUARY 2023

DATE CLOSING ARGUMENTS RECEIVED:

26 JANUARY 2023

DATE AWARD SUBMITTED:

30 JANUARY 2023

NAME OF PANELLIST:

IMTHIAZ SIRKHOT

Tokiso Dispute Settlement (Pty) Ltd

011 853 6300

info@tokiso.com

www.tokiso.com



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## INTRODUCTION AND DETAILS OF PARTIES

1. This matter was referred for an inquiry to Tokiso in terms of section 188 A (11) of the Labour Relations Act 66 of 1995 as amended, ("the LRA"). The employee was represented by Advocate Ben Prinsloo instructed by Haffagee Roskam Savage Attorneys. The employer was represented by Advocate Afzal Mosam SC duly assisted by Advocate Farzanah Karachi instructed by De Swardt Myambo Hlahla Attorneys. The proceedings were digitally recorded.
2. The parties submitted bundles of documents. Both parties submitted written argument and agreed to oral argument which was presented virtually on 26 January 2023.

## PRELIMINARY ISSUES

3. The employee was being subjected to a disciplinary hearing as a result of which the employee approached the Labour Court in terms of section 186(2)(d) of the LRA. The parties had then agreed that the employee would withdraw the section 186(2)(d) application provided that the employer withdraws the disciplinary hearing proceedings. The parties then elected to conduct the hearing in terms of the provisions of section 188 A (11).
4. After the parties had signed the necessary forms consenting to the section 188 A (11) proceedings, the employer added charge 5A. The employee raised two points *in limine* during the proceedings which I dismissed. The first point raised by the employee is that the employer does not have the right to add a further charge after the parties had signed the consent forms. At the time, there were only four charges.
5. The employee was alleging unfairness but there was no prejudice suffered by the employee as the employee was provided with sufficient opportunity to prepare a defence to the charge. The employee's submission was that charge 5A was not part of the charges and was not a charge that the employee had agreed to plead too. The prerogative to charge and discipline an employee rests with the employer. The formulation of the charges is also the prerogative of the employer and does not fall under the domain of the employee. The employer is at liberty to add charges at any stage provided that the employee does not suffer any prejudice. It is management's prerogative for the employer to charge the employee provided the employer allows the employee the opportunity to defend herself by stating a case in response to the allegations made against her. Nothing more is required of the employer.





6. The second point *in limine* raised by the employee before the cross-examination of the employee could commence in respect of charge 3 was that the employer could not cross-examine the employee on this charge as the employer had failed to present any evidence on this charge implicating the employee. The submission of the employee was that there no duty on the employee to prove her innocence and the employee had a right to remain silent so that the employee does not unjustly incriminate herself. One of the most fundamental principles of our law of evidence is that you must put a version to the witnesses called by the other party. The employer has every right to cross-examine the employee and place its version of events to the employee irrespective of whether the employer has failed to present evidence implicating the employee. The employee testified on charge 3 and the employer's right to cross-examine the employee cannot be curtailed or restricted in any form. The employee does not enjoy the right to remain silent. The cause of action pleaded by the employer is a breach of the employment relationship. The relationship between the employer and employee is one based on trust and cannot be equated to a criminal matter where one party applies for a discharge at the end of the State's case because the State has failed to prove its case beyond a reasonable doubt and the other party walks away from the process.

#### THE ISSUE TO DETERMINE

7. The purpose of this inquiry is to determine whether the employee is guilty or not of the following charges:

##### Charge 1 A

##### (Statements made by you about the current board)

You have breached your employment contract and PRASA's policies: in that you have made (and continue to make) disparaging statements in public and elsewhere about the current board of PRASA which statements have led to serious relationship disturbances and breach of the trust relationship. These statements include statements made at the Zondo Commission (Transcript of 23 February 2021). "Chairperson: Sorry, did you say, the current board. Ms Ngoye: The current board chair. Chairperson: Which you say is, has been at Prasa four months? Ms Ngoye: It's about-ja it's four months. Chairperson: You are saying your suspension by Mr Montana was... Ms Ngoye: was lawful. Chairperson: A number of years ago Ms Ngoye: Was lawful. Chairperson: Was lawful. Ms Ngoye: Yes Chairperson: Why did they have to go, go to that, go back that issue of you... Ms Ngoye: Well chair... Chairperson: Understand or do you not understand. Ms Ngoye: Ja, I don't know. And this is why I am saying you know the bitterness invoked this thing, they couldn't hide within them and therefore they felt that they even needed to go back to you know all those issues. Chairperson: And they were not there at the time. Ms Ngoye: And they were not there at the time. They were not there. Chairperson: They don't know the facts. Ms



*Handwritten signature and initials.*

Ngoye: Ja, they don't know the facts. They have never asked me; they have never engaged me. My view Chair and it's a strong view that I have and I believe that I have, is that they have been engaging with Mr Montana. Because all these issues are issues that are arising out of the affidavit of Mr Montana, to which I have responded. You know. And they have never bothered to ask me or communicate with me in any respect. But they went to the public and my view is that the issues that they were raising in any event at the time were not in the public interest. They terminated my contract you know and they say, I have overstayed my welcome at PRASA. As I am not sure why that is, is of public interest. Chairperson: Okay. To the extent or maybe let me start so that they can hear. I was saying we need to look at how to handle this, because while it is important that the Commission gets to know whatever challenges whistle blowers you know face, because maybe some of the things that the Commission is looking into might not have happened if there was a proper environment for whistle blowers... Ms Ngoye: Ja. Chairperson: And proper protection. And it may be that the Commission will need to make recommendations with regard to the protection of whistle blowers, to the extent that her statement might be making certain accusations against certain people. The question would be whether we have notified them. Chairperson: It may be that it is something that we should hear, but after that be notified that she would be, she will be here on a certain date and she will talk about the challenges. Chairperson: To put it that way, so you, you ought to get another opportunity. But after this due process. What do you think Mr Soni? Adv Vas Soni SC: Yes, chairperson, I would with respect we had not thought about it. I didn't understand that... Chairperson: Yes. Adv Vas Soni SC: Persons would be implicated. I thought it was going to be a general statement. Chairperson: Ja. Adv Vas Soni SC: Hadn't seen the statement. Chairperson: Yes. Adv Vas Soni SC: But, but with respect chairperson you are absolutely correct. Chairperson: Yes. Adv Vas Soni SC: We don't want to be accused... Chairperson; Ja. Adv Vas Soni SC: Of the same thing that they have been accused of. Chairperson: Ja. Adv Vas Soni SC: It is being unprocedural-being procedurally unfair to them".

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"I believed that my unlawful dismissal was related to the work I had been doing in fighting corruption and state capture in PRASA", "I have referred my unlawful dismissal to the Labour court and, if I am reinstated as I have requested from the Labour court, I may have to work with these people.", "When I first came to the Commission, it was after a number of attempts to unlawfully push me out of PRASA for spurious reasons had failed", "On 29 January 2021, the board of PRASA and the acting Group CEO found a spurious reason to unlawfully push me out of PRASA", "The stratagem employed by the board and the acting Group CEO is one that I have advised against throughout my career...", "The day after my unlawful dismissal, the board in an act that reduced PRASA to an organisation suffering from an inexplicable bout of bitterness, launched a smear campaign against me..." "It appears that the board and the acting Group CEO relied on lies that are peddled by the discredited Mr Lucky Montana..." "The board found that my suspension by Mr Lucky Montana was lawful. Why the board felt it necessary to enquire into this matter of the suspension... is unknown to me... the board and the acting Group CEO thought that this was a matter to consider under the circumstances and made the finding that they arrived at beggar's belief and betrays their mala fides", "I do not know whether... the board and the Group CEO are making common cause with Mr Montana on his hitherto lone campaign against me; I however find it instructive. The board and the Group CEO are making common cause with someone



*Handwritten signature and initials.*

against whom I and others have given evidence of suspected large scale corruption in court...and in this Commission...With respect, this is very unfortunate and makes the prospects of PRASA under this leadership, desperate.", "That the board believes that this transaction (the Swifambo transaction) was approved in 2015 when the review application was launched betrays their haste and zeal to defame me. It also betrays the board's ignorance of the real mischief of the Swifambo transaction", "What is curious though is that I have not heard of any member of the board deposing to an affidavit and sharing with the Commission the information that they deem material and that I am said to have withheld from the Commission. I hope that in their response, this is one of the things the members of the board will share with the Commission under oath", "In my view, because I am a whistle blower, and an employee of PRASA, my employer has decided to dismiss me unlawfully, launch a smear campaign against me and refuse to pay me my dues. PRASA has thus subjected me to an occupational detriment which is prohibited in terms of the Protected Disclosures Act, 26 of 2000..."

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**Statements made directly to the Board** (Letter dated 8 April 2021-Response to Notice of intention to suspend).

"I believe that the intention to suspend me and to institute disciplinary proceedings is yet another attempt by leaders of PRASA to push me out of PRASA as per my latest submission to the Commission of Inquiry into allegations of state capture, corruption and fraud in the Public Sector including organs of state ("the State Capture Commission"). I had thought that the new leaders will not pursue these unlawful attempts that cause PRASA to incur fruitless and wasteful expenditure. I am deeply disappointed to notice that these attempts are unrelenting even after your appointment". "It is most unfortunate that in this entity, hardworking, competent and honest employees are cruelly pushed out whilst those that have a lot to answer for are not even asked to account and are the ones that are the chief participants in ushering us out". "In order to increase PRASA's odds to unlawfully dismiss us, PRASA has now elected to institute disciplinary proceedings against us". "The selective discipline has not abated even under your brand new leadership".

Such conduct is in conflict with the accepted norms of behaviour which brings PRASA and/or the board of PRASA's image into disrepute.



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The above detailed conduct by you constitutes gross misconduct and leads to an irretrievable breakdown of the relationship of trust between you and PRASA, in particular because you undermine the integrity and authority of the board.

**Charge 1**

**(re: SA Fence and Gate Contract no. HO/SCM/225/11/2011)**

You breached clause 31 of the PRASA Powers and Authority of the Board and Delegation of Authority, clause 9.6 of the PRASA Supply Chain Management Policy, National Treasury's Irregular Expenditure Framework and/or the Public Finance Management Act 1 of 1999 in that:

- 1.1. On or about 25 March 2013, PRASA and SA Fence and Gate Investment Holdings (Pty) Ltd ("SA Fence and Gate") concluded contract number HO/SCM/225/11/2011 for National Fencing and Security Project. The contract amount was R209 874 559.79 and consequently fell within the delegation of the Board of Control.
- 1.2. During or about December 2014 and January 2015, you were appointed to act in the position of Group Executive Officer of PRASA.
- 1.3. On or about 20 January 2015, you approved to condone business to SA Fence and Gate for the supply, storage and installation of lights on the National Fencing and Security Project in the total amount of R58 153 296.72 (VAT inclusive).
- 1.4. You, in approving the condonation and/or extending the scope and amount of the contract.
- 1.5. Disregarded the contract amount of R209 874 559.79 and continued to escalate the amount even though processes were not followed;
- 1.6. Disregarded the variation of R47 083 730.37;
- 1.7. Disregarded the fact that there was no value for money;
- 1.8. Acted without due regard to your responsibilities and the approval processes envisaged in the Delegation of Authority and the Supply Chain Management Policy;
- 1.9. Acted beyond your authority;
- 1.10. Committed an act of financial misconduct; and/or
- 1.11. Acted in breach of your conduct by inter alia ignoring PRASA's policies.

The above detailed conduct by you constitutes financial misconduct alternatively gross misconduct and/or dereliction of duties.



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## **Charge 2**

### **(re: Swifambo Rail Leasing (Pty) Ltd**

You breached PRASA's Supply Chain Management Policy and/or the Public Finance Management Act 1 of 1999.

- 2.1. In that on or about 27 February 2012, Mafori Finance Vryheid (Pty) Ltd submitted a bid for tender number HO/SCM/223/11/2011 for the provision of electric locomotives, under the company Swifambo Rail Leasing (Pty) Ltd ("Swifambo").
- 2.2. Swifambo's bid did not comply with the requirements of the Request for Proposals in one or the following respects:
- 2.3. The sub contractor's letter of good standing with the relevant taxation authority in its country of origin was not submitted.
- 2.4. The BBBEE plan for procurement of goods and services for the duration of the contract was not submitted.
- 2.5. The bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain.
- 2.6. There was no evidence in the bid that supported Swifambo's assertion that it and its shareholders had previous experience in the rail industry.
- 2.7. Swifambo did not demonstrate in the bid that it had previous experience in the supply of locomotives nor did it show the capacity to manage a project of the size put out on tender.
- 2.8. Notwithstanding the above detailed non-compliance, the Bid Evaluation Committee recommended that Swifambo be appointed.
- 2.9. On 11 July 2012, the Corporate Tender and Procurement Committee ("CTPC") met and recommended that Swifambo be appointed in accordance with the recommendation of the Bid Evaluation Committee.
- 2.10. You participated in the decision of the CTPC to approve and/or recommend the appointment of Swifambo. Alternatively, when you became aware of the decision of the CTPC to approve and/or recommend the appointment of Swifambo, you as a member of the CTPC failed and/or neglected to report same.
- 2.11. You are responsible for the following failures committed by the CTPC:



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- 2.12. The CTPC did not consider the procedures followed by the Bid Evaluation Committee in recommending the appointment of Swifambo.
- 2.13. The CTPC failed to identify that Swifambo's Bid did not comply with the requirements of the Request for Proposals.
- 2.14. The CTPC failed to identify the irrational scoring followed by the Bid Evaluation.
- 2.15. The CTPC continued to consider the issue of appointment of Swifambo despite the fact that the Bid Adjudication Committee had not met to consider the report of the Bid Evaluation Committee.
- 2.16. You in your capacity as a member of the CTPC failed to execute your duties and responsibilities in a diligent and honest manner and failed to protect the best interests of PRASA.
- 2.17. The above detailed conduct by you constitutes gross misconduct and/or dereliction of duties.

### **Charge 3**

**(re:Umjanji Consortium (Provantage)/Siyathembana/Strawberry**

You breached the PRASA Supply Chain Management Policy and/ or the Public Finance Management Act 1 of 1999.

- 3.1. In that Umjanji Consortium was awarded a tender on Media Advertising and Broadcasting Concession (Tender Number HO/CA/739/02/2010) following a tender closing date of 11 March 2010.
- 3.2. Umjanji Consortium was incorporated on 23 April 2010, a month after the closing date of the tender.
- 3.3. The tender was therefore awarded to Umjanji Consortium, an entity that did not exist at the time the tender closed and therefor did not comply with the requirements of the PFMA.
- 3.4. Subsequent to its appointment, Umjanji Consortium ceded and assigned certain rights and obligations to Strawberry and/or Siyathembana.
- 3.5. Strawberry was also a competitor in the tender to one of the constituent parts of Umjanji Consortium, Provantage scoring 68.51 points and was the party who attended the compulsory briefing.
- 3.6. The cession agreements allowed PRASA, Siyathembana, Strawberry and/or Umjanji Consortium to circumvent the provisions of the PFMA.
- 3.7. You, as the Chief Executive Officer of Intersite (as a wholly owned subsidiary of PRASA), entered



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into a cession agreement/s which allowed PRASA, Siyathembana, Strawberry and/or Umjanji Consortium to circumvent a fair, equitable, transparent, competitive and cost effective tender process in respect of the tender on Media Advertising and Broadcasting Concession (Tender Number HO/CA/739/02/2010).

- 3.8. The above detailed conduct by you constitutes financial misconduct alternatively gross misconduct and/or dereliction of duties.

#### **Charge 4**

**(re: Obstructing PRASA investigations/unauthorised removal of company property)**

You breached your employment contract and PRASA's policies; in that:

- 4.1. On or around 2 November 2015, you uplifted a Corporate Tender Procurement Committee File ("the File") from PRASA's Supply Chain Department. The file contained, inter alia, the signed minutes of the Corporate Tender Procurement Committee of 11 July 2012 as well as the recording of such meeting.
- 4.2. To date you have failed to return the file/complete file to PRASA's Supply Chain Department.
- 4.3. As a result, the file (which contained the signed minutes and recording of the meeting of 11 July 2012 of the Corporate Tender Procurement Committee) cannot be found.
- 4.4. The removal of the file has compromised various investigations conducted in relations to the Swifambo tender.
- 4.5. The above detailed conduct by you constitutes gross misconduct.

#### **Charge 5A**

**(re: Statements made by you about Swifambo Rail Leasing (Pty) Ltd provision for diesel-electric locomotives tender number HO/SCM/223/11/2011.**

On or about 8 April 2021, in your written representations to the employer, you misled and/or deceived the employer regarding your involvement, participation and the role that you played in the Swifambo transaction.

- 5A.1. On or about 19 April 2021, in your letter to the Judicial Commission of Inquiry into allegations of state capture ("the Commission"), you misled and deceived the Commission regarding your involvement, participation and the role that you played in the Swifambo transaction.
- 5A.2. On or about 4 March 2021, in your sworn affidavit to the Commission, you continued to mislead and deceived the Commission regarding your involvement, participation and the role that you



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played in the Swifambo transaction.

- 5A.3. On or about 1 June 2021, you gave evidence under oath in the Commission, wherein you further continued to mislead and deceive the Commission regarding your involvement, participation and the role that you played in the Swifambo transaction.
- 5A.4. Both at the Commission and in your representations to the employer, you denied that you were present at the CTPC meeting of 11 July 2012 (which recommended that Swifambo be appointed as a preferred bidder) and/or that the said meeting took place.
- 5A.5. You above detailed conduct constitutes gross dishonesty and/or deceiving and misleading the employer and/or gross misconduct and/or making false statements in public thereby bringing the employer into disrepute.

## THE PLEADING

8. The employer withdrew charges 1A and 4. The employee pleaded not guilty to the remainder of the charges which was confirmed by the representative of the employee. I was satisfied that the employee understood the charges and recorded a plea of not guilty on the charges.

## EVIDENCE LED BY THE PARTIES

### Employer's case

9. **Mr Asif Rehman** employed as a Senior Manager of PRASA Technical SCM (Supply Chain Management) since 2013. At the time, Mr Sifiso Buthelezi was the chairperson of the Board of PRASA. Currently, Mr Leonard Ramathlhakane is the chairperson of the Prasa Board and was duly appointed in October/November 2020. During the period 2012 to 2015, the SCM policy of 2009 was applicable. The delegation of authority of the Divisional CEO at the time was up to R25 million. It was referred to the Board if the value was R100 million. The employee was appointed on 20 March 2012 as a member of the CTPC (Corporate Tender and Procurement Committee)<sup>1</sup>. There was a 2012 SCM policy but it was not approved and there are no minutes to support the approval of the policy. When he was appointed in 2013, the 2009 SCM policy was effective and no reference was made to the 2012 SCM policy.<sup>2</sup>

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<sup>1</sup> B 613

<sup>2</sup> D147





10. With regards to charge 1, (Fence and Gate Contract), as far as the delegation of authority is concerned, the 2009 SCM policy was applicable.<sup>3</sup> The condonation process with regards to the Fence and Gate Contract is a process governed by the irregular expenditure framework and which refers to irregular expenditure that must be condoned. The key requirements to condone expenditure that is irregular is whether the entity has experienced loss, who is responsible for the loss, the officials who caused the irregular expenditure, the consequence management must be meted out. The submission has to be submitted to the loss control function and internal audit to do an assessment of the condonation which is then submitted to a sub-committee of the Board for approval. If National Treasury legislation on the SCM policy is transgressed, the applicable body will approve that condonation.
11. In terms of the Fence and Gate Contract, the amount is R209 million and SCM policy dictates that it must be approved by the Board otherwise it is referred to the Board of Control. The procurement policy was followed by PRASA in terms of the SCM processes for the acquisition of service and goods. The first step in the procurement process is the development of the specifications. The supply chain division is responsible for service or goods, they will advertise a tender in the media and with the adverts are briefing sessions and compulsory briefing sessions, if the company has submitted a bid and fails to attend the compulsory briefing session, they will be disqualified. During the clarification process, the bidders are given the opportunity to raise questions, the bidders respond by submitting bids and they complete a submission register and the tender closes, the bid evaluation process commences and the evaluation team is appointed. SCM is responsible for the process. The Group CEO appoints the bid evaluation team who are then issued with letters of appointment. The bid evaluation team is a cross functional team consisting of members from Finance, SCM and Technical. The members of the BEC and BAC meet to evaluate the bids. The members have to sign attendance, declaration and confidentiality agreements. They are expected to uphold the confidentiality of the process and to conclude the evaluation according to criteria set out in the tender documents. The BEC evaluates bids, score the bids, and minute the sessions in terms of an outcome and develops a BEC submission report with an outcome which is then submitted to the BAC which at the time was known as the CTPC. The submission is tabled at the BAC and the members have the right to question the BEC in terms of the outcome and guide the BEC in terms of conformity to policy and what was required by the BAC. The BAC looks at requirements of the tender submission by the BEC and checks the compulsory requirements and whether the bidder has met the requirements. They check whether individual members are scoring consistently and

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<sup>3</sup> D147-148



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whether any points create red flags. They check on the requirements of tax clearance certificate and whether the bidder is compliant and whether the bidder has sufficient budget to fund the project and whether the bidder has complied with the requirements of the bid.<sup>4</sup> The BAC does not have delegation in terms of approval, they recommend to the delegated authority.

12. The employee was recommended and appointed as a member of the CTPC on 20 March 2012 by the then Group CEO, Mr Lucky Montana which appointment was accepted by the employee on 24 April 2012.<sup>5</sup>
13. **Sidney Khuzwayo** employed as a Senior Manager, Assurance and Projects since 1 September 2013. In 2010-2012, he was the Project Manager-SCM in preparation for the World Cup Project. He was given the title of Project Manager SCM to deal with the infrastructure.
14. Charge 2 which deals with the tender relating to the procurement of locomotives from Swifambo Rail Leasing (Pty) Ltd, D148. The CTPC meeting was held on 11 July 2012, there was an agenda and minutes of the meeting. Mr Donald Swanepoel was the secretary of the CTPC at the time. He had attended the meeting as the stand in secretary in place of Mr Swanepoel.<sup>6</sup> There were various items to be adjudicated on the day. Item 6 on the agenda was the provision and acquisition of diesel electric locomotives which was awarded to Swifambo. The word "done" is in his handwriting and indicates that the item was adjudicated on the day and this applied to item 6.<sup>7</sup> He made handwritten notes of the meeting at which the employee was present. The declaration of interest and confidentiality agreements were signed by the employee on 11 July 2012.<sup>8</sup> A resolution was taken at this meeting that it was conditionally approved to appoint Swifambo as the preferred bidder and that the Group CEO was to appoint a negotiating team to negotiate with Swifambo and if the negotiation was successful to elevate it to the Board for approval.<sup>9</sup> He had scratched out "recommended" and substituted it with "elevated". There was no difference in the wording, it moves it to the next level.
15. **Pieter Swart** is currently employed as the Project Manager and was employed as the Facilities Manager for the last 20 years. He was the third Project Manager for the Fence and Gate Contract. He had received a request from the previous arbitrator for PRASA

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<sup>4</sup>A193-A217

<sup>5</sup>B613-614

<sup>6</sup>B664

<sup>7</sup>B687

<sup>8</sup>B685-686

<sup>9</sup>B695



to verify the work done by Gate and Fence and BTKM were appointed as the verifiers. BTKM had to verify the equipment installed. The verification report was done by BTKM and he had verified the report.<sup>10</sup> The original budgeted amount for the lighting contract was R51 011 663.79 excluding vat. They verified that only 25 lights were installed at a cost of R1 644 406.00 and if the escalation is added, it amounts to R1 932 849.01. An amount of R47 034 028.70 was paid to SA Fence and Gate. The amount recoverable from SA Fence and Gate which is an overpayment made by the employer is R45 101 179.69.

### Employee's case

16. **Ornica Martha Ngoye** currently employed as the Group Executive Legal Risk and Compliance and has a BPROC, LLB and is an admitted attorney. The role entails looking after legal and compliance doing contractual work and the risk function. More than 44 employees report to her. The employee advises the Board in respect of legal and governance matters for the employer to comply with the prescripts of the law. There are various managers who report to the employee and they are responsible for identifying risks and putting in plans to mitigate those risks. The employee sits in Exco and in Board meetings. The employee commenced employment in 2011 and was then employed at Intersite which is a subsidiary of PRASA. In November 2011, the employee was appointed as the CEO of Intersite and remained in this position until 2014 when the employee based on operational issues was transferred to Group as the Group Legal and Compliance Executive and Risks was then added to the portfolio. In December 2014 to January 2015, the employee was requested by the then Group CEO, Mr Lucky Montana to act as the Group CEO and this was approved by the Board. This included the employee acting as Group CEO of PRASA Rail.
17. With regards to charge 1, a submission was brought to the employee by the Tender Procurement Committee requesting that condonation be approved, volume 3.<sup>11</sup> The condonation of the Gate and Fence Contract was made by the Board of PRASA which is the process in a case of this nature in terms of the policy of PRASA. If a matter is above the delegation of the CEO, it would go to the Board for condonation. Condonation cannot happen if there is no value for monies. The submission will go from the end user to the CTPC and then to the CEO who reported to the Board, nothing would go to the Board without it first going through the CEO. The condonation was required and was necessary. The employee was happy to support and approve the condonation. The

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<sup>10</sup> B500-504

<sup>11</sup> Page 152



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recommendation report was brought to the employee by the Chief Procurement Officer, Dr Josephat Phungula. The recommendation report stated that the particular transaction entered into for lights procured irregularly for R58 million had to be condoned to regulate it. At the time that this report was brought to the employee, the Fence and Gate Contract was extended and they had to regulate the irregularity as out of the R58 153 296.72 million, an amount of R33 million had already been paid by the employer. An amount of approximately R24 million was committed and the lights were required by the employer. The employee had visited the site in December 2014 and had concluded that having a fence without lights was meaningless. The employee was happy for the submission to be regularised as she did not see anything untoward as what was required to be done was in terms of National Treasury regulations.

18. For condonation to take place, the CTPC had to ensure that there was value for money and that there would be consequence management for the person who created the irregularity. There was a need for the employer to allow this particular transaction to go forward and be regularised. There had to be reasons and evidence shown to the CTPC and the end user had to explain to the CTPC and satisfy them as to what needed to be done. There were at the time a lot of irregularities and they had to beef up the policies. The employee did not approve the condonation and she had made comments. The consequences of the employee ticking "not approved" meant that the submission had to go back to be beefed up. The end user was required to go back and get more information as there was no budget. The employee needed to understand what was involved in the transaction and where will the budget come from as monies must be available to pay for the irregularity. The submission for condonation was given to the employee on 18 December 2014 and after she had rejected the request, it was referred back to Procurement. The employee was waiting for amendments to be made to the submissions so that it could be dealt with expeditiously. The employee started getting calls from Mr Montana and pressure was being put on her. The condonement was for the lights as the Gate and Fence Contract tender was approved. The lights were not included in the specification for the tender. The Project manager had entered into a contract with SA Fence and Gate to procure lights for the depot and had continued with the contract without taking it back to SCM and that is why it was irregular and subject to a disciplinary hearing for extending the contract irregularly. The PRASA technical division was responsible for this project and the R33 million and the other issues had occurred long before the employee was on the scene. There were no criminalities involved as not everything irregular is unlawful.
19. A revised request was brought to the employee in January 2015 and the employee was





satisfied with the request.<sup>12</sup> This request differed from the previous request as it disclosed where the budget was coming from and that monies were available to pay for the lights. The employee supported the submission as the work was done by the CTPC which the employee approved. The employee supported the transaction as it had to be regularised. The understanding that the employee had was that from a process perspective it still had to go to the Board, and at the time, the acting role of the employee had come to an end. The employee then reported to Mr Montana when he returned from leave and he was happy with her report.

20. It was only in May/June 2015 the employee realised through the media that something was wrong with the Fence and Gate matter as Mr Montana went to Hillbrow SAPS to get her arrested as the allegation was that she had unlawfully paid R58 million to Fence and Gate and that Fence and Gate had sponsored the Golf Day for the chairperson of the Board, Mr Popo Molefe.
21. The Steercom was a sub-committee of the Audit and Risk committee put in place by the Board to deal with issues of condonation because there were a lot of irregularities and a number of condonations had to be dealt with. A consequence of this is that this matter was referred to the Board and then brought to the sub-committee to be condoned so that there will be a record of the process that has been followed. The Board would be functus officio in relation to this matter.
22. There were issues between the end user and Gate and Fence regarding performance and payment as far as the contract was concerned. The matter was in court and the court ordered the employer to pay Fence and Gate and to appoint an engineer to assist with the project. After the employee went back to the legal department she had become aware of the issue of the lights, that either Fence and Gate delivered on the lights or reimbursed the employer. The lights were a contentious issue between the parties and which resulted in an arbitration award.<sup>13</sup> In terms of the arbitration award, Fence and Gate was ordered to pay PRASA the amount of R45 101 179.69. The employee has been sued by PRASA for this amount of monies. There was value for monies at the time that the end user sought approval for condonation. The employee had acted within her delegated authority of R100 million when she had acted as the CEO. The R33 million was already paid and there was a commitment to pay the R24 million. The CTPC are the gatekeepers and they had given the go-ahead and none of them had been charged with financial misconduct. The employee did not act in breach of the policies of the

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<sup>12</sup> Volume 3, page 158

<sup>13</sup> A379



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employer. The employee did not act in dereliction of her duties.

23. With regard to charge 2, there was a tender issued for the lease of 88 locomotives. There was a need for the locomotives and suppliers were requested to respond. The intention was to lease locomotives. There was an advert issued and there were responses to the advert. When the employee acted in December 2014 as the Group CEO, she had received a request from Dr Daniel Mthimkulu to approve pre-payment in the amount of R448 million. The employee was not happy to approve the payment without the signature of the CFO on the document. The Board ordered an investigation into this transaction. As members of the CTPC, they got together and none of the members of the CTPC could remember being part of the meeting that sat in 2012 regarding this transaction. There were issues around the tender when the employee was in the legal department, the tender value had increased from R3.5 billion to R5 billion. The employee together with her colleague, Mr Fani Dingiswayo looked at the transaction and asked questions about compliance and when they could not get the answers, they had requested to be excused.
24. After the forensic investigation, the Board decided to set this tender aside. An order was granted by the SCA and the Constitutional Court as the contract was riddled with unlawfulness and corruption. The allegation was that the employee was part of the committee (CTPC) that approved the contract. On 3 February 2015, in a media statement, the chairperson of the Board stated that the employee recommended the approval of the tender. The employer had received a negative finding from the Auditor General's office. There were findings of R500 million in irregular expenditure. This was during the period when Mr Popo Molefe was chairperson of the Board. The Public Protector at the time, Ms Thuli Madonsella found maladministration with the tender processes and following this report, the Board decided to conduct investigations.<sup>14</sup> The employee together with Mr Fani Dingiswayo was suspended by Mr Lucky Montana. The employee and Mr Fani Dingiswayo returned to work in August 2015 as Mr Montana left either in May or July 2015.
25. The legal department was asked by the Board to look at the engagement letter to be signed by the Board to appoint Werkmans Attorneys. The legal department had objected to the fees charged by Werkmans and the legal department were told that it is not their place to discuss fees. The legal department was overruled by the Board and the contact person at PRASA was the company secretary, Ms Lindi Kaya. The legal department was not let in as to what Werkmans were doing as they were not trusted by the Board.

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<sup>14</sup> Volume 3, page 164



The employee had provided information to Werkmans. After the legal department complained to the Chairperson of the Board that the work done by Werkmans was necessary, the legal department was then allowed to be involved in the investigation and this was after the Swifambo application was brought before the courts. The legal department was allowed to read the files at the offices of Werkmans and explained the procurement processes. There were a lot of transactions investigated by Werkmans. <sup>15</sup>

26. The employee was not part of the BEC that had recommended that Swifambo be appointed.<sup>16</sup> There was a signed agreement between the employer and Swifambo to purchase the locomotives and not to lease the locomotives as per the tender. If the BEC does a report on the leasing of the locomotives, the employer cannot purchase the locomotives. The employee was appointed as a member of the CTPC in 2012 and at the time the employee was at Intersite. It is a yearly appointment. On 10 July 2012, the employee received a meeting request from Mr Chris Mbatha, the Chief Procurement Officer to attend a CTPC meeting on 11 July 2012. These meetings are normally called by the secretary of the CTPC, Mr David Swanepoel. There was no agenda or pack of documents. The meeting was scheduled from 10am to 2pm but was less than an hour and a half. At this meeting, the employee had requested to be excused from further meetings of the CTPC after Mr Mbatha indicated the scope of the work that would be coming to the CTPC and that members must make themselves available. The employee had indicated to Mr Mbatha that she had a difficulty in participating because as the CEO of Intersite, she had duties and responsibilities. Mr Mbatha had understood and agreed. There was no objection to the request of the employee and the employee was excused. The members of the CTPC who were present at this meeting were Mr Tiro Holele, Mr Sipiwe Mathobela, Ms Maishe Bopape, Mr Chris Mbatha and Ms Jeritha Motshologane. The employee had received a letter from Mr Mbatha excusing her from attending further CTPC meetings but cannot find this letter. The employee had never attended another meeting of the CTPC. There were no other issues discussed at the CTPC meeting. There were no resolutions or submissions made. They were just informed by Mr Mbatha that critical matters were coming to the CTPC. The process of CTPC meetings was that members would be invited to a meeting and told that submissions will be made. Before the meeting, members will be provided with documents of what the CTPC will consider and these documents will be provided 2 or 3 days before the meeting. The secretary of the CTPC, Mr David Swanepoel will specify the matters that will be considered by the CTPC. There will be an agenda for the meeting.

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<sup>15</sup> Volume 4, page 150

<sup>16</sup> B615-622



27. A day before the meeting on 10 July 2012, the employee was in Mangaung, Bloemfontein for a meeting with the municipality.<sup>17</sup> On 11 July 2012, from 18h00 to 22h30, the employee was at a dinner and theatre.<sup>18</sup> The employee has seen the documents of a CTPC meeting held on 11 July 2012 at 10 pm.<sup>19</sup> The employee has not seen these documents before and knows nothing about these documents. The last meeting of the CTPC which the employee attended was on 11 July 2012.
28. It was a requirement that for every sitting of the CTPC meeting, you would sign a confidentiality agreement and a declaration of interest document. At the meeting of 11 July 2012, these documents were signed by the employee and by all other members of the CTPC as is the practice.<sup>20</sup> In 2015, when Mr Nkosinathi Khena was the acting CEO, during the forensic investigation conducted by Werkmans, the members of the then CTPC were given letters by Mr Khena asking for an explanation in relation to the Swifambo transaction and their involvement in the matter as CTPC members. The members to whom Mr Khena addressed the letter compiled a joint response.<sup>21</sup> The allegations made in charge 2 were taken from the affidavit of Mr Popo Molefe.
29. With regards to charge 3, the employee did not sign the cession agreement for Siyathembana as the Siyathembana contract was signed by the predecessor of the employee who was the CEO of Autopax which is also a subsidiary of PRASA. Intersite was an agent of PRASA. The contract was entered into by PRASA. A provision in the contract had allowed for cession. The consent for the cession was not granted by Intersite, it was sought by Umjanji Consortium. Mr Lucky Montana was the group CEO and also chairperson of the Intersite Board. A decision was taken by the Board of PRASA that Intersite had to sign the cession. The employee had raised an objection but was overruled by the Chairperson of the Board. The employee did not sign the cession agreement. The employee as the CEO of Intersite was authorised to sign the concession agreement regularising the agreement between PRASA, Strawberry and Siyathembana. The main agreement was entered into with Umjanji Consortium. The concession agreement was the main agreement for advertising. It would be done by Strawberry instead of Umjanji and Strawberry would provide guarantees, it was a replica of the main agreement.
30. The deed of cession was between PRASA, Umjanji and Siyathembana. At the time that the deed of cession was signed by the employees predecessor, Ms T.R. Kgaboesele in

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<sup>17</sup> Volume 4, page 11

<sup>18</sup> Volume 4, page 13

<sup>19</sup> Volume, pages 16-17

<sup>20</sup> D193-195

<sup>21</sup> D186



2011, the employee was an executive in the office of the CEO.<sup>22</sup> The main agreement which is the Media Advertising and Broadcasting Concession Agreement was signed with Umjanji Consortium.<sup>23</sup> The deed of cession is basically a document reflecting the rights ceded to another party, i.e. Siyathembani by Umjanji Consortium with the authority of PRASA.

31. The employee had signed the Media Advertising Concession Agreement on 31 August 2011 between PRASA and Strawberry Worx.<sup>24</sup> The instruction for the employee to sign the agreement came from the Board on the authority of the PRASA Board. If the employee did not sign the agreement, the employee would have been charged with insubordination. The rights and obligations of Strawberry in terms of the cession agreement will not be documented, it is a relationship that existed without proper documentation. The approval for the cession was granted by PRASA. Intersite was given a mandate to handle the advertising portfolio on behalf of PRASA and to collect the revenue on behalf of PRASA. Nothing had changed, it was the mirror image of the cession agreement entered into between Umjanji Consortium and Strawberry Worx. There was litigation between Primedia and PRASA, initially PRASA defended the litigation. Primedia had tried to set aside the tender and the agreement which was signed for a 5-year period. The litigation took forever as a lot of parties were joined in the litigation against PRASA. At the time the employee was the executive for Legal Risk and Compliance and was authorised to depose to affidavits. The legal advice obtained was to no longer challenge the application brought by Primedia. It was agreed that PRASA would terminate the relationship and go out to tender and commence a new process. The parties agreed that a new tender would be entered into.
32. With regards to charge 5A, the employee was not present at the meeting of 11 July 2012 which recommended that Swifambo be appointed as a preferred bidder. The employee is not aware if this meeting took place. The fact that there is a declaration of interest and confidentiality agreement is not proof that the employee was present at this meeting. The declaration of interest and confidentiality agreement referred to an earlier meeting which had no agenda and which was called by Mr Chris Mbatha. The value of the Swifambo transaction was too big for the employee not to remember. The employee did not write any letter on or about the 19 April 2021 to the Judicial Commission of Inquiry into allegations of state capture ("the Commission"). The employee had deposed to affidavits which were sent to 'the Commission'.

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<sup>22</sup> Volume 3, pages 118

<sup>23</sup> C1067

<sup>24</sup> C1112



33. Siyangena Technologies was a disclosure that the employee made to "the Commission". Siyangena was brought in by consultants to assist but there was no tender process that was followed. The forensic investigation identified 160 train stations and the figure taken to the Board was R1 billion which was approved by the CTPC and then increased by R800 million which was not approved by the CTPC. The employee deposed to the main affidavit regarding the contract with Siyangena and the contract was set aside. There was an appeal lodged by Siyangena at the SCA in August 2022. The employee assisted the legal team in putting together the affidavit.
34. Judge Makhubela was the chairperson of the Board of PRASA in 2018 after Mr Popo Molefe's appointment had ended. The Judge had sought to negotiate and settle litigation with a supplier, Siyaya, for R60 million and had excluded the legal department. The Attorneys were meeting with the Judge and when the legal department approached the Attorneys they were informed that the Judge barred them from speaking to the legal department. The settlement was made an agreement of court and the legal department were unsuccessful in challenging the agreement. The matter was escalated to the Minister and the legal department sought permission to rescind the judgement. The Minister granted the necessary permission and the monies were returned to PRASA.
35. The Administrator, Mr Bongasizwe Mpondo was appointed at PRASA after the Minister had dismissed the interim Board. The Administrator had replaced the Board of Control. The legal department was concerned about the appointment of the Administrator and the placing of PRASA under administration. The employee advised the Administrator that she was concerned about the lawfulness of his appointment and that it would be challenged if people were not happy with his decisions. The employee prepared a memorandum together with her colleague, Mr Fani Dingiswayo and sent it to the Administrator.<sup>25</sup> The Administrator was not happy and suggested to the employee that she discuss the memorandum with the DG of Transport. The employee received a final written warning from the Administrator in relation to a matter that did not warrant a final written warning. The Administrator had accused the employee of dereliction of her duties. There was a court decision and the appointment of the Administrator was questioned, the judgement nullified the appointment of the Administrator and declared the appointment unlawful.
36. The employee was requested to review an agreement between DBSA and the employer in order to transfer procurement to DBSA for a three-year period which amounted to over R6 billion. The employee highlighted this transaction and was not going to forward

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<sup>25</sup> Volume 2, page 380.



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the contract to the CEO for signature without checking that the processes were followed. The employee was placed on special leave. The employee submitted an affidavit to "the Commission" in relation to the DBSA and Fence and Gate matter. Mr Lucky Montana had reported the employee to SAPS as a result of which the employee was investigated by the Hawks. The investigation was conducted into the employee for unlawfully approving the Fence and Gate matter in the amount of R58 million. The employee made a statement which she provided to the Hawks.<sup>26</sup> Nothing had come out of the investigation as the prosecutor could not find any grounds to proceed against the employee.

37. The employee was dismissed by Mr Montana on 19 May 2015 because she challenged Mr Montana as he summarily dismissed Mr Fani Dingiswayo who reported to the employee. The employee had called Mr Montana and had exchanged words with Mr Montana as the employee sanctioned the work of Mr Dingiswayo and knew exactly what he was doing. The employee went to the CCMA and to the Board and the Board instructed Mr Montana to conduct investigations. The employee and Mr Dingiswayo were reinstated and then suspended by Mr Montana. When Mr Montana had left, Mr Nathi Kena was appointed as the acting CEO. The Board instructed Mr Kena to investigate the allegations against the employee and why she was dismissed. Mr Kena informed the Board that the employee was dismissed by Mr Montana because of the Fence and Gate matter but the letter of dismissal given to the employee says nothing about the Fence and Gate matter.
38. The contract of employment of the employee was terminated on 29 January 2021 on the basis that the employee was appointed in terms of a five-year contract which had come to an end. The employee was reinstated after the employee had brought an urgent application to the Labour Court. The employer applied for leave to appeal the judgment. The parties settled on the basis that the employee will be reinstated while the leave to appeal was pending. The leave to appeal was dismissed by the Labour Court and the employer petitioned the LAC and leave to appeal was granted. The employee returned to work on 6 April 2021 and was then suspended.<sup>27</sup> This culminated in a disciplinary enquiry which by agreement between the parties was processed as a Section 188A (11) arbitration. The employee was interviewed by the SIU in June 2021 regarding the Swifambo matter. All Boards of PRASA were aware of the litigation matters as the employee submitted reports to the Board. The last meeting that the employee had with the Board was on the 28 January 2021 and the employee was told that her report will

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<sup>26</sup> Volume2, page 868

<sup>27</sup> Volume 4, pages 1310-1319



be discussed in committee but that opportunity never materialised.

39. **Mr Fani Dingiswayo** employed at PRASA from 2015 and resigned in January 2021. He was the General Manager Group Legal Services and at times acted as Group Executive Legal Risk and Compliance and as Company Secretary. Legal services were internal lawyers and different people would consult them. They assisted SCM (Supply Chain Management) with the drafting of their policies. A new Board arrived in August 2014 and at this time there was a draft audit from the Auditor General's Office and they found that there were irregular transactions in the amount of R550 million. The Board was concerned about these irregularities and worried that there may be other irregularities. The Board formed a special committee to deal with irregular transactions and to consider them and if necessary to condone them. The Steercom was mandated by the Board to do this work. The Board had other subcommittees which made recommendations to the Board and the Board can decide whether to accept these recommendations. The Steercom did not make recommendations, they decided and approved, as the Steercom had done in the Fence and Gate matter, condonation was required for R58 million which was approved by Steercom.<sup>28</sup> The Steercom was delegated with the powers of the Board to approve condonations. Whatever was decided by Steercom was the decision of the Board and it was signed by the Company Secretary. The Company secretary gave advice and signed the resolutions.
40. He had questioned the irregularity of a transaction involving Prodigy Training which he believed was irregular and had brought the irregularity to the attention of Mr Lucky Montana. He had refused to take part in further meetings regarding this particular contract and had then received an email from Mr Montana complaining about his views and he was then summarily dismissed.
41. As regards the Swifambo contract, the legal department was approached by Dr Mthimkulu to draft an extension to the contract which value had been increased from R3.5 billion to R5 billion. They had met with Ms Brenda Molongeta who drafted the original contract and they had raised concerns whether the procurement procedure was followed as they could not find any budget for the purchase. Ms Molongeta confirmed that she was aware of the problems and that one of the conditions for signature of the contract was the approval of the Minister of Finance in terms of the PFMA. Ms Molongeta further confirmed that the budget was removed from the contract and that either Mr Mbatha or Mr Montana had done so and then signed the contract.

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<sup>28</sup> A324-325



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42. The Swifambo transaction was flagged by the Auditor General as a material irregularity. The Auditor General wrote to the Board and the Board decided to investigate the employees involved in the Swifambo transaction. The Board had mandated Werkmans Attorneys to conduct an investigation and he received the findings on or about 9 October 2019.<sup>29</sup> What was recommended was the E300 locomotive but the sale agreement provided for an E400 locomotive which was the incorrect height for South African conditions. The findings by Werkmans were preliminary but no further investigation was done because the documents submitted were not reliable. The documents referred to were written by someone who is not a PRASA employee. The BAC report was called the CTPC report. He was suspended after he gave an opinion that the appointment of the Administrator at PRASA was unlawful. He was not surprised when he heard that the employee was dismissed, if he had not resigned, he would have been dismissed.
43. **Brian Gerald Alexander** is currently the Acting Group CFO. He has been employed by PRASA since 2011. He was an advisor to the FCIP (Finance, Capital Investment and Procurement Committee) and accepted the Group Treasury role in 2012. He was not present at the meeting of 11 July 2012 where the Swifambo transaction was approved. He is not aware of any meeting of the CTPC which was held on 11 July 2012.

## SUMMARY OF ARGUMENTS

44. Both parties have submitted written argument which I have taken into consideration in arriving at my decision.

## FINDINGS ON GUILT

45. PRASA was established in terms of Section 22 of the Legal Succession to the South African Transport Services Act 9 of 1989. Its statutory mandate is to provide, inter alia, commuter rail services in the public interest throughout the Republic and is funded by the National Treasury through allocations made to the Department of Transport.
46. The subject matter of two of the charges have already been determined by the courts, i.e. charge 2 by the SCA and charge 3 by the High court.<sup>30</sup> Charge 1 was the subject matter of an arbitration which award was made in favour of PRASA but which has since been taken on review.<sup>31</sup>

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<sup>29</sup> Volume 4, page 147

<sup>30</sup> B595, C1023

<sup>31</sup> A347



47. What I have to decide is whether the employee was trying to disassociate herself from the acts of misconduct or whether the employee was an integral part of the acts of misconduct.
48. The events leading to the first charge occurred from December 2014 to January 2015 when the employee was acting as the GCEO. The events leading to the second charge occurred on 11 July 2012 and the events leading to the third charge occurred on 31 August 2011. An obvious difficulty which affects allegations and oral evidence closes on recollection of events which occurred several years ago is the unreliability of human memory. Memory is fallible. The best approach to adopt is to place little if any reliance on witness recollections of what was said in meetings and conversations and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that all oral testimony serves no useful purpose though its utility is often disproportionate to its length. This is illustrated by the employee testifying over 4 days and being subjected to lengthy cross-examination. But its value lies largely, in the opportunity which cross-examination affords to subject the documentary record to initial scrutiny, rather than in the testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his/her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth. It is in this way, that I intend to approach the evidence in the present matter.
49. Charge 1 deals with the SA Fence and Gate Investment Holdings and will be referred to as the 'SAFG' for ease of reference. This was the initial tender secured from PRASA to provide and install security fencing at eight depots nationally to the value of R209 874 559.79 million which was approved by the PRASA Board. Subsequently, the Board approved a variation of R47 083 730.37 resulting in a new contract value of R256 958 290.17. The employee was not involved in this procurement of fences from SAFG. The contract between the parties was signed on 25 March 2013 by Mr Montana. There was no evidence before me that the prices as quoted by SAFG yielded no value for money. This contract was later expanded and or changed by Mr Palello Lebaka to include perimeter solar lighting at the various depots referred to above totalling a further R58 153 296.72 inclusive of vat. It was not in dispute that Mr Lebaka was dismissed because he did not have the delegation to make such a decision. It was this irregularity committed by Mr Lebaka that the employee had to condone in her capacity as acting GCEO. The employee was condoning irregular expenditure and not unauthorised expenditure as the approximately R24 million had already been committed. The employee was not authorising any payments.



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50. The employee received a recommendation report in December 2014 from the Chief Procurement Officer which stated that the reason for condonation was as follows, "PRASA has already committed to the supply and install lights at the depots where the National Fencing and Security Project is being implemented for a total value of R58 153 296.72 (inclusive of Vat). R33 833 032.00 of this commitment has already been paid to SA Fence and Gate".<sup>32</sup> This would imply that the outstanding amount of approximately R24 million had already been committed to SAFG. The employee rejected the first report as there was no budget allocated and there was no scope. The employee visited the site and satisfied herself that there was a need for the lights and relied on the fact that the CTPC had considered whether there was value for money and approved the recommendation. The employee approved the second recommendation report on the basis of the section that stated the scope of the goods sought to be condoned, where the lights will be delivered, the need for the lights, the costing, the available budget, the implications if not approved and the approval of the CTPC. This was not the final approval as it was then referred to Steercom where the condonation was approved by resolution. This motivation was sent to Steercom on 1 December 2015 and approved by Steercom on 4 April 2016. Steercom recorded the resolution as follows: "The Committee having considered the transgression of the irregularity presented by Management resolved to approve the condonation".<sup>33</sup> Mr Rehman testified that Steercom supported the condonation, they could not approve the condonation. This is highly improbable as Steercom passed a resolution and the evidence of Mr Rehman is contrary to the evidence of Mr Fani Dingiswayo who testified that Steercom was delegated by the Board to consider and approve condonations and that Steercom was set up because of the number of irregularities that required condonation. This explains why the Company Secretary was present at the Steercom meeting as the resolution passed by Steercom was the resolution of the Board. The evidence of Mr Dingiswayo was not disputed or challenged by PRASA. Mr Swart confirmed that Steercom's approval constituted a sub-committee of the Board approving the condonation. The condonation was to condone the decision to pay for the lights that were still to be installed. The blame for the payment being made without verification that the lights were installed cannot lie at the door of the employee as the employee was not involved in the payment of monies to SAFG. The requirements for condonation were accordingly satisfied.
51. It was only a year later that it was discovered that only 25 lights to the value of R1.9 million were installed and that PRASA had paid R47 million, leaving PRASA out of

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<sup>32</sup> Volume 3, page 153

<sup>33</sup> A325



pocket by R45.1 million. The reason why this was discovered a year later, is because PRASA had failed to appoint a consultant who in turn would appoint an engineer to ensure that the work was being done by SAFG. The appointments were a condition stipulated in the contract signed between PRASA and SAFG. Consultant means the most senior manager or project manager appointed by PRASA to manage the execution of contract work on its behalf. Engineer means any person appointed by the consultant from time to time to supervise and take charge of the contract. It took a court order which was the result of litigation between PRASA and SAFG for PRASA to appoint BTKM to verify the work that had already been done by SAFG. Mr Swart was only appointed in or about late 2016 as the project manager. Mr Swart together with the engineering company BTKM had verified the work done by SAFG which led to the discovery that PRASA had paid SAFG for work that was not done. In terms of the contract, SAFG would submit what work had been done and PRASA's engineer would ensure that the work had been done, PRASA's engineer would then issue a certificate and on the strength of this certificate, SAFG would be paid.

52. The conduct of economic and business affairs whether in the corporate world or government requires the observance of certain rules of the game for activities to proceed in an orderly fashion. Rules and regulations are required to maintain a sense of fair play and to keep greed, predatory and other unsavoury human instincts in check. The rules, regulations and procedures were clearly set out in the contract but were not observed by PRASA. The employee's tenure as acting GCEO ended in January 2015 once Mr Montana returned from leave. The execution of the contract between PRASA and SAFG had nothing to do with the employee as the employee had duly performed her duties as the acting GCEO in condoning the irregular expenditure. Nothing more was required of the employee. Accountability has to do with the fact that for the proper observance of rules, regulations and procedures as set out in the contract, those administering the rules must be held responsible and accountable for their actions. The failure to observe the rules, regulations and procedures as set out in the contract occurred under the continued tenure of Mr Montana as GCEO. PRASA has elaborate rules and procedures in place regarding procurement and the administering of contracts signed with suppliers but it would seem that these rules and procedures are seldom invoked. The reason behind such blatant unconcern is easy to understand since corruption has permeated certain levels of the hierarchy.
53. In order to demonstrate that the employee is not a credible witness relating to the SAFG charge, PRASA in its written submissions raised the issue of the employee having made previous inconsistent statements and that the employee did not raise certain versions at



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the Zondo Commission into State Capture. None of these alleged inconsistent statements were put to the employee in cross-examination. The employee has submitted that these alleged previous inconsistent statements should not be considered and should be ignored as the employee was not given the opportunity to respond to these allegations or contextualise what she had said previously. I agree that the employee should have been granted the opportunity either to explain or deny the previous inconsistent statements. However, I see no reason to ignore the previous inconsistent statements made by the employee as the employment relationship is one based on trust. The allegations have been made by PRASA and the employee was granted the opportunity to respond by way of written submissions. The previous inconsistent statements referred to by PRASA arose in the Nkosi-Thomas (Arbitrator) arbitration heard in July 2020 where the employee admitted that she approved and not recommended the condonation. At the Zondo Commission, the employee stated that she approved but later when it transpired that what the employee had condoned was part of the original tender, the employee requested condonation of what she had done. At this arbitration, the employee stated that she was part of the administrative chain before the board could condone the irregularity. Furthermore, at this arbitration, the employee stated that it went to the committee of the board and not the board itself and that the employee did not mention at the Nkosi-Thomas arbitration or the Zondo Commission that there was a delegation and/or resolution by the board for Steercom to deal with condonations. Steercom approved the condonation because the employee's approval of the recommendation report was not final. I have found that based on the documentary evidence supported by oral evidence that Steercom had approved the condonation and that the employee had followed due process. The employee's evidence, in this respect, has been reliable despite the submission of PRASA that it is in apparent conflict with other evidence.

54. I find that the decision of the employee to approve the recommendation report was lawfully taken and within her authority in line with PRASA's policies. The employee could not have been acting beyond her authority as the condonation was approved by Steercom. There was no financial misconduct on the part of the employee. The losses which PRASA suffered cannot be attributed to the employee.
55. Accordingly, I find the employee not guilty on charge 1.
56. I intend to deal with charges 2 and 5A together as I believe that there is an unnecessary splitting of the charges as the evidence in the one charge proves the other.



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57. Charge 2 relates to the notorious locomotives that were acquired by PRASA from Swifambo which could not fit into the rail structure in South Africa. Both the High Court and the Supreme Court of Appeal, respectively found that Swifambo's bid did not comply with the requirements of the request for proposals in a number of material respects. In paragraph 47 of the SCA judgement, the SCA stated that, "while it is true that PRASA's current locomotives is old and must be replaced, it assists no one to spend public money on new locomotives that are not fit for purpose". In paragraph 124 of the High Court judgement, Francis J states that "it is clear that Swifambo was disqualified from the onset and this relates to the issue of the tax clearance certificate. They simply did not have one and should never been allowed to bid. This was overlooked by the BAC". Charge 5A follows from this charge and deals with the version of the employee to the Zondo State Capture Commission of Inquiry and PRASA as the employer.<sup>34</sup>
58. The question in charge 2 is whether the employee was part of a CTPC meeting, ten years ago, on 11 July 2012, that allegedly resolved to recommend/approve Swifambo as a preferred bidder. Both parties submitted that I should make a credibility finding regarding the evidence of the employee and that of Mr Khuzwayo who testified on this charge. Due to the effluxion of time, it would be unfair and unjust for me to do so as at some stage I would have to conclude that either they may have a moral disposition to lie, or some undefined capacity to err, or it may be partisan bias, or it may be faulty observation, or it may be defective recollection or any other quality. There is sufficient documentary evidence before me to decide this question. The employee denied at the Zondo Commission that she had attended any CTPC meeting on 11 July 2012 until the confidentiality agreement and declaration of interest which the employee signed on 11 July 2012 was presented to the employee. These declarations were obtained from Werkmans Attorneys and made available to the employee in September 2021. It emerged through evidence that this was a general declaration that would be signed before any CTPC meeting. The employee relied on the signed declarations to revive her memory which gave rise to her version of events put before this arbitration. Mr Khuzwayo relied on his handwritten notes and not his memory to enunciate his version of events on 11 July 2012.
59. The Swifambo deal was marred with illegality and fraud. Mr Dingiswayo testified how the Swifambo contract had been edited by either Mr Montana or Mr Chris Mbatha to exclude provision for the Minister of Finance's approval. Werkmans had conducted an investigation into PRASA and concluded that neither the BAC report nor the CTPC minutes could be relied upon. The BAC report was unsigned and its author is unknown.

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<sup>34</sup> B534, 595



Mr Khuzwayo was not aware of who drafted the BAC report and neither does PRASA. The BAC report was dated 23 June 2012. The BAC report said that the CTPC had adjudicated and approved the recommendation of the BEC on 12 July 2012. The CTPC sat on 11 July 2012 and not on 12 July 2012 let alone prior to 23 June 2012 which is the date of the BAC report. Werkmans said in their letter to PRASA that "the authenticity was questionable".<sup>35</sup> Mr Khuzwayo and Mr Rehman acknowledged the discrepancy and agreed that it was inconsistent. The then Public Protector, Advocate Thuli Madonsella has also previously concluded that official PRASA documents were unreliable.<sup>36</sup>

60. Mr Khuzwayo testified that there was one CTPC meeting on 11 July 2012 that started at 10am and was finalised at 9pm. According to the documentary evidence, there were two CTPC meetings on 11 July 2012. The first CTPC meeting was referred to as an extraordinary meeting and was scheduled to start at 10am and was held at room E124, East Wing, PRASA House, 1040 Burnett Street, Hatfield.<sup>37</sup> This is the CTPC meeting which the employee testified that she had attended at the invitation of Mr Mbatha and there was no agenda for this meeting which lasted until 11am. The employee submitted a calendar invite from Mr Mbatha to attend a CTPC meeting from 10am to 2pm and that at 6pm she had a dinner and theatre invite.<sup>38</sup> There were others invited to this meeting which was to start at 10am, i.e. Mr Kabelo Mantsane, Ms Phindile Kaunda, Ms Nonhlanhla Dube and Mr P. Kaunda who were unable to attend this meeting. The only apology recorded in the minutes was for Mr Kabelo Mantsane.<sup>39</sup>
61. There are several glaring discrepancies and material differences between the formal and handwritten minutes of the CTPC meeting of 11 July 2012 which started at 10am. The handwritten minutes do not indicate that Swifambo was going to be approved as the preferred bidder. The formal minutes according to Mr Khuzwayo were typed by Mr Donald Swanepoel and the resolution in the formal typed minutes records the resolution as being, "Concurred with the recommendation that Mafori Financing t/a Swifambo Rail Leasing be appointed as a preferred bidder and the GCEO appoint a negotiations team to negotiate with Swifambo Rail Leasing and if the negotiations are successful the negotiated agreement be submitted to the GCEO for recommendation to the (FCP) Board of PRASA". The formal typed minutes are not dated or signed and does not record the deliberations of the committee. The formal typed minutes made no reference to the conditional nature of the approval.

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<sup>35</sup> Volume 4, page 150

<sup>36</sup> Volume 3, page 325

<sup>37</sup> B667

<sup>38</sup> Volume 4, page 14

<sup>39</sup> B643



62. Mr Khuzwayo's handwritten notes in the CTPC meeting of 11 July 2012 at 10am record a heading titled "Recomposition of Committee" with three names following under, i.e. # Kameshni recused due to being a contract worker, # Martha# CEO to be, # Ningi Shezi- new appointment. Mr Khuzwayo denied that the hashtag symbol meant that the employee and Kameshni and Ningi Shezi were recused from the meeting. The version of Mr Khuzwayo is that these are symbols that he used randomly. The further version of Mr Khuzwayo is that these were announcements that he had made in the meeting. Mr Khuzwayo confirmed that Kameshni did not attend the meeting and that he just announced her recusal but he insisted that the employee and Ningi Shezi were present in the meeting. Mr Khuzwayo did not explain why Kameshni was recused from this meeting as her name does not appear on the list of invitees for this meeting on 11 July 2012 at 10am,<sup>40</sup>. There were 5 others present in the meeting of the 11 July 2012 and Mr Khuzwayo could not explain why only the name of the employee and that of Ningi Shezi were recorded under "Recomposition of Committee". The formal typed minutes makes no mention of the "Recomposition of Committee", it records that the employee and Ningi Shezi were present and does not record that Kameshni was recused from the meeting. Mr Khuzwayo also insisted that Mr Brian Alexander was present at the CTPC meeting on 11 July 2012 in order to do a presentation. This was denied by Mr Alexander. It is highly improbable that Ningi Shezi was present at this meeting as at the time she was the chairperson of the BEC and Mr Rehman and Mr Khuzwayo confirmed that if a person sits on a BEC for one bid, they cannot sit on the CTPC for the same bid, this would be akin to Ningi Shezi sitting in at the CTPC meeting and considering her own BEC report. When it was pointed out to Mr Khuzwayo that Ningi Shezi was the chairperson of the BEC, he confirmed that she could not sit on the CTPC, as she would have to recuse herself. It was then put to Mr Khuzwayo that the employee was also not at this meeting as she had told Mr Mbatha that due to her workload as the CEO of Intersite, she needs to be excused from further meetings of the CTPC and that is the reason why Mr Khuzwayo had recorded "CEO to be" next to her name. Mr Khuzwayo had no knowledge of this conversation and insisted that the employee was not recused from the meeting. Under cross-examination, Mr Khuzwayo confirmed that he could not recall whether Mr Mbatha announced that the employee was recused from the meeting of 11 July 2012. The handwritten notes of Mr Khuzwayo corroborated the version of the employee that the committee was recomposed and that the employee, Kameshni and Ningi Shezi were recused from this meeting.

63. Mr Alexander testified that his presentation report was discussed and finalised at the next CTPC meeting on 19 July 2012 and that he recommended that General Electric

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<sup>40</sup> B643





and not Swifambo was better value for money. It is common cause that the employee did not attend this meeting. This further corroborates the version of the employee that after she spoke to Mr Mbatha she was excused from attending further meetings of the CTPC. If the employee was still a member of the CTPC, the employee would have been expected to attend the CTPC meeting on 19 July 2012 or tender an apology for her non-attendance. The employee was not missed at the CTPC meeting on 19 July 2012 as it was known by Mr Khuzwayo and Mr Mbatha who attended the CTPC meeting on 19 July 2012 that the employee was excused from further CTPC meetings. The minutes of the meeting of 11 July 2012 were not presented at the sitting of the CTPC meeting on 19 July 2012 for approval as would be the expected process to allow for any corrections to be made. Mr Khuzwayo did not testify to any interaction that he had with the employee during the course of the CTPC meeting that would indicate that the employee was present at this meeting. The minutes record that a legal opinion was sought if PRASA could proceed with the Gauteng train simulator. If the employee was present at this meeting, one would have expected Mr Khuzwayo to direct this question to the employee and request timelines from her as to when the CTPC can expect such an opinion.

64. The CTPC meeting of 11 July 2012 which started at 10am was a "sham" as it is not in dispute that at the CTPC meeting on 19 July 2012, the CTPC resolved to appoint Swifambo under dubious circumstances. The decision regarding Swifambo was already taken at the meeting on 11 July 2012 there was therefore no necessity for the CTPC to meet again on 19 July 2012 to consider the same bid.
65. The second CTPC meeting took place on 11 July 2012 at 10pm and the venue for this meeting was the 3<sup>rd</sup> Floor, West Wing, PRASA House, 1040 Burnett Street, Hatfield.<sup>41</sup> For this meeting there was an agenda.<sup>42</sup> This corroborates the version of the employee that there was no agenda for the extraordinary CTPC meeting called by Mr Mbatha at 10am. This was an ordinary meeting of the CTPC. Mr Khuzwayo confirmed that on the formal typed minutes, he had recorded the word, "done" on the right-hand side of the page in his handwriting, which means that the item was adjudicated on the day.<sup>43</sup> When the starting time of this CTPC meeting of 10pm was put to Mr Khuzwayo, he testified that there was an error in the minutes and that there was only one CTPC meeting which started at 10am. There was no error in the starting time of the meetings, there were two CTPC meetings, the one at 10am and the second at 10pm which were held at different venues. There were formal typed minutes of the CTPC meeting held at 10pm on 11 July 2012 which were not signed and records the date of the next meeting as being the 2

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<sup>41</sup> B644

<sup>42</sup> B645

<sup>43</sup> B665



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July 2012. There is no list of names of who had attended this meeting at 10pm. It cannot be a continuation of the earlier meeting of the CTPC at 10am because that meeting was finalised at 9pm. There were recordings of these minutes as Mr Donald Swanepoel typed the formal minutes from the recordings. These recordings were not presented as evidence.

66. There is no evidence before me to indicate that the employee was part of any meeting that approved Swifambo as the preferred bidder, neither, is there any evidence before me to indicate that the employee misled PRASA regarding her involvement in the Swifambo transaction or that the employee had sent a letter to the Zondo Commission. The employee deposed to an affidavit which was sent to the Zondo Commission. Based on my finding in charge 2, the conduct of the employee did not constitute dishonesty or any attempt to mislead PRASA.
67. Accordingly, I find the employee not guilty on charge 2 read together with charge 5A.
68. The employee objected to being cross-examined with regards to charge 3 as the employer had failed to lead any evidence in respect of charge 3. It is not in dispute that the charge sheet refers to the employee being charged with signing a cession agreement. It is further not in dispute that the employee did not sign the cession agreement but had signed a concession agreement. PRASA has submitted that this is merely semantics as there is no difference between the cession and concession agreement. At first glance, it would seem that it is nothing but semantics but on closer reading of the agreements, it reveals much more than just "semantics".
69. The cession agreement was set aside by the High Court in 2021 as it was unlawful. It is common cause that Umjanji Consortium was awarded a tender on media advertising and broadcasting concession following a tender closing date of 11 March 2010. Umjanji Consortium was incorporated on 23 April 2010, a month after the closing date of the tender. The tender was therefore awarded to Umjanji Consortium, an entity that did not exist at the time the tender closed and therefore did not comply with the requirements of the PFMA. Subsequent to its appointment, Umjanji Consortium ceded and assigned certain rights and obligations to Strawberry and/or Siyathembana. The cession agreements allowed PRASA, Siyathembana, Strawberry and/or Umjanji Consortium to circumvent the provisions of the PFMA.
70. In the cession and concession agreements, PRASA was always the client duly represented by Intersite Asset Investments. The employee as the CEO of Intersite was



duly authorised to sign agreements on behalf of PRASA. The media advertising and broadcasting concession agreement between PRASA and Umjanji Consortium was duly signed by the predecessor of the employee, Ms Tumisang Kgaboesele on 27 July 2011, C1088. The deed of cession between PRASA and Umjanji Consortium and Siyathembana Trading was duly signed by Ms Tumisang Kgaboesele, the predecessor of the employee on 3 August 2011.<sup>44</sup> The media advertising concession agreement between PRASA and Strawberry Worx was signed by the employee as CEO of Intersite on 31 August 2011.<sup>45</sup>

71. There is a fundamental difference between a cession and a concession. A cession is a legal act as rights are passed in a cession agreement from one party to the other. In terms of the cession agreement, PRASA consented in writing that Umjanji Consortium may cede all of its rights it has to advertise in all buses owned by Autopax and PRASA to Siyathembana. Umjanji in turn ceded all its rights to advertise on these buses owned by PRASA and Autopax to Siyathembana who accepted this cession. A concession agreement occurs after the cession was agreed to between the parties. A concession agreement imposes obligations. The concession agreement signed by the employee came into being after rights were ceded from Umjanji Consortium to Strawberry Worx.<sup>46</sup> The cession agreement between Umjanji Consortium and Strawberry Works had already been signed. The purpose of the concession agreement signed by the employee was to assign obligations to Strawberry Worx as set out in clause 8.<sup>47</sup> If the employee did not sign the concession agreement, Strawberry Worx would enjoy the rights in terms of the cession agreement but would have no obligations.

72. Section 188A is not a criminal trial, and the way charges are described is less important than an overall assessment of whether there is evidence of misconduct. If the main charge is not proved, but an attempt to commit such misconduct is established, the employee maybe found guilty of an attempt on that same charge. I have found that a cession agreement is fundamentally different from a concession agreement and there is no evidence before me of the employee signing a cession agreement. Had the employee not signed the concession agreement, Strawberry Worx would have enjoyed the rights in terms of the cession agreement without having any obligations. PRASA had the right to amend the charges at any stage but chose not to do so. In order to prepare a response or answer to allegations of misconduct, the employee must have reasonable certainty

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<sup>44</sup> Volume 3, page 125

<sup>45</sup> C1112

<sup>46</sup> C1064

<sup>47</sup> C1100



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about what the charge is. In this regard, information on the charge sheet must be sufficient to allow the employee to prepare a real and not an illusory defence.

73. Accordingly, I find the employee not guilty on charge 3.
74. It is common cause that this inquiry cannot constitute an occupational detriment. The employee seeks a ruling on further instances of occupational detriments which the employee experienced during the course of her employment.
75. The employee submitted that she had brought an application in terms of section 186(2)(d) of "the LRA" alleging that PRASA's disciplinary hearing on the present charges constituted a violation of the PDA (Protected Disclosures Act). PRASA had then proposed that the disciplinary hearing will be terminated provided that the employee withdraws the section 186(2)(d) application. This agreement had culminated in the parties signing an agreement to proceed in terms of section 188A (11) and the employee expects this agreement to be honoured. In the matter of *Tsibani v Estate Agency Affairs Board and Others*<sup>48</sup>, the court held that "Section 188A (11) is not designed or intended to determine whether the facts constitute a protected disclosure as contemplated by the PDA or not, and if not, for an internal disciplinary hearing to proceed. The section provides for an inquiry into allegations pertaining to the conduct or capacity of an employee".
76. My jurisdiction in respect of the Section 188A inquiry is from "the LRA" as the inquiry is a statutory process and is not obtained from an agreement entered into between the parties. I am not bound by this agreement, if the employee is aggrieved, then her remedy lies elsewhere.
77. This inquiry does not have jurisdiction to consider or to pronounce on the further occupational detriments to which the employee has been subjected too or the protected disclosures that the employee has made to other bodies.
78. As regards the issue of costs in this matter, costs do not necessarily follow the result. All employees of PRASA involved in the Fence and Gate matter and the Swifambo matter had been disciplined or resigned. The employee is no exception. Employers should not be burdened with cost orders and should be allowed to exercise their management prerogative, in the same manner, that employees should be allowed to exercise their rights to be treated fairly and justly. To grant costs in this matter would

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<sup>48</sup> (J642/2021) ZALCJHB 150.



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mean that taxpayers carry the costs ultimately.

79. PRASA did not act frivolously or vexatiously in disciplining the employee. PRASA had a reasonable apprehension that the employee was involved in acts of misconduct and as a State Entity it had a duty to exercise its management prerogative and clear up any apprehension/misapprehension that it had regarding the conduct of the employee. In this respect, the conduct of PRASA was not extraordinary or worthy of rebuke.

#### **AWARD**

80. I find the employee, Ms Martha Onica Ngoye not guilty on charge 1, not guilty on charges 2 and 5A read together and not guilty on charge 3.
81. No order is made as to costs.



**IMTHIAZ SIRKHOT**  
**Arbitrator**

