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CC:

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Tuesday, 24 January 2023

Dear Sirs,

LETTER OF DEMAND

URGENT LEGAL INTERVENTION, SERVICE LEVEL PLANS AND THE DEVOLUTION OF THE PASSENGER RAIL AGENCY OF SOUTH AFRICA

1. We are appointed as the attorneys for #UniteBehind.
2. Enclosed undercover hereof is our client's letter addressed to both President Cyril Ramaphosa and Minister of Transport, Fikile Mbalula, setting out our client's respective demands as it pertains to the Passenger Rail Agency of South Africa ("PRASA"), for your urgent attention.
3. For your ease of reference, we have sought to reiterate our client's demands below, as they pertain to President Cyril Ramaphosa and Minister of Transport, Fikile Mbalula respectively:



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Equity Director and Founder: Rui JC Lopes | Paralegal: Michael Jenkins | Candidate Attorney: Jaimin Patel | Candidate Attorney: Mfihlakalo Kubeka | Candidate Attorney: Mandla Mogola | Legal Secretary: Aroona Bodhi | Legal Secretary: Matome Modiba | Business development and Marketing Assistant: Hayrah Sheik



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- 3.1 As it pertains to the Minister of Transport, that by no later than close of business on **14 February 2023**, the Minister of Transport:
- 3.1.1 Dissolve the current Board of Directors of PRASA and appoint a new board based on the requirements of the Companies Act, 71 of 2008, the Legal Services Authorities Act, 39 of 1987 and the Constitution of the Republic of South Africa, 1996, ensuring that the appropriate level of skills and integrity are present on the Board;
 - 3.1.2 Instruct the (new) Board of Directors to complete service level plans with all municipalities who have commuter rail services within their jurisdiction, in line with the National Land Transport Act, 5 of 2009;
 - 3.1.3 Pursuant to the *Siyangena* case, instruct the (new) Board of Directors to request the South African Institute of Civil Engineering to appoint an independent engineer as required by the order of the High Court and, by imputation, the Supreme Court of Appeal;
 - 3.1.4 Act immediately to work with the City of Cape Town and Gauteng Province to ensure that devolution occurs at the earliest opportunity.
 - 3.1.5 That either PRASA be placed under business rescue or judicial management, or that an application be made to court to place PRASA under the jurisdiction of a special officer of the court. In such application, the Board must be declared delinquent directors;
 - 3.1.6 Forward this letter and brief the new Minister of Transport, when they are inducted.
- 3.2 As it pertains to President Cyril Ramaphosa, we demand that you place an immediate and high priority on solving the crisis at PRASA and:
- 3.2.1 Appoint a new Minister of Transport, in your anticipated Cabinet reshuffle, who is professionally, politically and ethically capable of overseeing and implementing the demands set out in 3.1 above; and
 - 3.2.2 Forward this letter to the new Minister upon their induction and make sure that they prioritise our demands contained herein.
4. Where these demands are not met, we hold instruction to hold legal proceedings against you.
5. We look forward to your responses and, in the interim, our client's rights remain strictly reserved.

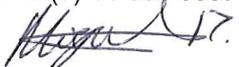
Yours Sincerely,



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Dear President Ramaphosa and Minister Mbalula

LETTER OF DEMAND: URGENT LEGAL INTERVENTION, SERVICE LEVEL PLANS AND THE DEVOLUTION OF THE PASSENGER RAIL AGENCY OF SOUTH AFRICA

1. Commuter rail services are necessary for people to live a fulfilled life. Among other uses, South Africans need rail services to go to work, school, hospital, social grant offices, religious gatherings, cultural and recreational activities, and to visit their families and friends. Trains are essential for a dignified life and to realise the rights to work, education, religious and cultural freedom, health, a healthy environment, safety, and many others. The state has to

respect, protect, promote and fulfil all these rights necessary to realise equality, dignity and freedom. Thus, a safe, efficient, affordable, effective, quality and ecologically sustainable commuter rail service is constitutionally protected.

2. Spatial justice as well as social and economic development requires a highly functional rail transport service and system. Such a service can only be provided if it is governed and managed in an ethical, accountable, open and professional manner that places the needs of people first. Diligence and urgency must accompany the work of the Passenger Rail Agency of South Africa (PRASA) because it is the state-owned entity tasked with the provision of commuter rail services.
3. PRASA's most recent Annual Report showed that it is a failed SOE. It has failed the people in providing affordable, reliable commuter rail services:
 - 3.1. 18 of 40 lines around the country were operational.
 - 3.2. Of 590 stations, only 134 were functional; "the other 323 stations had been vandalised."
 - 3.3. Passenger numbers have dropped by 97% since 2011.
 - 3.4. "Only 800 coaches in PRASA's fleet of over 4 000 coaches are operational and in service. Of the remaining coaches, about 80% are not in use because they either need to undergo light or heavy maintenance and upgrades, or have to be disposed of."¹
 - 3.5. PRASA failed to meet 81% of its performance targets in 2021/22.
4. It's mainline long-distance travel service is in an even worse state. Between 2009 and 2021:
 - 4.1. There was a 99.5% decrease in passengers and a 98.5% drop in service (6600 trips to 99).
 - 4.2. The number of routes dropped from 21 to 4.
 - 4.3. The percentage of trains on time dropped from 60% to 0%.
 - 4.4. There was 98.8% drop in revenue.²
5. Minister Mbalula, an ineluctable process of collapse and destruction of the commuter rail service has occurred under your gaze, even with recent patchwork improvements all hailed as

¹ Tebogo Tshwane. 13 Dec 2022. "Prasa botches critical R7.5bn train repair tender." *AmaBhungane*. <https://www.news24.com/fin24/companies/amabhungane-prasa-derails-critical-r75bn-train-repair-tender-20221213>

² Parliamentary Monitoring Group. PCOT. "Recovery of mainline train services: PRASA briefing; Marine Pollution (Prevention of Pollution from Ships) Amendment Bill: deliberations." Online: <https://pmg.org.za/committee-meeting/36073/>; Portfolio Committee on Transport. 22 Nov 2022. *Youtube*. Online: https://www.youtube.com/watch?v=NcSfpSe8wRo&ab_channel=ParliamentoftheRepublicofSouthAfrica

major successes. This destruction should have been evident to every President, Minister of Transport, Parliament, and responsible provincial and local authority since at least 2008.

6. PRASA must comply with the Constitution, the National Land Transport Act, the Legal Succession Act, the Companies Act the Public Finance Management Act, the Promotion of Administrative Justice Act, along with procurement legislation and the King IV Code for state-owned entities. None of these constitutional and legal prescripts and imperatives have been followed by the most important state-owned public transport agency since its inception.
7. We write this letter to you for immediate and urgent attention to address the abysmal oversight and governance of commuter rail services.
8. The Legal Succession to the South African Transport Services Act (Legal Succession Act) is constitutionally deficient to ensure the optimal functioning of a modern commuter rail service for the following reasons:
 - 8.1. In contrast to the Companies Act (Act 71 of 2008), the roles, responsibilities, duties and obligations of the PRASA Board of Control and its Directors are not codified in the Legal Succession Act.
 - 8.2. The LSA does not set out a statutory standard of conduct for the Board of Control as contained in section 76 of the Companies Act.
 - 8.3. Further, there are no “business rescue” provisions in the LSA. (By comparison, see Chapter 6 of the Companies Act.) Rather, the LSA requires an Act of Parliament to place PRASA under judicial management in the event of its dysfunction. Parliament is not best-suited to address the emergency steps required to rescue commuter rail services. Judicial management is a cumbersome process. Your past lack of action illustrates this reality.
 - 8.4. Mr Mbalula, you previously attempted to circumvent the inadequacy of the LSA in order to address the emergency at PRASA by appointing Mr. Bongisizwe Mpondo as its “administrator”. He assigned both the oversight and management powers of a complex state-owned entity to a single person. Mr. Mpondo immediately abused these powers.

We challenged his decision, taking it on review. The Western Cape High Court found your decision and this mechanism to be unlawful.³

- 8.5. Parliament has itself failed in every respect to address gross mismanagement, maladministration, fraud, corruption, state capture, and the safety and security of commuters, employees, PRASA property, plants and equipment. As stated in the Report of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (“State Capture Commission Report”):

...[P]eople who wielded public power, whether as leaders of the ruling party, Cabinet Ministers, Members of Parliament or members of law enforcement agencies were obstructive, refused to assist or simply stood by when there was a duty, whether constitutional, legal or moral, to actively assist the Board. This is part of the sad story of PRASA.⁴

The situation at PRASA is too grave to leave to a compromised Parliament and ineffective Transport Ministry.

9. You have several options at your disposal to ensure that governance at the rail agency is placed on a sound footing including: first, apply the Companies Act (Act 71 of 2008) to PRASA, which allows the entity to be placed in business rescue; second, you can use the LSA to place PRASA under judicial management through an Act of Parliament; or third, you can rely on the common law and constitutional powers of the courts to appoint a “Special Master” to take control of the rail agency.
10. Thus, we demand that, by 14 February 2023, the Minister initiates the following:
- 10.1. Dissolve the current Board of Control and appoint a new board based on the requirements of the LSA, Companies Act, and the Constitution, ensuring that the appropriate level of skills and integrity are present on the Board, and

³ #Unitebehind v Minister of Transport and Others [2020] 4 All SA 593 (WCC)

⁴ State Capture Commission Report, p.615 para 1715

- 10.2. Instruct the (new) Board of Directors to complete service level plans with all municipalities who have commuter rail services within their jurisdiction, in line with the National Land Transport Act 5 of 2009, and
 - 10.3. Regarding the *Siyangena* case, instruct the (new) Board of Directors to ask the South African Institute of Civil Engineering to appoint an independent engineer as required by the order of the High Court and, by imputation, the SCA, and
 - 10.4. Act immediately to work with the City of Cape Town and Gauteng Province to ensure that devolution occurs at the earliest opportunity.
 - 10.5. Place PRASA under business rescue or judicial management, or
 - 10.6. Apply to the court to place PRASA under the jurisdiction of a special officer of the court. In such application, the Board members must be declared delinquent directors.
 - 10.7. Forward and brief this letter to the new Minister of Transport, when they are inducted.
11. President Ramaphosa, we demand that you place immediate, high priority on solving the crisis at PRASA and:
- 11.1. Appoint a new Minister of Transport in your anticipated Cabinet reshuffle who is professionally, politically and ethically capable of overseeing and implementing our demands.
 - 11.2. Forward this letter to the new Minister upon their induction and make sure that they prioritise our demands contained herein.
12. If our demands are not met, #UniteBehind will institute legal proceedings against you to have these demands met and to #FixOurTrains, and our attorneys hold instructions to do so. Our demands and timeframes apply equally to the new Minister of Transport when they are appointed.
13. The “**PRASA Integrated Annual Report 2021/22**” (Annual Report 2021/22) which includes the **Auditor-General’s Report to Parliament** as well as other reports, presentations and documents make a clear and compelling case for immediate legal intervention. These, along with our demands, are detailed in the Annexure attached. Our demands are substantiated by this evidence. If you would like any further information or access to any documents (although all are publicly accessible), please let us know.

Sincerely,



Zackie Achmat



Zukiswa Vuka



Lederle Bosch



Joseph Mayson

Annexure:

Detailing the Our Demands: Dysfunction, Corruption and Need for Action at PRASA

The PRASA Board of Control is not Lawfully Constituted

1. PRASA has failed as a going concern because it has been blighted by a crisis in governance and oversight. Over the last three years under your watch, PRASA's accounting authority, the Board of Control led by its Chairperson, Mr Leonard Ramathlakane has failed in every respect to maintain minimum legal and ethical standards at the rail agency. The PRASA Board has failed in its basic governing duties as outlined in Section 195 of the Constitution, the King IV Report, and, its supplementary code for the governance of state-owned entities. The Annual Report 2021/22 confirmed this egregious conduct. Every Board of Control since the inception of the rail agency in 2008/9 (with the exception of the Molefe Board's attempts at probity) has failed abjectly as accounting authorities.
2. The PRASA Board of Control must be composed of no more than ten persons including a number of members who must possess specific expertise and experience because of the complexity of managing the agency. Statutory positions on the PRASA Board include representatives of Treasury, the South African Local Government Association (SALGA) and the Department of Transport. **Currently, there appears to be no representative from SALGA.**
3. Critically, the Legal Succession Act specifically sets out in Section 24(2) that: "At least three of the members of the Board of Control **shall have expertise and experience in the management of a private sector enterprise**". (Emphasis added) It is evident to us that an insufficient number of Board members have the requisite experience. Parliament, Treasury and the Auditor-General have always insisted that the government representatives be appointed to ensure that the Board is legally constituted. However, they have failed to ensure that the lawfulness of the Board's appointments included people with experience and expertise to manage a state-owned entity. Such private sector management experience and expertise is indispensable to PRASA's governance and operations.

4. The rail agency commands billions of rands of assets including land; it also requires the management of significant engineering work for capital investment projects and rolling-stock maintenance. PRASA's various income streams including its property assets, commuter fares, operational and capital subsidies from the state all require detailed oversight. In addition, PRASA employs about 17 000 people and deals with hundreds of suppliers, vendors and other service providers. The rail agency has failed in the governance and management of all these areas of core business. Simply put, this has occurred in part because there are no persons with the experience or expertise in the management of a major national enterprise.
5. The PRASA Board of Control for the most recent period under discussion comprised of Mr. L. Ramatlakane (Chairperson), Ms. N. Mpye, Mr. D. Mohuba, Mr. M. Mukhuba, Ms. M. Nokwe-Macamo, Advocate S. Sethene, Mr. T. Zulu (Treasury), Mr. X. George (SALGA), Ms H. Ngwenya and Mr. N. Makaepa (DoT). Nothing in the report or on PRASA's website indicates that any of the members of PRASA's Board of Control have expertise or experience in **managing** a complex private or public sector entity.
6. This is not only a contravention of the Legal Succession Act, the Public Finance Management Act, but also of the King IV Code and the Companies Act, which appears to govern PRASA subsidiaries such as PRASA Crescent or Autopax (currently in business rescue). The Ministers and Cabinet have failed to appoint Boards according to the law.
7. In addition, Mr. Xolile George, whose appointment is a statutory obligation as the SALGA representative, did not attend thirteen of the fourteen PRASA Board meetings. Neither did he participate in a single meeting of the Finance, Capital, Investment and Procurement Committee (FCIP). The FCIP is arguably one of the most important committees of the Board because of its role in revenue management, capital spending and procurement oversight. Every one of these functional responsibilities require an intensive duty of care but the Board failed to ensure that the FCIP operates within the bounds of legality. Mr. Makaepa, the representative of the Department of Transport, was absent for four Board meetings and eight Audit and Risk Committee meetings. Therefore, every decision taken by the Board, the ARC and the FCIP is unlawful and open to challenge because the Board and at least two of its committees were unlawfully constituted. Regrettably, you have not addressed these facts in your most recent report to Parliament.

8. Another disturbing omission from the Annual Report was any reference to a Company Secretary except for remuneration. PRASA has had a significant turnover of company secretaries almost all who have served in acting positions. A company secretary is essential to ensure good governance because the assigned person will guide the board on duties, responsibilities, powers, relevant laws, record Board and Audit Committee decisions, keep records, certify financial statements and undertake the duty of holding Board members accountable when they act improperly or unlawfully. The omission of a declaration by the Acting-Company Secretary Ms. Mapula Thebethe or the then-Company Secretary, Mr. Sandile Dlamini regarding the completeness of the financial statements in the 2021/2022 Annual Report is a telling oversight.
9. In any application to the High Court, it is incumbent upon yourself to ask for the Board members to be declared delinquent Directors not only because of the destruction and corruption at PRASA but because of the deliberate subversion of its governance and management systems.

The PRASA State Capture Report and its future

10. The State Capture Commission Report represents a watershed moment in the history of South Africa. It laid bare the depth of state capture and the destruction of professional, competent, qualified, experienced and ethical leadership at state-owned entities such as Transnet, Eskom, South African Railways, SARS and PRASA.
11. The State Capture Commission investigated less than 1% of the cases of state capture, corruption and fraud at PRASA because of their complexity as well as time and resource constraints. However, its investigations were detailed and its findings were no less damning. PRASA's Annual Report for 2021/22 responded to its investigations, findings and recommendations in this manner:

The State Capture commission has recommended the following: "that a special commission of inquiry be appointed to examine specifically the following matters: why PRASA was allowed to slide into almost total ruin, who should be held responsible for that and who could have benefited from that unacceptable state of affairs". PRASA awaits further information on the establishment of the aforementioned special commission. (Emphasis added)

12. True. But, not the whole truth. The State Capture Commission Report on PRASA raises a number of extremely serious questions and findings against Ministers, the Cabinet, Parliament, Boards, rail agency executives, businesses and politically-connected business-owners.⁵ In its Annual Report, the PRASA Board does not address this or any of the findings and recommendations in the State Capture Report apart from one. Probably the least effective recommendation of the State Capture Commission was to appoint another commission of inquiry into PRASA. However, the PRASA Board leaves out Chief Justice Zondo’s reasoning for the appointment of a special commission into its affairs including its current regime. The final recommendation reads in full as follows:

*I conclude this Report with the following observation. Many, many days of the Commission's hearings were devoted to allegations of the capture of PRASA and strident denials thereof, especially by Mr Montana. However, I am left with the uneasy perception that there is much about the ills at PRASA that has not yet been uncovered. That perception is reinforced by what I have set out in the previous sections relating to the instability at PRASA that was exacerbated by the unacceptable delays having a permanent Board and a permanent Group CEO appointed for more than three years and five years, respectively, **and also what appears of late to be a harking back to the Montana-style of leadership. I worry that if I do not make a general recommendation about these matters, it is unlikely that PRASA will recover.** Having given anxious consideration to the issues, I have decided that a special commission of inquiry be appointed to examine specifically the following matters: why PRASA was allowed to slide into almost total ruin, who should be held responsible for that and who could have benefitted from those that unacceptable state of affairs.*
(Emphasis added)

13. When referring to the Montana-style of leadership, the State Capture Commission Report imputed the conduct of the current Board with an authoritarian leadership bent on unlawfully removing executives who would not tow the line. On 30 January 2021, Martha Ngoye, Tiro Holele and Nathi Khena, three PRASA executives were unlawfully dismissed from PRASA. As you are aware, both Ngoye and Holele testified at the State Capture

⁵ As you are aware, Chief Justice Zondo reiterated findings of your unlawful appointment of an “administrator” by the Western Cape High Court, and, further found you in dereliction of your duty to ensure that PRASA employed a permanent CEO.

Commission. Ngoye, one of the most senior professionals, the group executive for PRASA Legal, Risk and Compliance is one of the most persistent resisters to state capture and corruption. She has literally saved PRASA billions of rands from unlawful and politically connected contracts.

14. The Board created a fiction of the temporary employment of Ngoye, Holele and Khena through fixed-term contracts without any evidence of such contracts. As you must be aware, the Labour Court did not take kindly to the Ramatlakane Board's unlawful actions. Moreover, the three executives had been full-time employees for many years. Ngoye, Holele and Khena were reinstated and the Board members were held jointly and individually liable for costs along with PRASA. The costs order against Board members in their personal capacities arise out of the fact that they were individually cited as respondents and they were fully engaged in the unlawful actions. All this took place at the start of the 2021/22 financial year and, therefore, both the court and State Capture Commission's findings ought to have caused this expenditure by PRASA to be reflected as irregular, fruitless and/or wasteful. The Labour Court record and its judgments during March 2021 (including the refused application for leave to appeal) along with evidence before the inquiry led to the following findings by Chief Justice Zondo.

It must be remembered that the Board of PRASA was obliged, in terms of section 51(1)(b)(ii) of the PFMA to "prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity". The PFMA defines "fruitless and wasteful expenditure" as meaning "expenditure which was made in vain and would have been avoided had reasonable care been exercised". The Board and its Acting Chief Executive Officer appear to have acted without exercising reasonable care in causing the expenditure arising from the dismissal of the three executives in early 2021 and in opposing their Court application. To the extent that PRASA may have had two people for each of the posts to which the three executives were attached - namely each executive and somebody acting in their positions between their date of dismissal and their reinstatement or the finalisation of the litigation, serious consideration must be given to whether the Board members should not jointly and individually be required to pay back that money.

...

*It must accordingly be asked whether what the Board and Acting Chief Executive Officer did could have been in the best interests of PRASA. If they were not, the question is: in whose interests were the Board and the Acting Chief Executive Officer acting when they dismissed the three executives on the ground on which they dismissed them early in 2021 and then decided to oppose the executives' application in the Labour Court? That is the question. In this regard, **it may be noted that nobody in the PRASA Board and the management needed to be a lawyer to realise that to dismiss the three executives on the grounds on which they were dismissed and to oppose their Court application when PRASA had no defence on the merits of their claims could not have been in the interests of PRASA. If any one of them did not see that, then it must be concluded that he or she was either incompetent or simply did not have what he or she was supposed to have to serve on the Board of a company, particularly a company as big as PRASA.** (Emphasis added)*

15. It is understandable that the Board did not place this evidence before the Auditor-General and Parliament because they are criminally liable under section 86 of the PFMA for irregular and wasteful expenditure as well as withholding material evidence of financial misconduct from the Auditor-General and Parliament. Despite the fact that Chief Justice Zondo pointed out that PRASA had no defences in their case against Ngoye, Holele and Khena for their unlawful dismissal, the Board has seen it fit to continue wasting money at the Labour Appeal Court.
16. Chief Justice Zondo further found that Board members appeared not to be capable of serving “on the Board of a company, particularly, a company as big as PRASA”. Regrettably and for reasons only known to yourself, you have not called the Board to account but instead omitted these facts in your own accounts to Parliament.

The ARC’s Unlawful Status, Failure to Fulfil its Duties and Responsibilities and its Deceptive Statement Submitted to the Auditor-General, the Executive Authority, the Accounting Authority, Accounting and Parliament

Duties and Responsibilities in Relation to Finance and Risk Management

17. PRASA’s Audit and Risk Committee (ARC) owes a greater duty of care to the entity than the other members of its accounting authority. This is so because it accepts that its function is to

“assist the Board in discharging its duties under the Companies Act”. There has been an abject failure by the ARC to fulfil its legal duties in terms of the Constitution and relevant statutes that govern PRASA.

18. Section 94(7) of the Companies Act requires the PRASA ARC to prepare its own annual report explaining its work and it must include comments on the financial statements, accounting practices and the internal financial control of the rail agency. The ARC report must be included in the annual financial statements. No such report is evident.
19. Another critical duty of the ARC is to receive and deal with complaints from within or outside PRASA. In particular, from the perspective of #UniteBehind, the ARC has the power and duty to “deal appropriately” and “on its own initiative” with complaints relating to PRASA’s financial statements, accounting practices and the internal financial control. The Treasury’s Guidelines for the PRASA ARC sets out the following legal duties and responsibilities in terms of section 77 of the PFMA:
 - 19.1. The ARC must manage risk in terms of Treasury Regulation 27.1.8 which requires that, “[s]hould a report from internal audit (or **any other source**) to the audit committee implicate any member(s) of the accounting authority in fraud, corruption or gross negligence, the chairperson of the audit committee must promptly report this to the relevant executive authority and the Auditor-General.”
 - 19.2. The ARC’s strategic value is to provide the PRASA Board and GCEO with “independent counsel, advice *and* direction in respect of risk management.” A range of public authorities and the rail-commuting public rely on the ARC’s independence and objectivity to assess the effectiveness of PRASA’s risk management. Public authorities that place their trust in PRASA’s ARC include the Ministers of Transport and Finance, Parliament, the DOT, Treasury, the Auditor-General, as well as provincial and local authorities responsible for commuter rail transport.
 - 19.3. Risk management must be “conducted in a systematic manner, using proven methodologies, tools and techniques.” The Guide states that, if the PRASA ARC rationally and reasonably discharges its oversight responsibility, it will be empowered to take adequate measures. According to the Guide, the ARC must gain a “thorough

understanding of the risk management policy, risk management strategy, risk management implementation plan, and [PRASA's] fraud risk management policy.”

- 19.4. PRASA's ARC is also legally required to facilitate, monitor, review and critique progress by its Group Chief Executive and Board in relation to the implementation of its recommendations and those of the Auditor-General.
- 19.5. Regrettably, there is no evidence apart from the PRASA ARC's word that it fulfilled its duties. Or, specifically that it facilitated, monitored, reviewed and critiqued the progress or regress in the duties of PRASA's Board or its GCEO in relation to among others, financial management, accounting, supply chain management.
20. The ARC comprising of Ms. Mpye, Adv. Sethene, Ms. Makaepa and Mr. Zulu has failed in its legal and oversight duty.
21. Ms. Mpye, Mr. Mkhuba and Mr. Zulu attended all fourteen ARC meetings. Adv. Sethene was delinquent and only attended one meeting. Mr. Makaepa (DoT), whose presence at both Board and Committee meetings is compelled by statute, failed to attend eight ARC meetings.
22. In addition to the unlawful constitution of the PRASA Board, Mr. Makaepa's absence at ARC meetings renders its decisions of the ARC both non-compliant and unlawful in terms of section 24 of the LSA and section 94 of the Companies Act.

ARC's Misleading Annual Report Statements

23. An annual report by the ARC is indispensable to PRASA's governance and operations. However, apart from minor changes to the ARC's statement in PRASA's Annual Report 2021/22 is virtually a cut-and-paste from the previous year despite the rail agency's phenomenal regression.
24. The following statements appear in PRASA Annual Report 2021/22:
 - 24.1. *“Certain areas of non-compliance with legislative and regulatory requirements were noted by the Committee.”* There is no explanation of which aspects of the applicable law and

regulations were not complied with, how they were flouted, and what steps, if any, were taken as a consequence of the non-compliance of PRASA's Supply-Chain Management or Finance departments.

24.2. *“During the financial year under review, the Committee did not raise any issue of non-compliance with applicable corporate governance principles.”* The ARC is totally complicit in PRASA's unlawful governance, for instance, Board Chairperson, Mr. Ramatlakane has been directly involved in operational management of PRASA with the full knowledge of the ARC members.

24.3. #UniteBehind wishes to address, among countless others, a number of issues that graphically illustrates the unlawful conduct of the Board and, specifically, the criminal conduct of Mr. Ramatlakane.

Ghost Employees

25. Due to weak IT systems, the payroll and personnel records were manipulated to create 1600-3000 fake employees. Thereafter, wages were paid to these fake employees' accounts. The amounts paid have not been reported but the total could be enormous, considering the number of ghost employees. The PRASA Board of Control and CEO have been negligent or clearly do not have the management capabilities to handle billions of Rands and a complicated rail infrastructure, if it cannot even control its payroll systems.

Attempted Siyangena Settlement and Lying Under Oath

26. Mr. Ramatlakane, the PRASA Board, suspended Group CEO Mr. Zolani Matthews and the agency's acting-Group Executive/s for the Legal, Risk and Compliance (LRC) Department attempted to undermine an order and judgment of the Gauteng High Court. The order was granted in favour of PRASA protecting about R5.5 billion of its finances against Siyangena, a corrupt company. There is no doubt that this would not have happened under the watch of Ms. Martha Ngoye, the “dismissed”, then “reinstated”, and then, “suspended” LRC Group Executive.

27. On 14 July 2021 (during the financial year 2021/22), Mr. Ramatlakane asked for a legal opinion from Advocate Kgomotso Mathipa through Leepile Incorporated Attorneys on the merits of settling the dispute with Siyangena Technologies. At this stage, Werksmans attorneys and their counsel were still on record and unaware of these machinations. There is no doubt that this is a breach of the PFMA, never mind the Constitution and other laws.
28. Leepile Incorporated Attorneys sent questions to Adv. Mathipa in their brief from PRASA. On 29 July 2021, Mr. Ramatlakane saw it fit to send a further set of questions to Adv. Mathipa regarding a possible settlement with Siyangena. Adv. Mathipa's opinion, sent to the PRASA on 31 August 2021, was unequivocal: The only settlement that could be lawfully entertained is Siyangena's unconditional withdrawal of their appeal. Any other settlement would be unlawful in terms of the Constitution, the PFMA and the relevant Treasury Regulations.
29. Instead of accepting the Mathipa opinion, Mr. Ramatlakane subverted it by sending a letter to Mr. Mario Ferreira, the owner of Siyangena, on 15 September 2021 to explore a mutually beneficial settlement. Following the correspondence and an informal meeting between Mr. Ferreira and Mr. Matthews PRASA's GCEO, a meeting was held between Siyangena and PRASA on 3 November 2021 on a "without prejudice". The offer agreed to by both parties was to be placed as a resolution to the PRASA Board of Control. The settlement offer was R2.6 billion paid by PRASA to Siyangena and a further R500 million in terms a new extended contract for Siyangena to continue its work. Thankfully, the Matthews did take the offer further, due to internal legal employees voicing their concern over the legality of such settlement. At this time, Werksmans attorneys were still on record and, on 21 November 2021, PRASA's Head of Argument were filed in the SCA.
30. Two months later, on 19 January 2022, Werksmans withdrew as attorneys of record because they had not been paid for several years. You will recall that we had to make an application to the High Court early in 2020 when Werksmans were in a similar position. PRASA then came to court and on the day tendered wasted costs and reappointed Werksmans. Given this fact, #UniteBehind was compelled to launch an application to join the Siyangena appeal as 'friend of the court' at the Supreme Court of Appeal (SCA) in order to prevent an unlawful settlement. PRASA appointed a new firm, Ngeno and Mteto Inc. Attorneys, who could not

have had knowledge of a record that was around 8000 pages in length and who had to start from scratch when the appeal proceeded.

31. In an affidavit filed on 18 July 2022 in the SCA, the now suspended Acting-Head of PRASA's Legal, Risk and Compliance, Ms Thato Tsautse lied under oath to suggest that Mr. Ramatlakane knew nothing of the meeting held on 3 November 2021 nor had any knowledge of the proposed settlement. Despite having sent a letter of invitation to Mr Ferreira of Siyangena to meet to discuss a possible mutually beneficial settlement with PRASA, Mr. Ramatlakane also lied under oath to deny any knowledge of a meeting.
32. Needless to say, Siyangena lost their appeal. It has now appealed to the Constitutional Court. This is not the end of the road, as you suggested in your media statement. However, in the event that PRASA is successful at the Constitutional Court, #UniteBehind cannot trust the PRASA Board, its Executive Management and Siyangena to appoint a genuinely independent engineer to value the costs of work done given the attempted "settlement." We demand that the South African Institute of Civil Engineering be asked to appoint an independent engineer as required by the order of the High Court and, by imputation, the SCA.
33. The Siyangena settlement attempt by the PRASA Board under the leadership of Mr. Ramatlakane incurred unlawful expenditure through the unnecessary appointment of lawyers to subvert a court order worth about R5 billion in PRASA's favour. Again, this deliberate omission in the financial statements and the ARC statement requires legal action.

Unlawful Settlement Relating to the Creation of New Train Depots

34. One of the only positive developments in the past few years relating to PRASA is the successful production of new 'blue trains' at the Gibela factory. However, the utilisation and is being stymied by the fact that PRASA's depots are not ready to receive the trains. Thus, the trains stand idle at the Gibela factory. Attempts to upgrade the depots have been halted due to further tender irregularities, where an overpriced award was interdicted on 26 Aug 2021. Thereafter, PRASA attempted to settle the dispute through unlawful mechanisms, whereby the tender awardee, GladAfrica, would cede "its right, title and interest in and to the Contract" and "all warranties and representations given to PRASA by GladAfrica in terms of the Contract shall be deemed to have been given by GIBB". In exchange, GIBB would

withdraw its review application. This is contrary to a legal opinion completed by the State Attorney for National Treasury.⁶

The Board, Ramatlakane and People's Responsibility to Protect Project

35. The failure by the ARC and the Board to disclose what constitutes unlawful expenditure and improper interference in PRASA operations is further illustrated in the recruitment of security. PRASA and its predecessor, the South African Rail Commuter Corporation's security has been a disaster for decades with temporary improvements and then serious regression. Courts at every level of our society⁷ have dealt with criminal violence against rail commuters, PRASA employees, assets, and even robberies by its own security staff at its national office in Pretoria.
36. The safety of people who use the trains has been at the heart of #UniteBehind's work along with mismanagement and state capture. You would recall that #UniteBehind had to go to Court against yourself and PRASA in both November 2019 and March 2020 on the premature and reckless cancellation of unlawful security contracts by the previous Board. (See *#UniteBehind v Minister of Transport and Seven Others* WC High Court Case No: 19976/19) You may also recall that PRASA was fined by the Private Security Industry Regulatory Authority (PSIRA) for employing untrained and unregistered "security guards." Despite our best efforts, PRASA has still been able to safeguard its infrastructure.
37. Thus, blaming the destruction of PRASA on the COVID lockdown is disingenuous. This was noted in PRASA's report to the Portfolio Committee on Transport on 22 November 2022. The destruction of the rail network, particularly in Gauteng and KwaZulu-Natal, was neither inevitable nor unforeseen. PRASA had employed unregistered and untrained people as security. Virtually all PRASA security contracts were unlawful and entered into more than 15 years before under then Board Chairperson Sfiso Buthelezi and GCEO Lucky Montana.
38. About one year prior to your assumption of office, on 12 March 2019, Minister of Transport, Dr Blade Nzimande, replied to a question by Mr. Manny de Freitas (MP) related

⁶ Online: https://www.groundup.org.za/media/uploads/documents/prasa_depots/annex_a-sc_opinion_on_cession_assignment_17-8-2020.pdf

⁷ See, for example: *Passenger Rail Agency of South Africa v Moabelo* [2017] 4 All SA 648 (SCA); *Mashongwa v PRASA* [2015] ZACC 36

to financial loss as a consequence of the loss of coaches. Dr Nzimande stated that over the period 1 April 2018 until early March 2019, 550 full coaches were stolen while another 5 locomotives and 151 coaches were “vandalised” for purposes of theft. The theft of coaches can in no way be considered an ordinary crime of opportunism because it requires sophisticated syndication and cooperation from within PRASA.⁸ Many of PRASA’s “security guards” also had serious criminal records.

39. All this should have given pause to the new Board headed by Mr. Ramatlakane when they were appointed by yourself on 27 October 2020. Mr. Ramatlakane had been the Deputy-Chairperson of the Portfolio Committee of Transport and was fully aware of the rot, destruction, mismanagement and maladministration at PRASA. #UniteBehind had made several representations to him to ensure that these crises are addressed, specifically, that PRASA adopt a commuter-centred safety and security plan that would also prioritise the protection of rail infrastructure. But no action was taken to reverse PRASA’s trajectory.
40. The Ramatlakane Board was barely ensconced at PRASA when it decided to act in violation of every prescript of the PFMA, procurement and SCM policies as well as the Private Security Industry Regulation Act (Act 56 of 2001). The Ramatlakane Board decided to recruit 4930 Rail Neighborhood Safety Committee “safety officers” with the Chairperson playing a central role in the procurement of unqualified and unregistered security personnel. In a motivation for a “round robin” resolution by the Board on 3 January 2021, the late Acting-CEO, Ms. Thandeka Mabija stated that a “slide” had been presented to the PRASA Board for approval of the People’s Responsibility to Protect (PR2P) project’s implementation plan as part of the Corporate Security Plan. The justification for the PR2P project is quite bizarre given the fact that PRASA was already facing large scale criminal networks bent on dismantling infrastructure. According to the implementation plan:

⁸ Minister Nzimande failed to report that on 23 January 2019, Mr. Mthura Swartz, a former senior executive at PRASA was charged for theft of railway lines, sleepers, money laundering and corruption which occurred a number of years ago. Instead of dismissing or suspending Swartz when the charges came to light, he was promoted by the rail agency to Executive Manager for Shosholozha Meyl (long-distance passenger rail). Swartz was then further promoted under the Makhubele Board (December 2018) to the position of Acting Head of PRASA Rail combining commuter and long-distance passenger rail. See #UniteBehind letter “Urgent request for release of report: Alleged Maladministration, Mismanagement and Abuse of Resources and Irregular Recruitment and Labour Processes by Officials of Metrorail Western Cape – Mr. Mthura Swartz” (30 January 2019) to the Office of the Public Protector, Advocate Busisiwe Mkwhehane. The letter also addressed the fact that at that time Mr. Swartz was still being investigated by the Hawks.

The PR2P effectiveness lies with communities' ability and willingness to effectively eradicate crime on the rail system within the ambit of mobilising communities to be the driving force in creating greater awareness about crime in the commuter rail network.

41. Every community in our country desires to see the eradication of crime including robbery, assault, sexual violence and murder on the rail network. But, the belief that the PR2P programme's success depended on the effectiveness of the community beggars belief. The amount allocated for this reckless expenditure was around R200 million. When you launched the programme on 15 March 2021, the number of PR2P personnel who would receive a stipend had ballooned to 9860 without any justification.
42. In addition, as Minister, you were fully aware and therefore directly complicit in procuring personnel from bodies aligned to the ANC including the South African National Civics Association (SANCO) and the MK Veterans during an election year instead of following an open and competitive recruitment process. The employment of personnel for the PR2P project violated the constitution, the PFMA and the Prevention and Combatting of Corrupt Activities Act (PRECCA).
43. You are also fully aware that PRASA's erstwhile Acting-Chief Financial Officer Lazarus Mkhabela refused to sign off on the PR2P project while the head of security, Tebogo Rakau questioned the implementation of a programme "adopted" by the Board on a Sunday afternoon. Rakau raised valid security questions that went unanswered. Instead, he was dismissed and then reinstated by the Labour Court.
44. You were made aware of all the unlawful actions by Mr. Ramatlakane, the Board, Ms. Mabija and others in an investigation by amaBhungane⁹ but, not only did you fail to act against them, in your foreword to the Department of Transport's Annual Report for 2020/21, you failed to disclose the maladministration and failure of governance at PRASA in relation to the PR2P project.
45. Instead, on railway safety and security, your foreword to the Annual Report stated blandly that:

⁹ Tebogo Tshwane. 09 July 2021. "Prasa bungles multimillion-rand plan to hire thousands of 'volunteers' as 'guards.'" *AmaBhungane*. Online: <https://amabhungane.org/stories/210709-prasa-bungles-multimillion-rand-plan-to-hire-thousands-of-volunteers-as-guards/>

In the rail transport space, the Rail Safety Bill has now been introduced in Parliament. Once promulgated, the Bill will provide a much-needed framework to guide safety and security in rail. We also remain steadfast to ensure significant reduction of rail safety and security occurrences. Work has already advanced in the Mabopane-Pretoria line to wall off the corridor and ensure security of infrastructure against theft and vandalism.

46. The then-Accounting Officer of the Department, Mr. Alec Moemi had slightly more to say in the Annual Report to Parliament:

As part of ensuring a rail transport sector that is safe and secure, a concerted approach to address security and asset protection at PRASA has been adopted, leading to the development of an Integrated Security Plan. The plan, which was informed by Intelligence-Driven Operations, Regulatory Environment and PRASA's security response, will see PRASA having a fully fledged in-house security within three MTEF periods, to be achieved through a phased-in approach. To date, a total of 3 072 appointments were realised against the targeted 3 100 in the initial phase of the plan.

Mr. Moemi fails to mention PRASA's unlawful PR2P which falls foul of the Constitution, PFMA, PSIRA and PRECCA.

47. The PR2P project definitely illustrates collusion between yourself, the Department of Transport, the PRASA Board, its Governance, Social and Ethics Committee, ARC and management to withhold material related to unlawful practices and spending from the Auditor-General.
48. The inescapable conclusion on Siyangena and PR2P is this: the Board, Executive Management, the Minister (yourself) and the Accounting Officer have flouted the Constitution, the PFMA, the Public Audit Act and PRECCA by deliberately withholding and concealing evidence from the Auditor-General, Parliament, and other oversight bodies related to unauthorised and irregular expenditures to the loss of PRASA and unduly benefited structures aligned to the ANC. No doubt there are other similar incidents or attempts at flouting the Constitution and the law.

Systemic Executive Management Failures through Maladministration, State Capture, Incompetence and Nepotism

49. In the last seven years (2015-2022), there have been eleven Group CEOs at PRASA, this includes the architect of state capture, corruption and nepotism, Mr. Lucky Montana.¹⁰ An example of Mr. Montana's criminality, mismanagement, maladministration and nepotism (among countless others) was the defence of a now convicted fraudster, Daniel Mthimkhulu, the Chief Engineer who claimed to have a PhD in civil engineering but only had a matric certificate. Other Acting-GCEOs and the short-lived permanent CEO, Mr. Kgosi Matthews were similarly implicated in unlawful acts. The disaster in PRASA's governance is the fundamental cause of the instability, dishonesty and crisis.
50. In a Portfolio Committee on Transport (PCOT) meeting on 22 Nov 2022, PRASA CEO Hishaam Emeran gave a briefing on the recovery of mainline train services – long distance rail services. The minutes from the meeting are not yet uploaded on the Parliamentary Monitoring Group (PMG) website. However, the Powerpoint presentation was uploaded,¹¹ as was the video recording of the meeting.¹² Shockingly, two slides were removed from the Powerpoint presentation uploaded to the PMG website. This is evidently a deliberate

¹⁰ Lucky Montana, along with Sfiso Buthelezi, was the architect and a beneficiary of state capture, maladministration, mismanagement, corruption and nepotism at PRASA.

Lindikhaya Zide benefited from corruption.

Cromet Molepo benefited from corruption.

Nkosinathi Sishi was inefficient, ineffective and acted in breach of the PFMA and other laws

Sibusiso Sithole was inefficient, ineffective and acted in breach of the PFMA and other laws

Bonginkosi Mpondo was unlawfully appointed, inefficient, ineffective and acted in breach of the PFMA and other laws

Thandeka Mabija was inefficient, ineffective and acted in breach of the PFMA and other laws

Kgosi Matthews was inefficient, ineffective and acted in breach of the PFMA and other laws

David Mphelo was suspended for corruption but also inefficient, ineffective and acted in breach of the PFMA and other laws.

Hishaam Emeran was previously suspended for performance issues.

¹¹ Parliamentary Monitoring Group. PCOT. "Recovery of mainline train services: PRASA briefing; Marine Pollution (Prevention of Pollution from Ships) Amendment Bill: deliberations." Online: <https://pmg.org.za/committee-meeting/36073/>

¹² Portfolio Committee on Transport. 22 Nov 2022. *Youtube*. Online: https://www.youtube.com/watch?v=NcSfpSe8wRo&ab_channel=ParliamentoftheRepublicofSouthAfrica

attempt to conceal the complete destruction of mainline passenger services. From the video recording of the meeting, the missing slides show that, between 2009 and 2021:

- 50.1. There was a 99.5% decrease in passengers and a 98.5% drop in service (6600 trips to 99).
- 50.2. The number of routes dropped from 21 to 4.
- 50.3. The percentage of trains on time dropped from 60% to 0%.
- 50.4. There was 98.8% drop in revenue.

This drop cannot be attributed solely to Covid – the crumbling of long-distance rail started more than a decade ago, as seen by the following graphs, screen-grabbed from PRASA’s presentation:



Figure 1: Passenger Volumes and Lost Patronage 2009-2021

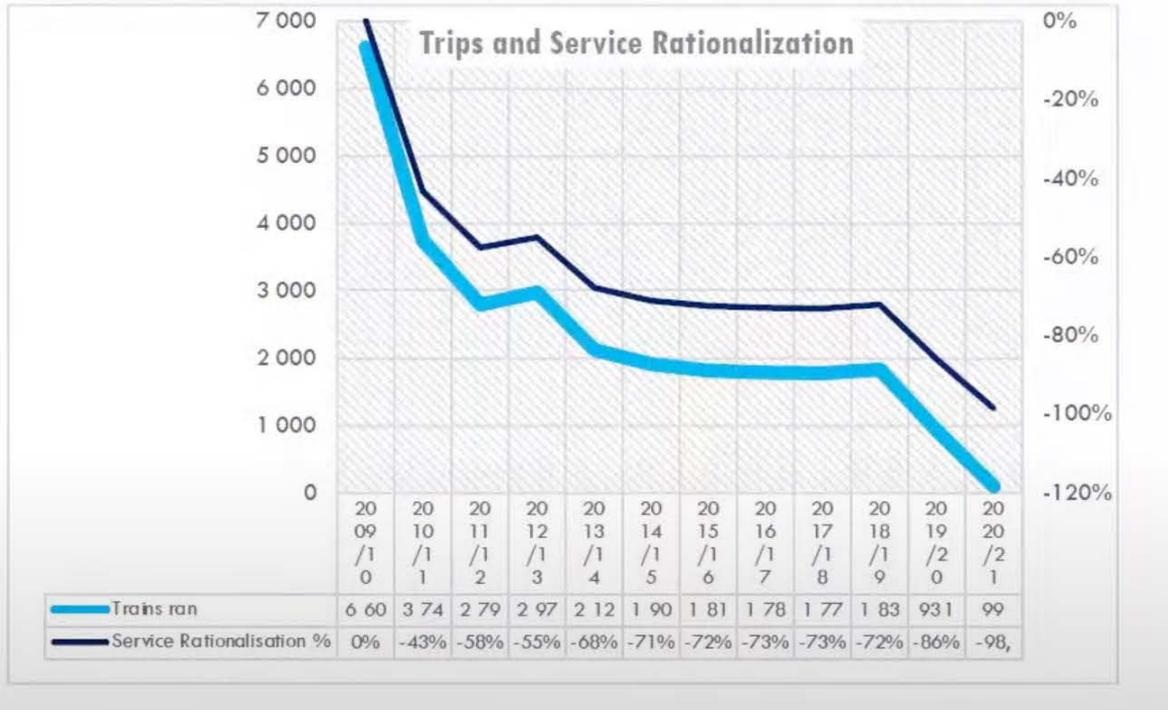


Figure 2: Trips and Service Rationalisation 2019-2021

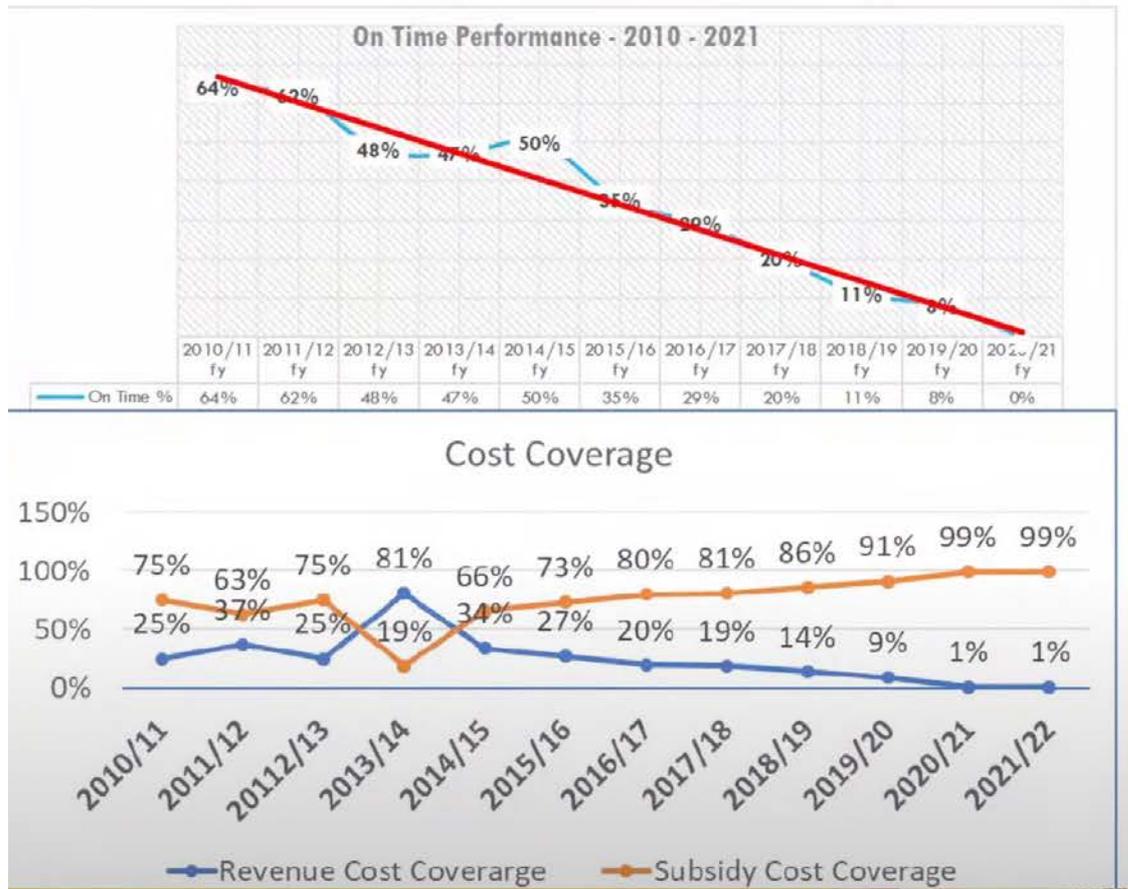


Figure 3: On-Time Performance and cost coverage 2010-2021

51. The maladministration and lack of service delivery extends to PRASA's urban commuter rail operations as well, as is evident in its Annual report, which showed that:
- 51.1. 18 of 40 lines around the country were operational.
 - 51.2. Of 590 stations, only 134 were functional; "the other 323 stations had been vandalised."
 - 51.3. Passenger numbers have dropped by 97% since 2011.
 - 51.4. "Only 800 coaches in PRASA's fleet of over 4 000 coaches are operational and in service. Of the remaining coaches, about 80% are not in use because they either need to undergo light or heavy maintenance and upgrades, or have to be disposed of."¹³
 - 51.5. PRASA failed to meet 81% of its performance targets in 2021/22.
52. The Board's systemic terrible performance and the deception evident in the presentation are grounds for you to take serious action against the Board. PRASA's mainline services are near-dead. PRASA needs to be placed saved. You have shown that you are incapable of doing so.

FINANCES AND FINANCIAL SYSTEMS

53. The robustness of financial systems and finances are a critical indication of the health or otherwise in any organisation. This much is trite. #UniteBehind wishes to raise the following issues pertaining to the finances and financial systems at PRASA:
- 53.1. Is PRASA a going concern?
 - 53.2. Are PRASA finances governed in terms of the Constitution and applicable laws?
 - 53.3. Does PRASA's accounting officer/s maintain a robust financial system with appropriate consequence management?
 - 53.4. Does PRASA maintain an accurate system of record-keeping/?

Is PRASA a going concern?

¹³ Tebogo Tshwane. 13 Dec 2022. "Prasa botches critical R7.5bn train repair tender." *AmaBhungane*. <https://www.news24.com/fin24/companies/amabhungane-prasa-derails-critical-r75bn-train-repair-tender-20221213>

54. In the Annual Report 2021/22, PRASA's financial statements declare without equivocation that it is a going concern: "There is no uncertainty on the economic entity to continue as a going concern. The entity report an **operating surplus** of R5.9 billion (2021 deficit: 3.1 billion)." In truth, the deficit increased in the same report. When the actual financial statements are examined, we learn the following. As an economic entity, PRASA's **operating deficit** was R3.83 billion in 2021 and R3.85 billion in 2022. In both instances, PRASA's ring-fenced capital subsidy for major infrastructure and rolling-stock investment is included when this money is not available for operations. This falsely creates an impression that PRASA is operationally financially sustainable. However, without the mis-labelling of ring-fenced funds as operational funds, it is clear that PRASA is operating at a large deficit.

55. In your Ministry, Department and PRASA briefed the Standing Committee on Appropriations (SCoA) chaired by none other than Mr. Sfiso Buthelezi, one of the architects of state capture, corruption, malfeasance and mismanagement at the rail agency. Your candid remarks should dispel the notion that PRASA is a going concern.

56. The SCoA minutes records the following comments from yourself:

The gap between PRASA's operating revenues and operating expenditures has been larger than the operating subsidy provided by the government. This gap has continued to grow since 2019 and 2020. To prevent this shortfall, PRASA used capital subsidies to fund its operations rather than using them to invest in new capital assets.

57. This has to be restated. At a time when PRASA assets have been destroyed on an almost unimaginable scale, "the economic entity" has "used capital subsidies to fund its operations rather than using them to invest in new capital assets." Mr. Hishaam Emeran stated the following at the SCoA:

It is clear that PRASA's current cost structure cannot be sustained, as the business is simply pushing itself deeper and deeper into debt that it cannot pay. In order to address this, PRASA needs to clearly articulate what its future looks like and how it will run trains within its budget. This will include developing a funding model that suits the operational and capital subsidy received; rationalising the business so that its costs are within budget, and the operational subsidy is available to fund the running of trains; developing a dynamic pricing

model for fare revenue that better represents the cost of running rail but still makes a significant contribution economically; growing income from the secondary mandate to support the primary mandate above.

58. Mr. Emeran's evidence to Parliament makes it clear that despite this crisis of declining revenues PRASA. In 2008, income from fare collection was around R1.2 billion and in the latest report it is around R344 million.
59. Both you as Minister of Transport and Mr. Emeran, the Acting-Group CEO agree that PRASA is not a going concern and that it is in breach of the PFMA because it is using money allocated for capital investments for operations.

Are PRASA's finances governed according to the Constitution and applicable laws?

60. A fraction of the failures by the Board's Audit and Risk Committee has been laid bare above. However, the broader context must be sketched based on the Auditor-General's findings. She finds:

I do not express an opinion on the financial statements of the public entity. Because of **the significance** of the matters described in the basis for disclaimer of opinion section of this auditor's report, I was unable to obtain sufficient, appropriate audit evidence to provide a basis for an audit opinion on these consolidated and separate financial statements.

61. The failure by PRASA's accounting authority, the Board of Control, to ensure the efficient, effective and economic use of public resources is systemic. Over the last few years there has been a string of disclaimers of PRASA's financial statements by the Auditor-General's office, because, it was "unable to obtain sufficient, appropriate audit evidence."
62. The Auditor-General is at pains to repeat the refrain that PRASA's Accounting Authority has the legal duty to ensure that financial systems, controls, records, income and expenditure, procurement of goods, services and works, as well as, its financial statements and reports all comply with the law. #UniteBehind will add that PRASA's Board of Control its Executive Authority have failed to comply with the Constitution.

The basis for the disclaimer in the Auditor-General's 2021/22 report

63. We set out for your convenience most of the key findings of the Auditor-General (AG).
- 63.1. PRASA could not give adequate account of its property, plant and equipment because there were “significant control deficiencies in the asset management process, inadequate state of accounting records and the non-submission of information in support of reported balances. The same finding was made in the previous financial year.
 - 63.2. Financial statements were not submitted by PRASA’s Board of Control to the Auditor-General in the legally required time-frames. The same finding was made in the previous financial year.
 - 63.3. Financial statements were not prepared in accordance with the PFMA. The same finding was made in the previous financial year.
 - 63.4. PRASA’s financial statements contained material misstatements and supporting records were missing. The same finding was made in the previous financial year.
 - 63.5. No effective steps were taken to prevent fruitless and wasteful expenditure. The same finding was made in the previous financial year.
 - 63.6. PRASA did not take any effective steps to prevent irregular spending. The same finding was made in the previous financial year.
 - 63.7. There is not sufficient appropriate evidence to substantiate that PRASA ensured any form of consequence management in relation to officials implicated in fruitless and wasteful and or irregular expenditure. sufficient appropriate evidence to substantiate
 - 63.8. The PRASA Board of Control, in its capacity as the Accounting Authority could not provide sufficient appropriate evidence to substantiate that goods, works and services were procured in a fair, equitable, transparent and competing manner as

required by the Constitution and the PFMA. The same finding was made in the previous financial year.

- 63.9. Management instability and the critical staff shortages both in number and skills in PRASA's key finance, asset management, supply chain and contract management, internal audit and information technology units, systemically hampered any form of oversight. The same finding was made in the previous financial year.
- 63.10. Human resource policies were flouted. The same finding was made in the previous financial year.
- 63.11. PRASA poor and failed procurement planning had a negative impact on infrastructure recovery and modernisation initiatives. The same finding was made in the previous financial year.
- 63.12. The Auditor-General found significant deficiencies in record-keeping and IT systems. The same finding was made in the previous financial year.
- 63.13. Several PRASA contracts were flagged in relation to irregular spending. A critical contract related to general overhaul and maintenance must take precedence. The Auditor-General sets out the unlawfulness of the general overhaul procurement process as follows:

Competitive bidding process not followed in the appointment of general overhaul and upgrade contractors

- 64. A competitive bidding process was not followed for the initial appointment of suppliers to provide general overhaul and upgrade services and for the subsequent extensions of the contracts, in contravention of the requirements of section 51(1)(a)(iii) of the PFMA which requires a fair, equitable, transparent and competitive procurement process. The extensions from 1 April 2014 to 31 March 2019 did not include any extension contract values. This was done despite the supply chain management policy at the time of the extension, prohibiting the awards of contracts for periods longer than three years.

65. Since the transition from South African Rail Commuter Corporation Limited (SARCC) to Prasa in 2008, a competitive bidding process has not been followed. Over time, various suppliers were added to the list of contractors from the SARCC, including some added through a “confinement” process which was also found to be non-compliant with section 51(1)(a)(iii) of the PFMA and had been reported on in previous audit reports.
66. These contractors continued to render services and significant irregular expenditure continued to be disclosed in respect of these services. Cumulative payments made in respect of these contractors exceeded R2,8 billion. A material financial loss is likely, as PRASA has not secured market-related prices by way of a competitive bidding process since 2008.
67. The accounting authority was notified of the material irregularity on 17 July 2019. The accounting authority requested an investigation by the SIU into the matter, which was approved by the president on 13 August 2019 and is in progress. I will follow up on the investigation and the implementation of the planned actions including disciplinary steps, financial recovery and civil and criminal cases arising from the outcome of the investigation, during my next audit.
68. Some additional information on the general overhaul and maintenance contracts is necessary. On 13 August 2019, PRASA reported the unlawful contracts to the Special Investigation Unit. It would appear from this step, for all intents and purposes, that the matter of new tenders for general overhaul and maintenance contracts would be undertaken with due diligence by the Board of Control in terms of the PFMA. Not quite.
69. PRASA’s internal investigation into aspects of the general overhaul contracts was completed in September 2018. One of the companies implicated in corruption at PRASA is YNF Engineering. In its report, PRASA investigators found that one of its employees had a corrupt relationship with YNF Engineering and recommended both disciplinary and criminal proceedings against the parties involved. This should have been the end of the matter.
70. On 28 October 2022, Field Services Engineering (PTY) Ltd and Mbita Holding (PTY) Ltd launched proceedings against PRASA, several companies and yourself to set aside all the latest GO contracts because of numerous irregularities. One of the irregularities relate to the awarding of a contract to YNF Engineering. Irrespective of any other irregularity, PRASA’s accounting authority and the accounting officer flouted the law when they appointed YNF

Engineering to provide overhaul and maintenance services to the rail agency. AmaBhungane reports, “companies with the technical experience and capacity to do the work were arbitrarily excluded in favour of companies that did not have the requisite capacity, facilities or equipment when they received the award.”¹⁴ The review of PRASA’s tender award, worth R7.5 billion, “has been set down for April 2023. This could lead to the tender being cancelled for a second time, adding to the tally of self-inflicted setbacks by Prasa’s management and board.”¹⁵

71. Each of the Auditor-General’s findings have at one time or another been raised in audits since 2008. Despite the early audits appearing relatively clean, it has emerged time after time that since its inception, PRASA has covered up evidence of its criminality. In the matter between PRASA and Swifambo brought to the courts by former Board Chairperson Mr. Popo Molefe, Justice Francis found that records at PRASA were concealed or destroyed and had to be forensically retrieved by investigators.
72. PRASA has provided a good reason why the evidence was not given by the particular persons or the persons who created the documents. The evidence is merely derived from contemporaneous documents and PRASA's official records. Molefe's statement under oath is entirely satisfactory and has stated that the documents form part of PRASA's official records. They were provided to him by independent investigators and the veracity of those documents can be tested by an examination of the documents that were annexed to the founding and replying affidavits.
73. There are additional facts justifying why individuals have not deposed to confirmatory affidavits. This is due to resignations, dismissals and a generally un-cooperative attitude from certain employees within PRASA. In some instances PRASA's records were concealed, spirited away or destroyed and it was only through the interaction and assistance of the investigators that the facts set out in this application were discovered.
74. Almost every audit and investigation by Treasury, Werksmans Attorneys and the Public Protector revealed the systemic nature of concealing and destroying documents.

¹⁴ Tebogo Tshwane. 13 Dec 2022. “Prasa botches critical R7.5bn train repair tender.” *AmaBhungane*. <https://www.news24.com/fin24/companies/amabhungane-prasa-derails-critical-r75bn-train-repair-tender-20221213>

¹⁵ Ibid.

75. We cite extensively from #UniteBehind’s analysis of the leaked Treasury investigations “#PRASALEAKS: Rig, Conceal, Destroy and Falsify: How State Capture Happened at PRASA” on the destruction of PRASA’s record-keeping system:

...a key finding in all the forensic reports that were reviewed is the lack of record keeping. Despite numerous requests for access, documents and data were either missing altogether, misplaced, possibly destroyed or not made available to the auditors. In many instances, where documents were found, they tended not to comply with PRASA’s Supply Chain Management (SCM) policy. Irregular documentation, in turn, renders expenditure to be irregular. We found that the problem of irregular or non-existent record keeping spanned the entire supply chain. All key SCM related offices in PRASA are implicated in the poor record keeping.

76. A further inference which may be drawn, based on the extent of the missing documentation, is that many of the steps in the normal supply chain process were simply not followed.

77. There is a specific legislative requirement to keep an audit trail from the very start of a procurement process – i.e. from the needs analysis. The following are just some of the examples found in the forensic reports of missing records: needs analysis; bid specification documentation; tender advertisements; procurement documents on the tender process; tender evaluation sheets; bid submission documents from unsuccessful tenderers; bid scoring sheets; inventories and unsigned documents.

78. Of particular concern are instances where tender specifications were found to be lacking. This has far reaching implications as it not only results in a flawed tender process but also impacts negatively on contract specifications, the ability to manage and monitor implementation and delivery and ultimately on the actual services delivered. In some of the most important areas of engineering technical competency, scores were not noted or were accepted well below the minimum threshold. In a number of instances, the forensic auditors reported that findings could not be made regarding payments because of lack of documentation. The absence of an audit trail facilitates the siphoning off of public funds and resources with impunity.

79. Given how widespread the lack of record keeping is, it is not unreasonable to assume that this is a deliberate strategy and not simply a case of poor or incompetence record keeping. In

the *Swifambo* case the judge found that documents had been concealed, spirited away or destroyed. This judge found further that even after the then GCEO, Montana, had left PRASA, “...he managed to obstruct the distribution of relevant information through a network of associates who were collaborating with him. Employees who did not follow were victimised or unfairly dismissed”.

80. It is therefore probable that the lack of documentation is, in many cases, a deliberate failure to undertake many of the critical steps in the procurement process, combined with a deliberate attempt to hide corrupt actions. Where one or two cases emerge, it may be reasonable to recommend that PRASA institute more adequate document management and disciplinary action against staff responsible for poor record keeping.
81. While all the investigators made similar findings, they were not all equally bold in their recommendations, sometimes erring on the side of caution, given the paucity of records available for scrutiny.
82. However, this investigation had access to 193 investigations and the patterns of process abuse emerge across the board. Where this is so widespread as to affect the overwhelming majority of tenders and involve all levels of management, different conclusions are unavoidable. This, coupled with an apparent lack of delivery, irregular procurement processes and extensions and inflated prices, point to criminal conspiracy.
83. Any Court seized with an application by yourself to dissolve the Board on the basis of the audits alone and, to simultaneously constitute an alternative accounting, oversight and management authority would concur. A lawful remedy would be to ensure that either business rescue practitioners or special officers of the Court are appointed to address PRASA’s most critical failures – governance, executive management and financial systems including record-keeping.
84. #UniteBehind is also of the view that service level plans between PRASA and municipalities or provinces, as well as the devolution of commuter rail, can only be effectively realised with legal intervention. This is due to PRASA’s inaction in engaging with municipalities on such developments.

PRASA SERVICE LEVEL AGREEMENT & DEVOLUTION

85. The City of Cape Town and the Gauteng Provincial Government (in conjunction with its municipalities) have indicated that they wish to take ownership and control of PRASA within their respective jurisdictions as land transport planning authorities in terms of the National Land Transport Act. (Act 5 of 2009)
86. In addition, #UniteBehind has demanded of the City of Cape that they enter into “service level planning for passenger rail on a corridor network basis in consultation with” PRASA. (NLTA section 11(c)(xix)). The NLTA requires various current duties that the City must undertake regarding commuter rail in Cape Town.
87. The City is responsible for, among others, “preparing transport plans for its area, ensuring the implementation thereof and monitoring its performance in achieving its goals and objectives”. (NLTA section 11(c)(iv)). As a planning authority, the City is responsible for “exercising control over service delivery through— (i) the setting of operational and technical standards and monitoring compliance therewith; and (ii) the monitoring of contracts and concessions” (section 11(c)(xxv)). Lastly, it is responsible for “promoting safety and security” on trains (section 11(c)(xiii)).
88. #UniteBehind has no confidence that the current PRASA Board of Control, or, its Executive Management are capable of entering into service level plans with capable municipalities. They are equally incapable of implementing rational and reasonable plans.
89. Since 1996, the devolution of commuter rail services to municipalities with capacity to take over ownership, control and operations of PRASA has been the official policy of the government. Over more than two decades, various iterations of this policy has been issued by government as White Papers. The Constitution and the NLTA requires that this be undertaken. #UniteBehind knows that the City of Cape Town has regularly communicated with you to set up a joint implementation task team for devolution. You have ignored their requests to do so for at least nine months. You have missed your own deadline to have a national devolution strategy prepared by the end of 2023. We are also aware of a worrying retraction of the policy by you and members of the ANC.¹⁶ Such decision-making goes

¹⁶ Sandile Motha. 22 Jan 2023. “State will keep dysfunctional Prasa.” *Sunday World*. Online: <https://sundayworld.co.za/news/state-will-keep-dysfunctional-prasa/>

against decades of expert and political opinion. Further, it contravenes the NLTA and the Constitution, both of which require that commuter rail services be devolved to the lowest possible level of government.

90. The Constitution provides ample authority for the Minister of Transport to initiate such devolution. Section 156(4) of the Constitution requires (it is written in mandatory language) the national government to assign the administration of a matter listed in schedule 4A (such as ‘public transport’), “which necessarily relates to local government, if - (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it.. if the relevant municipality has the capacity to exercise such powers and functions and if the relevant service would be provided most efficiently at local level.” Section 151 of the Constitution states that “A municipality has the right to govern, on its own initiative, the local government affairs of its community.” Further, section 156(1), read with Schedule 4B of the Constitution, states that “A municipality has executive authority in respect of, and has the right to administer— ... Municipal public transport.”
91. Further, the NLTA states that the national government is “responsible for- ... (iv) assigning [public transport] functions to the most appropriate sphere of government”¹⁷ and that “[t]he Minister may assign any function contemplated in subsection (1)(a) to a province or municipality.”¹⁸
92. Municipalities are empowered to complete service-level plans, after consultation with PRASA, in order to exercise their oversight and management roles in terms of section 11(c) of the NLTA. The Minister has various facilitation and coordination powers and duties in terms of the NLTA.¹⁹ You are also the ultimate custodian of the Act. Given that no municipality has at yet, to our knowledge, completed a service-level plan regarding commuter rail, it would be prudent for you to facilitate such arrangements. This would also allow for easier transition towards devolution to municipalities and provinces.
93. From the above, it is clear that, in terms of the Constitution and the NLTA, the Minister is duty-bound to initiate the devolution to the lowest appropriate and competent level of government. We posit that this would mean devolving Cape Town’s commuter rail operations

¹⁷ Section 11(1)(a) of the NLTA

¹⁸ Section 11(2) of the NLTA

¹⁹ See, for example, section 5 of the NLTA

to the City and Gauteng's commuter rail operations to the Provincial Government, respectively. You are also empowered to initiate transitional arrangements between the PRASA and municipalities and provinces.

94. #UniteBehind has no confidence that you can undertake the intricate, complex and difficult task of devolving ownership, control and operations of commuter rail services to the City of Cape Town or the Gauteng Provincial Government. #UniteBehind demands that you approach the courts for the appointment of business rescue practitioners or special officers of the court to ensure the success of PRASA's devolution to the most appropriate levels of government.

The Companies Act can apply to PRASA

95. First, we urge you to immediately, "*in consultation with the Board of Control, by notice in the Gazette declare*" in terms of section 31(3) of the Legal Succession Act that all the provisions applicable to state-owned companies in the Companies Act (Act 71 of 2008) shall be applicable to the Passenger Rail Agency of South Africa (PRASA). The problem you face is that the Board is aware that it is delinquent and could face criminal charges.
96. Second, we demand that you **then** make an immediate and urgent application to the High Court for an order to place PRASA in business rescue in terms of section 131 of the Companies Act.
97. These steps will begin to address the systemic mismanagement, maladministration, state capture, corruption, fraud, failure of oversight and collusion by successive Ministers of Transport and Parliament to prevent PRASA from. In addition, these oversight bodies have bemoaned the fact but neglected to take action against PRASA for its intentional delinquency in addressing the findings of unlawfulness by the Auditor-General for about six years. You have had oversight for four of these six years.

Judicial Management

98. In the alternative, you have the power under the LSA to introduce a bill in Parliament to place PRASA under judicial management. The concept of judicial management was located in the previous Companies Act (Act 61 of 1973).

99. Section 427 (1)(a) & (b) of that Act holds that:

When any company by reason of mismanagement or for any other cause-
(a) is unable to pay its debts or is probably unable to meet its obligations; and
(b) has not become or is prevented from becoming a successful concern,
and there is a reasonable probability that, if it is placed under judicial management, it will be enabled to pay its debts or to meet its obligations and become a successful concern, the Court may, if it appears just and equitable, grant a judicial management order in respect of that company.

100. PRASA more than meets the threshold for being placed under judicial management. Our courts developed the common law to address aspects that required elaboration such as the types of companies that ought to be placed under judicial management. The courts have found that the public impact, size and public interest in ensuring that a company becomes a successful concern is central for granting an order for judicial management.

101. The courts have inherent powers to ensure that just and equitable remedies are available to the state for the furtherance of its constitutional duties. Therefore, a further alternative available to you is the appointment of a Special “Master” (what we will call the ‘special officer of the Cour’t) to take control of PRASA because of the urgency of this matter and the fact that Parliament has failed in its oversight. This might in fact be the simplest route that could achieve maximum results. We demand that, if you do not place PRASA under business rescue or judicial management, you apply to an appropriate Court for the placement of PRASA under the jurisdiction of a special officer of the Court.

102. #UniteBehind demands that you:

103. Thus, we demand that, by 14 February 2023, the Minister initiates the following:

103.1. Dissolve the current Board of Control and appoint a new board based on the requirements of the LSA, Companies Act, and the Constitution, ensuring that the appropriate level of skills and integrity are present on the Board, and

103.2. Instruct the (new) Board of Directors to complete service level plans with all municipalities who have commuter rail services within their jurisdiction, in line with the National Land Transport Act 5 of 2009.

- 103.3. Regarding the *Siyangena* case, instruct the (new) Board of Directors to ask the South African Institute of Civil Engineering to appoint an independent engineer as required by the order of the High Court and, by imputation, the SCA.
 - 103.4. Act immediately to work with the City of Cape Town and Gauteng Province to ensure that devolution occurs at the earliest opportunity.
 - 103.5. Place PRASA under business rescue or judicial management, or
 - 103.6. Apply to the court to place PRASA under the jurisdiction of a special officer of the court. In such application, the Board members must be declared delinquent directors.
 - 103.7. Forward and brief this letter to the new Minister of Transport, when they are inducted.
104. President Ramaphosa, we demand that you:
- 104.1. Appoint a new Minister of Transport in your anticipated Cabinet reshuffle who is professionally, politically and ethically capable of overseeing and implementing our demands.
 - 104.2. Forward this letter to the new Minister upon their induction and make sure that they prioritise our demands contained herein.
14. If our demands are not met, #UniteBehind will institute legal proceedings against you to have these demands met and to #FixOurTrains, and our attorneys hold instructions to do so. Our demands and timeframes apply equally to the new Minister of Transport when they are appointed.