

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: J111/21

In the matter between:

ONICA MARTHA NGOYE	First Applicant
NKOSINATHI ALLEN KHENA	Second Applicant
TIRO HOLELE	Third Applicant

And

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA	First Respondent
LEONARD RAMATLAKANE	Second Respondent
THINAVUYO MPYE	Third Respondent
DINKWANYANE MOHUBA	Fourth Respondent
SMANGA SETHENE	Fifth Respondent
XOLILE GEORGE	Sixth Respondent
NOSIZWE NOKWE-MACAMO	Seventh Respondent
MATODZI MUKHUBA	Eighth Respondent
THEMBA ZULU	Ninth Respondent
THANDEKA MABIJA	Tenth Respondent

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DATED AT SANDTON ON THIS 8TH DAY OF MARCH 2021.


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TO: THE REGISTRAR OF THE LABOUR COURT
JOHANNESBURG

AND TO: PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Respondent
Mjantshi House
30 Wolmarans Street
Braamfontein
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Gauteng Province
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AND TO: LEONARD RAMATLAKANE N.O

Second Respondent
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AND TO: THINAVUYO MPYE

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AND TO: **SMANGA SETHENE**

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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT the Applicants will apply to this Court on a date and time to be arranged with the Registrar and the presiding judge or so soon thereafter as counsel may be heard for an Order in the following terms:

- 1 Pending the finalisation of the application for leave to appeal in the above court dated 3 March 2021 and any further applications for leave to appeal or appeals, the order of this Court per Baloyi AJ dated 2 March 2021 under case number J111/21 is operational and enforceable.
- 2 The second to tenth respondents are ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved, including the costs consequent upon the employment of two counsel.
- 3 Further and/or alternative relief.

TAKE NOTICE FURTHER that the accompanying affidavit of **ONICA MARTHA NGOYE**, together with the confirmatory affidavits of the second and third applicants shall be used in support of this application.

KINDLY TAKE NOTICE FURTHER THAT if you intend opposing this application, you must notify the Applicants' attorneys in writing by no later than close of business on **10 March 2021**, file your answering affidavit(s), if any, by no later than close of business on **15 March 2021**. The Applicants shall then file their replying affidavit not later than close of business on **17 March 2021**.

KINDLY place the matter on the roll for hearing accordingly.

DATED AT SANDTON ON THIS 8TH DAY OF MARCH 2021.


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**TO: THE REGISTRAR OF THE LABOUR COURT
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**FOUNDING AFFIDAVIT IN THE SECTION 18(3) SUPERIOR COURTS ACT
APPLICATION**


1

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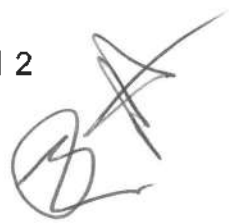
I, the undersigned,

9

ONICA MARTHA NGOYE

do hereby make oath and say:

- 1 I am an admitted attorney of 199 Pritchard Street, Olivedale, Randburg, Gauteng Province. The facts stated in this affidavit are within my personal knowledge and are true and correct. I am the Group Executive: Legal Risk and Compliance at PRASA. This application is brought also on behalf of the Second and Third Applicants who have duly authorised me to bring this application on their behalf and depose to this affidavit. I attach in support of this, their respective confirmatory affidavits.
- 2 On 2 March 2021, this court, per Baloyi AJ, issued orders which effectively reinstated us (the Applicants) to our positions effective from the termination dates (29 January 2021 in the case of Mr. Khena and I and 1 February 2021 in the case of the Third Applicant), also set aside the purported termination of our contracts of employment and reinstated us to our positions and ordered PRASA to pay any salaries and benefits due to us from the date on which the contracts of employment were terminated to the date of reinstatement. For ease of reference, the judgment of Baloyi AJ is attached hereto and marked "**18A**".
- 3 On 3 March 2021, the respondents applied for leave to appeal dated 2 March 2021.



- 4 This is an application in terms of section 18(3) of the Superior Courts Act 10 of 2013 for the implementation of the orders of Baloyi AJ of 2 March 2021 pending the finalisation of the application for leave to appeal filed by the respondents on 3 March 2021 and any other subsequent appeals or applications for leave to appeal.
- 5 Unless leave to implement the decision of this court of 2 March 2021 ("the judgment") is given, the Applicants will suffer irreparable harm. PRASA on the other hand will not suffer any irreparable harm if the judgment is implemented.
- 6 Taking into account the *conspectus* of the evidence to hand, there exist exceptional circumstances which warrant the implementation of the judgment. I deal with each of these propositions in turn.
- 7 I do not re-hash the contents of the papers underpinning the urgent application. I ask that they be incorporated by reference as a costs saving measure but also to avoid prolixity. Much of the underlying reasons in support of the urgency are also relevant for demonstrating the Applicants' irreparable harm.
- 8 I ask that the founding affidavit and relevant portions of the replying affidavit be incorporated by reference. In any event, for ease of convenience for the court, those affidavits – without annexures so as to not burden the court – are attached and marked "18B" and "18C".



A. OVERVIEW OF THE APPLICATION

9 This application is brought against a very disturbing state of affairs. PRASA has applied for leave to appeal against the judgment, effectively reversing the decision of PRASA to terminate the Applicants' employment contracts, reinstating them to their positions, setting aside those decisions and ordering PRASA to pay their salaries and benefits.¹ A copy of the judgment is attached marked "18A".

10 More disturbing are the conclusions made against PRASA by the court in coming to its decision. I highlight just a few.

10.1 The court came to the conclusion that it had jurisdiction to adjudicate over the matter [18]. It did so against the background that the determination of unlawfulness was on the basis of section 77(3) read with section 77A(e) of the Basic Conditions of Employment Act [20].

10.2 Furthermore, the court found that the matter was urgent. The court found, tellingly, that the circumstances under which the employment contracts were terminated were in an "abrupt manner." The court found that that on its own raised "exceptional circumstances".

10.3 The termination was accompanied by what was placed in the public domain and that this drew a great deal of public interest

¹ Order

in the matter. The court further said that the public policy consideration on its own renders the application urgent, particularly where the public funds are made a subject matter of the case [30].

- 10.4 The respondents did not provide a factual response to the allegation that the contracts of employment of the Applicants were for an indefinite period and “elected not to produce documentation or to make averments to support the decision to terminate the contracts” [32].
- 10.5 Clause 9 which recognises various forms of termination of employment makes no mention of termination on grounds of expiry of a five year fixed term contract [32]. By acting in the manner it did, contrary to the terms of the contract, that amounted to a breach of contract [33].
- 10.6 PRASA’s conduct of terminating the Applicants’ contracts of employment with immediate effect gives rise to unlawfulness on account of violation of the terms and conditions of the Applicants’ contracts of employment [37].
- 10.7 Further, on the facts of the case it was appropriate to make an order of costs against PRASA [40].
- 10.8 The court received no factual response from PRASA on the merits of the case founded on issues raised in the Applicants’

letters. The respondents failed to produce evidence to justify the decision to terminate the contracts [40].

- 10.9 PRASA did not deny what the Director-General said openly to its employees that PRASA was resourced to out-litigate any employee challenging the unlawful termination of their employment contracts and that the administrator should employ the resources of PRASA to out-litigate any employee challenging the unlawful termination. No individual employee will be able to succeed using their own personal resources against the resources of the state [42].
- 10.10 These conclusions reached by the court based on a non-response by PRASA are at best, damning. They render the application for leave to appeal nonsensical and without any basis whatsoever in law and in fact.
- 11 Elsewhere I deal with the grounds advanced by the respondents in support of their application for leave to appeal.
- 12 As I state elsewhere, the full history of the matter is set out in the papers before this court in the urgent application and in the judgment of Baloyi AJ, in particular the conclusions that I have just highlighted.
- 13 I only attach the founding affidavit and the replying affidavit insofar as they support the facts made in this founding affidavit. I do so to avoid prolixity and to save costs. This application is funded by us and from our pockets.

Unlike PRASA, the Applicants do not have the necessary resources to prosecute this matter indefinitely. They do so under very strained circumstances financially.

- 14 I wish to highlight the following points before I deal with the merits of the application.
- 15 Any opposition to this application, including the application for leave to appeal brought by the respondents is part and parcel of the stratagem that I articulated in the founding papers, that the respondents elected not to deny, and in respect of which this court made a conclusion.
- 16 There are obviously no prospects of success in the appeal, precisely for the reasons given by this court in its judgment but more echoed by our legal team in the written submissions placed before this court.
- 17 The application for leave to appeal does not contain any grounds sufficient to upset the exercise of this court's discretion in finding for the Applicants on urgency and costs.
- 18 The application is frivolous and unmeritorious. It is typical of what this court warned about in the matter of *Passenger Rail Authority of SA v Molepo* [2014] 5 BLLR 468 (LC) [63]; [67], [71] [73].
- 19 PRASA's application for leave to appeal is just an exercise in frivolity and a waste of taxpayers' money. The Applicants should not have to pay for these unmeritorious proceedings.

20 I now turn to deal with the following subject matters:

20.1 The parties

20.2 Some brief background on the matter

20.3 A commentary on the application for leave to appeal

20.4 A discussion of the requirements for the granting of an order under section 18(3) of the Superior Courts Act 10 of 2013.

20.5 I then discuss in some detail the question of costs and why PRASA should not cover the costs of the other respondents. In other words, the members of the Board of Control ("the Board") must *pro rata* contribute to the costs and those costs are to be paid personally by the directors and not by PRASA.

20.6 Some comments before I conclude in asking this court to grant the order.

21 I am the First Applicant in this application.

22 The Second Applicant is **Mr. Nkosinathi Allen Khena ("Mr. Khena")**, of 157 Wilton Avenue, Bryanston, Johannesburg. Mr Khena was the Chief Operating Officer of PRASA.

23 The Third Applicant is **Mr Tiro Holele ("Mr. Holele")** of 142 12th Street, Parkhurst, Johannesburg, Gauteng. Mr Holele was the General Manager: Strategy.



- 16
- 24 The first respondent is **Passenger Rail Agency of South Africa** ("**PRASA**") established in terms of section 22 of the Legal Succession to the South African Transport Services Act, 9 of 1989 ("Legal Succession Act"). It provides rail commuter services within the Republic in the public interest. PRASA provides for long-haul passenger rail and business services in terms of the principles set out in section 4 of the National Land Transport Transition Act, 22 of 2000. The balance of its objects and powers are set out in section 23 of the Legal Succession Act. PRASA's principal place of business is at Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg, Gauteng.
- 25 The second respondent is **Mr. Leonard Ramatlakane**. The second to ninth respondents are all members of PRASA's Board. The members of the Board are appointed in terms of section 24 of the Legal Succession Act. The second respondent is the Chairperson of the Board of PRASA.
- 26 The second to ninth respondents are cited as members of the Board, but they are also cited in their individual capacities because the Applicants intend to ask this Honourable Court to mulct them with costs in their personal capacities for frivolity and unmeritorious application for leave to appeal, waste of taxpayers' money and, as was warned in the case of *Passenger Rail Authority of SA v Molepo* [2014] 5 BLLR 468 (LC). In *Passenger Rail Authority of South Africa v Molepo* the court warned PRASA in particular to take into account public trust considerations when deciding to embark on litigation in the name of PRASA and how that litigation is to be conducted.

27 The tenth respondent is the acting Group Chief Executive Officer ("AGCEO") of PRASA, she is the one under whose hand the termination letters were issued to us. The position that is held by the tenth respondent is that of Group Executive: Human Capital Management. She was appointed into this position around October 2019. By virtue of her position she is the group executive who is the custodian of all policies that relate to human capital management, she is also the custodian of all employment contracts. Had there been any issue with our employment contracts that was picked up by non-executive members of the Board who had been at PRASA for four months, such issue would have been picked up by her and corrected before the Board was appointed. The tenth respondent knows as much as the Board knows that the reasons for termination of our employment contract are unlawful. With this knowledge, she signed the termination letters and deposed to an affidavit opposing our application to vindicate our employment contracts.

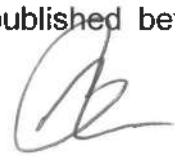
28 We, the Applicants, will ask this court to exercise its discretion by ordering the members of the Board and the AGCEO to pay the costs of this application and those costs are not to be recovered from PRASA.

29 I shall ask that the matter be disposed of with due expedition. It is largely because as I say elsewhere in this application the expected resistance to the section 18 application and the application for leave to appeal are but examples of the stratagem to frustrate us, to draw out this matter, to out-litigate us at the public's expense. That should not be allowed. We have not been paid for the month ending 28 February 2021, unless the matter



is settled before 25 March 2021, we will not be paid for the month of March. Our entitlements including leave pay-out (except for Mr. Holele) and access to our pension moneys in order to live and to sustain our families have also not been paid. This is despite Mr. Khena and I writing to PRASA to require it to release those leave pay-outs. The letters which we have written to PRASA are attached to this application as "18D" – "18E".

- 30 The only response that was received from PRASA's legal representatives was on 4 March 2021 informing our legal representatives that they were consulting with PRASA on 4 March 2021 and would revert. As at the date of this application no further communication has been received in this regard and the leave pay-outs in respect of me and Mr Khena remain unpaid.
- 31 The high-handedness and the callousness which we as the Applicants are being treated should be highlighted and condemned. Especially because it is done using the name and clout of PRASA and taxpayer's money. There is no sense of decency from PRASA given our precarious financial position.
- 32 We shall seek that the section 18 application be disposed of fairly expeditiously together with the application for leave to appeal so that there are no further delays to our returning back to work to discharge our responsibilities. There is no reason why this matter cannot be dealt with in the next 10 court days so that some outcome is published before



27 March 2021. That date is important because it is the day on which we are paid in terms of our contracts of employment.

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- 33 Even if this court is not minded to implement the entirety of the section 18 application, the question of remuneration is critical. It is our source of livelihood and that aspect at least should be preserved and PRASA be made to make payments. We are, as matters stand, employees even though the decision is challenged it is suspended but it is not reversed.

B. THE APPLICANTS WILL SUFFER IRREPARABLE HARM

- 34 If the application to execute the order is not granted, we will suffer irreparable harm.

- 35 In the urgent application I expounded upon the grounds which I said motivated urgency. Because that application was not an application for an interdict, I did not posit the harm that I would suffer, specifically under the rubric of irreparable harm. What we did do was to set out our personal circumstances, to demonstrate that unless the relief was granted on an urgent basis, we would not obtain adequate redress in due course. The same applies here. Those facts underpin the irreparability of the harm that we will suffer if this application is not heard expeditiously and the relief sought is not granted.

- 36 I said earlier that the circumstances under which our contracts were terminated were quite peculiar. Not only did the Chairperson of the Board inform the world that PRASA had decided to terminate (unlawfully) our

 13



contracts of employment, there was liberal defamatory innuendo published, at least in my case and that of Mr Khena, that suggested that we are guilty of taking advantage of instability in the Board (in other words, being grossly dishonest), and for procurement irregularities and other malpractices at PRASA.

37 This of course has been singularly refuted by a subsequent arbitration award in favour of PRASA and issued by Ms. Nkosi-Thomas SC awarding PRASA R45 million. This arbitration award put paid to any suggestion that PRASA can have any claim against Mr Khena and I. That information however was not put out in the public domain by the chairperson and so as far as the world knows, not only have we dishonestly overstayed our welcome at PRASA but PRASA intends to pursue proceedings against us ostensibly to recover, in my case R58 million and in the case of Mr Khena R25 million.

38 This innuendo, which in my respectful submission falls, is intended to tarnish our reputation is still operative and so there is an imperative –

38.1 To redeem our names which the judgment of this court has already done in a sense;

38.2 Because now there is an application for leave to appeal, the perception in the market continues that we are guilty of those alleged offences;



- 38.3 It becomes difficult to obtain employment opportunities, especially in this repressed economic environment where executive positions are difficult to come by;
- 38.4 We have not been afforded a notice period which in our case would have been three months, so that we could arrange our affairs properly;
- 38.5 In the case of Mr. Khena and I, PRASA unlawfully refuses to pay us our leave pay; and
- 38.6 We are not being paid by PRASA (this is also an exceptionality point).
- 39 On 1 March 2021 our attorneys sent a letter to PRASA demanding that Mr. Khena and I be paid our leave pay. As of the date of signature of this affidavit, PRASA had not released our moneys. I believe that it is important to state that:
- 39.1 I first made enquiry about this payment on 15 February 2021. When I made this enquiry, I was referred to the acting Group Executive: Human Capital Management ("GE: HCM") and the acting Group Chief Executive Officer ("AGCEO").
- 39.2 The GE: HCM and the AGCEO simply ignored me.
- 39.3 I later (on 25 February 2021) received an e-mail from a Senior Manager: Employee Relations indicating to me that I should make contact with PRASA's external lawyers in relation to my



leave pay. In this e-mail, the Senior Manager: ER copied the AGCEO, the GE: HCM, the person who has been appointed to act in my stead as well as PRASA's external lawyers.



39.4 The email thread between myself and PRASA is attached hereto marked "18F".

39.5 I therefore asked our lawyers to send an enquiry to PRASA's external lawyers. In response to our lawyers, PRASA's lawyers indicated that they will be obtaining instructions from their client (PRASA). To date, PRASA's lawyers have not responded to our lawyers and it is clear to me that PRASA wishes to drag this unlawfulness for as long as it is possible to do so (Annexure "18G").

40 We just don't have the necessary money to sustain ourselves on a month-to-month basis until we are restored.

41 One of the reliefs granted by this Honourable Court is that we be paid any salaries and benefits due to us from the termination date. Unless this matter is disposed of on an urgent basis and that the relief sought be granted, we will face poverty, financial ruin, bad credit records, our dependents will also suffer likewise.

42 In the application before this court in the urgent matter we each adverted to our financial commitments on a month-on-month basis. We are now facing the prospect of a second month without salary payments in

 
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circumstances where PRASA's conduct has been found to be unlawful and where there is a court judgment which vindicates our rights. But more importantly, it also orders PRASA to pay our salaries going forward. We just do not have the resources personally to cover these monthly contingencies as and when they fall due. The inability to satisfy our financial and legal commitments as and when they fall due has a very grave legal consequence and that is

42.1 Legal proceedings to be instituted such as banks repossessing our houses and cars, schools expelling our children amongst others;

42.2 Bad credit records;

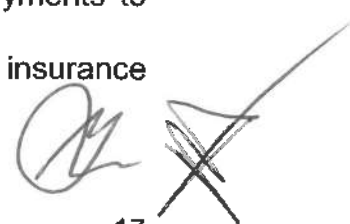
42.3 All those activities and items that are required to be paid on a month-to-month basis will be defaulted upon; and

42.4 The consequences of default would be a terrible credit record (sight should not be lost of the fact that we have a judgment that vindicates our rights).

43 Without re-hashing what is already stated in the urgent application papers, the prospect of not having a salary going forward is as follows:

In my case

44 I am a single parent and a breadwinner. I have bond repayments to service, vehicle repayments to service, medical aid and insurance



policies. I have not been able to do that because I was not paid as at the end of February and PRASA is unlawfully withholding my leave pay.

- 45 I have had to borrow money from friends to be able to buy food and petrol. I was unable to pay for my niece's registration at university and therefore she too has been affected and cannot go to university because I am responsible for her fees. I have not paid my levy, rates and taxes as and when they fell due at the end of February. The same will happen obviously going forward.
- 46 My daughter who is in grade 12 this year, was supposed to resume her sessions with her educational psychologist and this has had to be put on hold because it will be another debt I can no longer afford to pay for.
- 47 I was not able to pay my daughter's school fees and all the other miscellaneous debit orders that go through on my account were rejected and this of course results in a bad credit record and penalties that I incur from my bank for not having sufficient funds in my account when charges are made by debit orders on the account.
- 48 I have not been able to pay my helpers their full payments for the month ending end February.
- 49 I am concerned about my mental wellbeing as I suffer and have been treated before for severe anxiety and panic attacks.

A handwritten signature in black ink, consisting of a stylized 'A' followed by a large 'X' and a long horizontal stroke.

- 50 He is a breadwinner at his home and financially supports his wife, his son and relatives who need support from time to time. For the month of March, Mr. Khena has had to borrow money from friends and relatives. If this matter is not finalised by 25 March 2021, he will have to go back to such friends and relatives to borrow more money to be able to support his family.
- 51 Mr. Khena is recovering from a major hip operation. This requires rehabilitative treatment that was covered by his medical aid. Because Mr. Khena is now unable to contribute to his medical aid, this rehabilitative treatment will be adversely affected.
- 52 Mr Khena has approached his bank to seek a holiday for repayments on his bond. This was rejected by the bank. He has not paid his son's school fees. He has not paid his monthly municipal rates and taxes. His credit card was not paid with consequent expenses of 27% interest on the outstanding arrears. He has not been able to pay for servicing his car.

In the case of Mr Holele

- 53 Mr Holele too is a breadwinner and will not be able to pay his bond, and will not be able to pay his dependants' school fees. The monthly debit orders for insurance policies, medical aid, car insurance, car repayments life cover policies will be rejected at the end of March and he will lose the necessary cover from the medical aid and this will imperil his family and





dependants. His parents are elderly (mother is 80 and father 86) and his father is in a frail care facility. This unlawful dismissal has been very traumatic and devastating to his elderly parents. Them watching their son being targeted and victimized for no reason has caused them sleepless nights, and he is afraid that if this unlawful conduct is allowed to continue it may complicate his elderly father's frail health leading to his early death. This will cause terrible torment to the family.

54 In addition to what I have stated above, can I ask this Honourable Court to also have regard to the section dealing with financial hardship that I set out in the urgent application (p 44 paragraphs 94 *et seq.*).

55 It will be cold comfort to suggest that we await settlement or that this matter be heard. The proverbial horse would have bolted. The prejudice, even if money is obtained at a later stage would have occurred. My niece's lost academic year is not be recoverable, so are all the interest payments to be made to creditors, the bad credit record and the inability to have access to private medical care in circumstances where the public health care system is battling to cope partly as a result of the Covid-19 pandemic.

56 There was no suggestion, and there can never be a suggestion that the trust relationship between ourselves and PRASA has broken down. That certainly is not the reason that was given to us when our contracts were unlawfully terminated. There is also no suggestion that the positions have been filled by PRASA. It is important that we go back to work. We should discharge our duties. This court recognised the public interest element

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(rule of law) that attends this application. PRASA should not be allowed any day more to continue with its unlawful conduct. We should be afforded an opportunity to go back to work, we have tendered our services.

- 57 PRASA can only benefit from our labour. We have in the papers before this Honourable Court highlighted our respective roles which as we have said, are at a senior level. PRASA needs those services. For every day that we are not at work and PRASA now has to move people around to carry more burdens whilst we are available is simply nonsensical. It is not to act in the interests of PRASA, it is to defy the constitutional mandate of PRASA and it is also to breach the enabling legislation, the Legal Succession Act as well as the Public Finance Management Act.
- 58 For as long as we are not at work the annual audit of PRASA by the Auditor General is due to start in April and we are critical employees to work with the Auditor General on the Audit. We are also meant to start implementing the PRASA Strategic Plan for the financial year beginning in April 2021, which is funded at huge cost by the taxpayers as announced in the recent budget by the Minister of Finance. There is simply no time to lose.



C. NO IRREPARABLE HARM TO PRASA

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59 When challenged to state whether there might be a case for it for irreparable harm in the urgent application, PRASA did not rise to the occasion. They contented themselves with raising technical defences.

60 Essentially, if the order were to be implemented PRASA will suffer no irreparable harm at all. PRASA will be kept to its end of the bargain by observing the terms and conditions of the contracts of employment that are extant, not only by order of this court, but also by their own terms. It will have to pay the salaries and benefits as it has for the last number of years that we have all been working. We, on the other hand, will be rendering services in accordance with the contracts of employment. PRASA will not be "forced" to put up with us. We are entitled to be at PRASA in accordance with our employment contracts. To require PRASA to implement the terms and conditions of the contracts, including the payment of its employees would not, by any stretch of the imagination, result in any irreparable harm to PRASA. There is no suggestion that our presence at work, our discharging our obligations under the contracts of employment will in any way harm PRASA. I therefore submit that PRASA will suffer no harm if the order of this court is implemented.

D. NO PROSPECTS OF SUCCESS ON APPEAL

61 There are no reasonable prospects of success in the appeal. PRASA raises essentially three grounds for its appeal:

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61.1 First the issue of costs;

61.2 Second, the issue of urgency; and

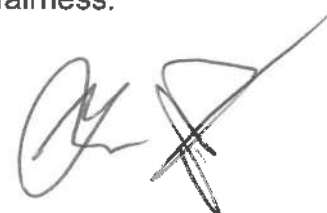
61.3 Thirdly, the issue of jurisdiction.

62 Costs and urgency are matters for discretion and the Labour Appeal Court will not upset the findings or the exercise of this court's discretion unless it can be shown that there was no proper exercise of a discretion.

63 There is no basis upon which the exercise of a discretion by this court on the question of costs can be upset by a court of appeal because that exercise was in accordance with the requirements of law and fairness.

64 The defence put up by PRASA is without any merit, has been discredited and is unlikely to be upheld by the LAC. There is no basis in fact or in law on which the decision of this court can possibly be upset on appeal.

65 Insofar as the issue of jurisdiction is concerned, PRASA entirely and totally misreads the cases on which it relies. In fact, if anything, those cases say the opposite of what PRASA contends for. Those cases are clear that an Applicant who seeks to rely on a contract of employment (as we did as Applicants) is entitled to do so under section 77(3) of the BCEA. The remedies are set out in section 77A of the Act. That was always the case in the urgent application. There cannot have been any confusion. At no stage did we claim to rely upon the LRA or indeed upon fairness. That was expressly disavowed by us in the urgent application.



- 66 The Applicants made clear that the basis of jurisdiction is section 77(3) of the BCEA. This court has the powers under section 77A(e).
- 67 The jurisprudence of this Court, the LAC, the SCA and Constitutional Court has consistently and without any contradiction come to the same conclusion.
- 67.1 There is a distinction between fairness and lawfulness;
- 67.2 Once a litigant invokes either ground, it cannot seek to access relief under the other heading;
- 67.3 A litigant who relies on the LRA and its provisions cannot claim relief for unlawful termination of contracts (this, we did not do);
- 67.4 Nothing precludes an Applicant from enforcing the terms and conditions of its contract (specific performance) (this is exactly what we did in the urgent application);
- 67.5 This court is entitled as has been found in many a case that it can adjudicate over claims based on unlawfulness (also framed as a breach of contract, ignoring a contract, disregarding a contract).
- 67.6 This court has the power to enforce contracts (specific performance) (something that we asked the court to do).
- 68 Upon a conspectus of all the evidence and argument presented by the parties, there are no prospects of success on appeal. It is a factor that

this Honourable Court usually takes into account to assess whether there will be any harm on either of the parties. We submit that there are no prospects of success on appeal.

E. THIS APPLICATION IS EXCEPTIONAL

69 The Board requested my employment contract and stated that it conducted a review of employment contracts of executives. In the case of our employment contracts, there is no fixed term of employment. The respondents have no basis for the decision that they took to terminate our contracts. They proceeded nonetheless unlawfully, published the fact of termination alongside baseless defamatory allegations. Effectively killing off our livelihood without cause.

70 This conduct is consistent with what I intimated in the founding papers, namely, that the Director-General had said that any employee who does not "toe the line" will be terminated unlawfully and that PRASA has bottomless resources to out-litigate such employees.

71 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.

72 Further, PRASA in its termination letters say that we were contracted for a five year period. This is repeated in the press release of 30 January 2021. When an opportunity is afforded to the respondents to



justify and to take the court into their confidence under oath and to show precisely what the source is of the alleged five year tenure, the respondents say nothing at all. They do not repeat what it said in the letters and the media releases under oath. They do not state under oath that what they stated in the letters and what they stated to the whole world is true and correct and that they stand by the letters. All that they were content with doing was to take unmeritorious technical points.

- 73 There is a sad history of PRASA's cavalier conduct when dealing with its employees. Our counsel adverted to this attitude in their written submissions at paragraphs 101-107. I do not re-hash those legal principles. Suffice to state the following:

73.1 In their written submissions our counsel indicated that what the respondents were doing was characteristic of conduct that was previously criticised by this court in at least three matters in this court².

73.2 PRASA litigates without reflecting, without so much as thinking about the fruitless and wasteful expenditure it will incur, in the face of clear illegality where there is absolutely no defence. It does so with total disregard to the position raised by the employees in their demand letters to PRASA dated 31 January 2021 in respect of me, 1 February 2021 in respect

² *Mpane v PRASA and others* J3745/18 [2020] ZALCJHB 173; [2021] 1 BLLR 76 (LC); *Mchuba v PRASA* (2016) 37 ILJ 1293 (LC); and *Passenger Rail Authority of SA v Molepo* [2014] 5 BLLR 468 (LC). (

of Mr Khena and 3 February 2021 in respect of Mr Holele. That is exceptional.

- 74 We have now been put out of work unlawfully. The courts have vindicated our rights by way of the judgment given.
- 75 I incorporate by reference, and I adopt what is stated in the founding affidavit insofar as the irreparable harm we shall suffer is concerned. That was also highlighted by my legal team in its written submissions under the heading of urgency, and in particular urgency of financial hardship as well as the lack of adequate redress in due course. I do not rehash those. I ask that they be incorporated by reference.
- 76 We all have financial responsibilities. We have not been paid for the month ending February. The application for leave to appeal is now being lodged to frustrate our ability to earn a living and frustrate our ability to challenge PRASA's unlawful conduct. Unless this matter is disposed of on an urgent basis and the application is granted, we will not be paid for the month ending and March 2021.
- 77 By bringing the leave to appeal application and possibly resisting this application, the respondents are acting high-handedly. They are repeating exactly what this court criticised in the three of four cases I have referred to above.
- 78 For as long as the matter is not disposed of, for as long as the judgment is not implemented, for as long as that judgment must wait to be disposed

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- by way of an application for leave to appeal or the actual appeal, we will not have any livelihood, our financial commitments and responsibilities continue notwithstanding the fact that we are not earning any income. Our credit records are being spoiled. That will affect our ability to raise any credit currently or in the future, our dependents and (besides ourselves) are also prejudiced by our inability to provide for them.
- 79 We have a contractual claim to be compensated month on month for as long as our contracts are extant. This Court made that finding. By applying for leave to appeal and therefore suspending the operation of the judgment, PRASA aims to ensure that we are prejudiced irreversibly.
- 80 If the respondents elect to resist this application, it will be exceptional under the circumstances but expected in terms of the stratagem to out-litigate us. To allow PRASA to continue with the unlawfulness and illegality pending the disposal of the matter on appeal is exceptional on its own. PRASA should not be allowed to do that.
- 81 PRASA has still not produced either in this court or outside of court the source or the legal and factual basis upon which our contracts were terminated. To allow them to enjoy that state of unlawfulness would itself be exceptional.
- 82 I ask that this court exercises its discretion by disposing of this matter as one as exceptional under section 18 of the Superior Courts Act 10 of 2013.
- 83 The circumstances are also exceptional for the following reasons.



84 Another court (*per* Tlhotlhemaje J) in the matter of *Munthali v PRASA*³ found essentially on the same terms as this court in the urgent application. It will be recalled that Ms Munthali was also unlawfully terminated by letter dated 29 January 2021 but she approached court separately and Tlhotlhemaje J made an order similar to this court's (a copy of the judgment is attached for convenience as Annexure "18H").

85 It will be exceptional to deny us the benefit of our judgment when two judges in this Court have found against PRASA precisely for the same conduct, in a matter raising substantially the same issues and resolved in favour of the employees. The difference in *Munthali* is that PRASA changed tack from the termination and attempted to contend that the termination was based on its policies. This argument was rejected by this Court.

86 A further reason for the exceptionality is the public interest considerations argued by our counsel. PRASA is not a private enterprise. It is a state-owned entity with certain statutory responsibilities and obligations. These are to be found in its enabling legislation, that is, the Legal Succession Act as well as the PFMA read with the Constitution.

87 I emphasise the following:

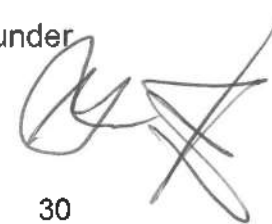
87.1 The principles and values underpinning public administration in terms of section 195.

³ *Munthali v Passenger Rail Agency of South Africa (PRASA)* (J 143/21) [2021] ZALCJHB 3.

87.2 The responsibilities of this organisation under the PFMA and under the Legal Succession Act.

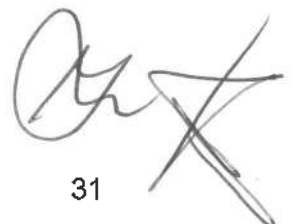
88 PRASA has turned those provisions on their head. Unless the judgment is implemented, which in a sense is a vindication of those statutory and constitutional prescripts, PRASA would in a sense enjoy the fruits of its unlawfulness. It is important that South Africans know that their tax money does not go to waste on account of frivolous defences that PRASA is currently raising. It is a matter of public notoriety that PRASA is cash strapped and is in a financially precarious position.

89 The Financial Position of PRASA has been on a steep decline for several years, leading to the organisation experiencing a serious liquidity crisis. The Annual Report for the 17/18 financial year states that "the Group has for a number of years experienced cash flow problems and is currently experiencing a severe cash crisis. The accumulated funding shortfall by 2017/18 financial year, stood at R5.2 billion". For the Financial Year 18/19, it is recorded that "this Annual Report confirms that PRASA still faces a massive cash shortfall on its operational expenditure budget, which has accumulated over several years, caused by rising operational costs, declining revenues, and a stagnant operational subsidy". The Annual Report for the 19/20 Financial Year states "Especially with the continuing decline in revenue generation in the Rail and Autopax divisions, PRASA's revenue remains materially reliant on the subsidy from the Department of Transport (DoT). Fare revenue for the year under



review dropped to R1,049 billion; this was 47% lower than the budget of R1,9 billion and R0.5 billion lower than the previous year”.

- 90 According to the PRASA's Annual Financial Statement dated 31 March 2020, PRASA made a loss of R537 million (excluding depreciation and amortization which are non-cash items) during the 2019/2020 financial year. The situation will be exacerbated in the 2020/2021 as the entity will generate less revenue due to the lockdown as a result of COVID 19.
- 91 PRASA is not able to settle its debts timeously due to cash constraints. Creditors are paid after more than 30 days which is in contravention of the PFMA. Accounts payable increased from R5.6 billion to R5.7 billion in the 2019/20 financial period. As a result, the entity also incurred fruitless and wasteful expenditure of R34 million in the form of interest and penalties due to delays in paying creditors.
- 92 PRASA budgeted for a deficit of R3.8 billion which further demonstrates that the entity cannot generate sufficient revenue to meet its operational requirements.
- 93 PRASA is subjected to chronic vandalism and a stripping away of its assets. Instead of saving money to plug those holes, PRASA is now opening up another dark hole into which taxpayers' money is thrown. This should be stopped. All of these I submit render the application exceptional.



F. COSTS

- 94 In the application before this Honourable Court, we only sought costs against PRASA but also asked that in the event that this court was not minded to grant urgent relief, costs should not be ordered against us.
- 95 This application, and it will also be argued in the application for leave to appeal, the Applicants seek a punitive costs order as against the second to tenth respondent in their personal capacities and that money is not to be recovered from PRASA for purposes of payment.
- 96 The second to tenth respondents are liable to pay the costs jointly and severally, one paying the others to be absolved and they are to be compelled to pay the costs out of their own pockets. There is no reason why PRASA as a state-owned company must bear costs for these kinds of decision of the members of its Board and the AGCEO.
- 97 The application for leave to appeal in the opposition to this application will be frivolous and without merit for all the reasons I have discussed above.
- 98 The members of the Board have failed to take heed of the judgment of this court in *Passenger Rail Authority of SA v Molepo* in which the presiding Judge set out in some detail the reprehensible conduct by PRASA in the matter and the fact that PRASA had undertaken an unmeritorious exercise without reflecting. That is repeating itself in this case.



99 I need not remind this Honourable Court that what is currently happening has been presaged as our counsel indicated in their written submission in the urgent application. The Director-General of the Department of Transport has said, and this was never been denied, and it should not be denied, because any denial will be opportunistic and an after-thought and contrivance.

100 It will be recalled that in the founding affidavit I referred to a meeting attended by myself, other executives and Department of Transport officials at the instance of the Director-General at which he made clear that any employee who does not toe the line should be hounded out of PRASA unlawfully. That is exactly what happened to us.

101 By embarking upon an unmeritorious application for leave to appeal and if it opposes this application, PRASA once more and without reflection and at taxpayers' costs, is embarking upon another expensive exercise. It is unnecessary.

102 It is a matter of common notoriety that PRASA is experiencing a critical financial squeeze. It does not have money and its financial and performance accounts are in a chaotic state. This much was also said at the various meetings at SCOPA (Parliamentary Committee on Public Accounts). It is a matter reported widely in the media. It is also a matter widely reported by the Auditor-General. I can only summarise it as follows:

A handwritten signature in black ink, appearing to be 'G. N. Nkomo', with a large 'X' mark over the end of the signature.

- 102.1 PRASA has received two consecutive disclaimers of its financial accounts from the Auditor General due to instability at the Board and Management levels with key management roles (CEO, CFO, Heads of Security, Engineering, Procurement) remaining vacant.
- 102.2 PRASA is so cash strapped that it cannot pay suppliers and has incurred fruitless and wasteful expenditure of R34 million from interest charges on debts that it cannot pay,
- 103 The Board of PRASA bears responsibility under the Constitution. PRASA is an organ of state as defined in section 239 of the Constitution.
- 104 Under the PFMA, in particular section 51, which sets out general responsibilities for accounting authorities, it is required to ensure that PRASA takes effective and appropriate steps 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 and responsible for the management, including the safeguarding of the assets and for the management of the revenue, expenditure and liabilities of the public entity.

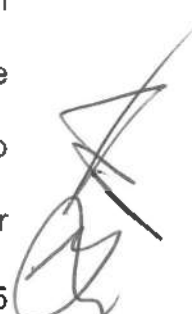
105 It is subject to the fiduciary duties under section 50 of the PFMA. It is required to act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity.

106 Members of the Board may not act in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of the Act and/or use the position or privilege of, or confidential information obtained as accounting authority or a member of an accounting authority for personal gain or to improperly benefit another person.

107 The AGCEO bears responsibilities of a public entity in accordance with the PFMA in particular those under section 57.

108 I only highlight some of the few provisions from the PFMA that apply to the Board and the AGCEO but this is not to suggest that this is all. This court is at large to consider other provisions of the PFMA in assessing the question of whether the members of the Board and the AGCEO (the second to tenth respondent) have conducted themselves in a manner consistent with the Constitution, the PFMA and the Legal Succession Act.

109 In light of what I have said and having considered the high-handedness and cavalier attitude displayed by the respondents, considering the merits of this application and the conduct of the second to tenth respondents in the manner in which they conducted themselves in relation to our main application and their application for leave to appeal, we submit that there is no reason why the costs occasioned by the conduct of the second to tenth respondent should be paid from PRASA's funds. They bear



fiduciary duties towards PRASA, I respectfully submit that they have abused their positions and their power to start and perpetrate an unmeritorious fight against PRASA's own employees.

110 This is a classic case of the respondents acting against the interests of PRASA. PRASA should not have to bear the costs of this unmeritorious adventure by members of its Board and the AGCEO. They have betrayed their commitment to conduct the affairs of PRASA in accordance with the Constitution, the enabling legislation and the PFMA. They have been on a frolic of their own and PRASA should not pay for that expense.

111 I accordingly ask that the second to the tenth respondents should pay the wasted costs in their personal capacities and that the money is not to be defrayed from PRASA.

112 I again similarly ask that if this court is not minded to grant the application that no costs should be ordered against the Applicants. We have been put to bringing this application under very desperate circumstances. We have been deprived of our livelihoods. We are simply not in a position to pay for our monthly expenses as and when they fall due. We will be hard pressed were we to be required to pay PRASA's legal costs in the event of a loss by us.

113 We ask that this court incorporate what we have said in the founding affidavit under the heading "**COSTS**" at paras 139 – 144.



114 This should be read together with the principles in *Biowatch*⁴ and in *Zungu*.⁵

G. CONFIRMATORY AFFIDAVITS

115 I attach hereto the confirmatory affidavits deposed to by **NKOSINATHI ALLEN KHENA** and **TIRO HOLELE**, marked as annexures “18I” and “18J” respectively.

H. CONCLUSION

116 I have established on a balance of probabilities and submit that I have made out a case for the implementation of the decision of Baloyi AJ –

116.1 We will suffer irreparable harm;

116.2 PRASA will not suffer any irreparable harm;

116.3 This matter occurs against exceptional circumstances that I have highlighted above;

116.4 The second to tenth respondents should be mulcted with costs and those costs should be paid by them in their personal capacities and should not be defrayed by PRASA.

⁴ *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

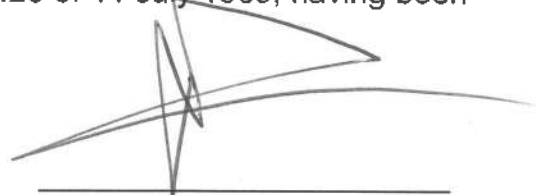
⁵ *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); 2018 (6) BCLR 686 (CC).

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116.5 I ask that the application be granted with costs, including the costs occasioned by employment of two counsel.


DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Jardyn on this the 8th day of MARCH 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.


COMMISSIONER OF OATHS
FULL NAMES:
ADDRESS:
CAPACITY:

Philladelphia Kedibone Mothupi

Commissioner of Oaths
Practising Attorney R.S.A.
12th Floor, The Forum
Sandton Square
No2 Maude street, Sandton

"18A"

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DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO. ☒ YES ☐ NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES ☐ NO.

(3) REVISED. ☐ YES ☒ NO.

02/03/2021
DATE

[Signature]
SIGNATURE



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J 111/21

In the matter between:

**ONICA MARTHA NGOYE
NKOSINATHI ALLEN KHENA
TIRO HOLELE**

**First Applicant
Second Respondent
Third Respondent**

and

**THE PASSENGER RAIL AGENCY OF
SOUTH AFRICA**

First Respondent

LEONARD RAMATLAKANE

Second Respondent

THINAVUYO MPYE

Third Respondent

DINKEANYANE MOHUBA

Fourth Respondent

SMANGA SETHENE

Fifth Respondent

XOLILE GEORGE

Sixth Respondent

NOSIZWE NOKWE-MACAMO

Seven Respondent

MATODZI MUKHUBA

Eighth Respondent

THEMBA ZULU

Ninth Respondent

MS THANDEKA MABIJA

Tenth Respondent

Heard: 12 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour

[Signature]

Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 02 March 2021.

JUDGMENT

BALOYI, AJ

Introduction

- [1] The termination of employment contracts of the three applicants with immediate effect is the subject matter of this application. The applicants approached this court on urgent basis essentially seeking an order that such termination be declared unlawful and set aside. Consequently, the reinstatement to their respective positions be ordered. The application is opposed with pleas of lack of urgency and this Court's lack of jurisdiction in the forefront of the respondents' case. The matter was first scheduled for hearing on 11 February 2021. Due to administrative glitches a bulk of the Court papers did not reach the Court file on time. As a result, the matter was by agreement adjourned to 12 February 2021.
- [2] It appears from the Court papers and the arguments that the termination was effected by the first respondent at the instances of its Board of Control. The said Board of Control is headed by the second respondent as its chairperson. The third to ninth respondents are the second respondent's fellow members of the Board of Control. The tenth respondent is the Acting Group CEO of the first respondent. They are cited on reason that the termination was precipitated by their collective decision. Part of the relief sought by the applicants is to have the resolutions so taken by the Board be declared unlawful, invalid and of no force. Furthermore, the Board was according to the applicants not properly constituted hence a specific order is sought in this respect. More of this appear herein below.



Background

- [3] As pointed above, the respondents have raised legal objections with regard to lack of urgency and this Court's lack of jurisdiction. To enable me to deal with these points, it is thus imperative to briefly lay down the factual background to this dispute. The first applicant, Ms Onica Martha Ngoye, received a letter of termination of her contract on 29 January 2021 dated 29 January 2020. It appears that the parties held a common understanding that the date appearing in her letter of termination was intended to be 29 January 2021. The relevant content of the letter is self-explanatory and was crafted in the following manner:

"Dear Ms Ngoye

SAP Number: XXXXXX

29 January 2020

Re: Termination of Employment

1. You will recall that on 13 January 2021, the Chairperson of HCM & REMCO requested employment contracts of all executives, including yours. In response to the said request, you indicated by way of an email dated 13 January 2021, that there is no contract signed between yourself and PRASA on your current position.
2. Having perused PRASA's records, the only contract of employment PRASA has with you relates to your previous role as Chief Executive Officer: Intersite
3. For your current position, only the letter of transfer [transferring you from Intersite to Group Executive: Legal, Risk and Compliance] dated 22 August 2014, could be found. For ease of reference, I attach the said letter as annexure "A".
4. According to the letter, your transfer was to commence on 1 September 2014 and the other conditions of service were not amended by the said letter.
5. In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives. In your



current position, PRASA relies on you for issues concerning legal, risk and compliance and you out to have brought this administrative defect to the attention of PRASA (sic).

6. Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.
7. Having said that, PRASA hereby informs you of its intention to approach court for necessary relief against you in respect of various matters including the unauthorised and unlawful approval of R58 153 296.72.
8. You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,

Signed

Ms Thandeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa"

- [4] On the very day, that is, 29 January 2021 the second applicant, Mr Nkosinathi Allen Khena, also received a letter of termination of his contract of employment dated 29 January 2021. The letter is similarly self-explanatory and it reads as follows:

"Mr Khena

SAP Number: XXXXXX

29 January 2021

Re: Termination of Employment

- [1] Having perused PRASA's records, the only contract of employment PRASA has is that of Chief Operating Officer dated 1 December 2012.
- [2] In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives.

[3] Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.

[4] Having said that, PRASA hereby informs you of its intention to approach court for necessary relief against you in respect of various matters including the unauthorised and unlawful approval of an amount in excess of R 25 million without requisite authority.

[5] You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,

Signed

Ms Thandeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa"

[5] As at 29 January 2021 the first and second applicants occupied the positions of Group Executive: Legal Risk and Compliance and Chief Operating Officer respectively. These positions fall within the level of executives in terms of the first respondents' structure. These letters were followed by the first respondent's media statement published on 30 January 2021 announcing the termination of employment of three executives for having been in the employ of the first respondent for more than 5 years, and they ought to have left years ago. According to the statement all executives are employed for a period not exceeding 5 years with no expectation of extension of the contracts. The statement went on to state that these executives took advantage of instability at the level of the first respondent's Board, hence they stayed unlawfully for a longer period in the positions. The letter further conveyed the first respondent's intentions to institute legal action to recover R58 million from the first applicant and R25 million from the second applicant. The reason for the legal action relates to their approval of such payments to the external service providers without the requisite authority.

- [6] The first applicant came into her position by virtue of the transfer from her initial position of CEO at one of the subsidiaries of the first respondent, Intersite Asset Investment Soc Ltd as per the transfer letter dated 22 August 2014 following the Board's resolution to the effect. What is of utmost importance in this regard is that in the first applicant's letter of transfer it is recorded that such transfer was lateral and did not amend all other terms and conditions. The conditions referred to, in the understanding of the parties are those set out in the first applicant's contract she entered into with Intersite Asset Investment Soc Ltd dated 01 September 2012. The commencement date is recorded as 01 September 2011.
- [7] The relevant features of the contract as recorded in clause 3 are that the first applicant accepted the appointment subject to the terms and conditions contained in the very agreement and its annexures. Furthermore, that the appointment in question *shall be deemed to have commenced on 01 September 2011 and shall endure until terminated as provided for herein*. Clause 9 of the contract identified the grounds on which the employment shall be terminated. Firstly, without notice on account of misconduct or any other cause recognized by law. Secondly, within three months' notice which the employee has to serve. Whichever mode of termination to be effected in terms of clause 9, the parties are in all respects bound to have regard to the internal policies and procedures and the provisions of the Labour Relations Act prior to such termination.
- [8] In Annexure "A" of the first respondent's contract, the salient details of employment are recorded as follows:

"ANNEXURE A – SALIENT DETAILS OF EMPLOYMENT"

- [1] **Full Name:** Martha Onica Ngoye
 [2] **Identity Number:** XXXXXX
 [3] **Capacity:** Chief Executive Officer
 [4] **Annual Leave Entitlement:** 22 Days per annum
 [5] **Duration:** Permanent



[6] **Commencement Date:** 01/09/2011

[7] **Termination Date:** N/A

[8] **Physical Address, postal address and telefacsimile:**

Physical - XXXXXX

Postal - XXXXXX

[9] **Sick Leave entitlement:** 40 working days per leave cycle"

- [10] The second applicant's contract of employment signed on 30 November 2012 with commencement date recorded as 01 December 2012 contains the same terms and conditions as that of the first applicant with regard to the appointment and duration in clause 3 as well as the termination in clause 9. Annexure "A" of his contract reveals the salient details of employment as follows:

"ANNEXURE A – SALIENT DETAILS OF EMPLOYMENT,

1. **Full Name:** Nkosinathi Khena
2. **Identity Number:** XXXXXX
3. **Capacity:** Chief Operating Officer: PRASA
4. **Annual Leave Entitlement:** 22(twenty two) paid working days per annum
5. **Duration:** Full time
6. **Commencement Date:** 01 December 2012
7. **Termination Date:**
8. **Physical Address, postal address and telefacsimile:**
Physical - XXXXXX
Postal - XXXXXX
9. **Sick Leave entitlement:** 40 working days per leave cycle"

- [11] The third applicant, Mr Tiro Holele was appointed to the position of General Manager: Corporate Affairs on 30 May 2007 by the first respondent's predecessor known at the time as South African Rail Commuter Corporation Ltd. Although the appointment letter refers to an employment contract that he was supposed to sign, it was however never signed. On 01 December 2009 he was offered a position of Group Executive: Office of the CEO subject to 6



months' probation which he accepted. Reference to the signing of the contract is also made in the appointment letter. His continued occupation of the position beyond the period of 6 months signalled that he had probably completed his probation successfully. Between 2011 and 2020 he was moved to several executive positions within the first respondent by either transfer or appointments. This included appointment to the position of the CEO at Autopax, one of the first respondent's subsidiaries.

- [12] After the third applicant's recall from the Autopax CEO position in March 2020, he continued to serve the first respondent as Group Executive: Office of the CEO. In March 2020 he was offered a position of General Manager: Strategy following the phasing out of the position of Executive: Office of the CEO from the first respondent's structure. He only accepted the offer in August 2020 through his attorney. The General Manager position is not an executive position but a managerial position. On 01 February 2021 he received a letter terminating his contract of employment stating the same reason as that in the other applicants' letters with the following content:

"Mr Tiro Hotele

SAP Number: XXXXXX

01 February 2021

Re: Termination of Employment

1. Having perused PRASA's records, a letter of appointment dated 01 December 2009 relates to your last role as Group Executive: Office of the GCEO, I attach the letter as **annexure A**.
2. For your current position, Group Executive: Office of the GCEO, there is no contract of employment that was signed between yourself and PRASA in our records.
3. In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives.
4. Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.

5. You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,

Signed

Ms Thandeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa"

- [13] Upon receipt of the letters of termination of contracts of employment, all applicants separately addressed letters to all the respondents raising their discontent with the termination as they viewed same to be unlawful. The core issues raised in the letters were akin to cautioning the first respondent about the incorrect position it has adopted. Furthermore, that there is no basis for its assertion in both letters of termination and the media statement that they had exceeded their stay at PRASA and ought to have left years ago. They also intimated that they were never aware of the alleged normal five years fixed term contract extended to all executives. They requested particulars upon which the claim of extension to all executive was based. They further reminded the respondents that at no point did they enter into five years fixed term contracts. Notably, none of the applicants' letters was favoured with a reply.

The case before this Court

- [14] The applicants seek a relief that the resolution passed by the Board directing the termination of their contracts of employment be found to be unlawful. Furthermore, such resolution was passed by a Board that was not properly constituted as it did not have a member appointed from Department of Transport. The resolution does not form part of the Court papers and it is not pleaded in the founding papers as to when was the resolution passed. The applicants also seek an order that the termination of the applicants' contracts through the resolution be declared unlawful and accordingly be set aside. The

applicants' case goes further to seeking the setting aside of the termination of the contracts and reinstatement. In opposition the respondents deny the absence of a person sourced from the Department of Transport in the Board. A letter of appointment of Hlengiwe Ngwenya by the Minister of Transport dated 05 January 2021 is attached to the answering affidavit to back up the said denial.

- [15] The applicants raised certain controversies in the replying affidavit which in effect suggest that it cannot be possible that Ms Ngwenya was appointed a Board member. This is in view of the second respondent's comments in another media statement of 03 February 2021 that the Director General is in fact the person appointed from the Department of Transport to serve as a Board member. Furthermore, Ms Ngwenya's name did not appear in the list of invitees to the Board meetings. The rest of the opposition of the application comprises of objections based on lack of urgency as well as this Court's lack of jurisdiction. I will, therefore, deal with these objections herein below

Lack of jurisdiction

- [16] The respondents' challenge to the jurisdiction of this Court is heavily loaded with the attack on the primary relief sought, that is, unlawfulness. The respondents contend that it does not fall within the competencies of this Court to grant. Huge focus is placed on the fact that the applicants' founding affidavit lacks specificity as to the terms of the contract alleged to have been breached. The mere asking for an order to declare the termination unlawful, so goes the argument, does not in itself disclose a cause of action. The applicants' failure to specifically plead breach of contract deprives this Court jurisdiction to determine this application. In support of this contention the respondents relied on *Phahlane v Minister of South African Police Services*¹, *Shezi v South African Police Services*² and *Chubisi v South African Broadcasting Corporation (Soc) & Others*³. The respondent's arguments are in essence that this Court's

¹ Unreported J736/2020 (11 August 2020).

² [2021] 42 ILJ 184 (LC).

³ (2021) 42 ILJ 395 (LC)

jurisdiction cannot be found where relief is sought to declare unlawfulness of the employer's action without locating a claim in the cause of action justiciable by this Court.

[17] The applicants' reaction to the jurisdictional issue is that the terms of the contract have been pleaded and specific references were made to clauses 3 and 9 of the contracts of the first and second applicants. The absence of the phrase 'breach of contract' cannot deprive this Court of its jurisdiction to determine a claim of unlawfulness of the termination of employment contract. By determining the matter solely based on the respondents' interpretation, the Court will undesirably be asked to prioritize form over substance. The applicants further relied on *Somi v Old Mutual Africa Holdings (Pty) Ltd*⁴ and *Solidarity v South African Broadcasting Corporation*⁵ to demonstrate that this Court has jurisdiction as it upheld the applicants' claims based on unlawfulness. The respondents' non-compliance with the terms of the agreement leads to unlawfulness and this cannot be dispelled by mere use of words.

[18] Based on what is placed before this Court, I am of the view that this Court has jurisdiction for the reasons appearing below. Section 157 of the Labour Relations Act has been given a consistent interpretation by various Courts as to the jurisdiction of this Court. The Constitutional Court has put this issue to bed in *Baloyi v Public Protector & Others*⁶ and held as follows at paragraphs 26 - 29:

"[26] By virtue of section 157(1), the Labour Court will enjoy exclusive jurisdiction over any matter "in terms of" the Employment Act. Matters governed by or concerning the enforcement of a provision of, the Employment Act accordingly fall within the ambit of the Labour Court's exclusive jurisdiction. The Labour Court and the Labour Appeal Court have held on a number of occasions that "the provisions of section 77(1) do no more than confer a residual exclusive jurisdiction on the

⁴ [2015] 36 ILJ 2370 (LC).

⁵ [2016] 37 ILJ 2888 (LC).

⁶ (2021 (2) BCLR 101 (CC) (4 December 2020).

Labour Court to deal with those matters that the [Employment Act] requires to be dealt with by the court".

[27] However, both the LRA and the Employment Act expressly recognise that there are certain matters in respect of which the Labour Court and the High Court enjoy concurrent jurisdiction. Section 157(2) of the LRA provides, in relevant part:

"The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—

(a) employment and from labour relations;

(b) . . .

(c)"

[28] Section 77(3) of the Employment Act provides, similarly, that the Labour Court "has concurrent jurisdiction with the civil courts to hear and determine any matter concerning *a contract of employment*, irrespective of whether any basic condition of employment constitutes a term of that contract". That disputes arising from contracts of employment do not, without more, fall within the exclusive jurisdiction of the Labour Court is further made clear by section 77(4) of the Employment Act, which emphasises that the exclusive jurisdiction of the Labour Court referred to in section 77(1)—

"does not prevent any person relying upon a provision of [the Employment Act] to establish that a basic condition of employment constitutes a term of a contract of employment in any proceedings in a civil court or an arbitration held in terms of an agreement."

[29] It is plain from these sections that the parameters of the scope of the exclusive jurisdiction of the Labour Court is not cast in Manichean terms. Section 157(1) of the LRA does not refer to specific sections of that Act as sources of the Labour Court's exclusive jurisdiction. It only provides that they are to be found elsewhere in the Act. In some instances, their location is clear: for example, sections 68(1), 77(2), 145 and 191. In others, it is left to the courts to determine whether a matter is one that arises in terms of the LRA and is, in terms of that Act, or another law, to be determined solely by the Labour Court."



[19] In the *Baloyi* matter the applicant sought an order declaring the termination of her contract unlawful for non-compliance with internal policies including probation policy in the High Court. A jurisdictional issue was raised to the effect that the High Court was not a correct forum but this Court. The essence of the Constitutional Court's findings is that this Court has concurrent jurisdiction with the High Court on employment issues which do not require any determination of fairness. The exclusive jurisdiction which this Court has is in respect of fairness which is only assertable through the Labour Relations Act. In view of the fact that *Baloyi* was not seeking relief based on fairness or unfairness of the termination of her employment contract, but unlawfulness, both this Court and the High Court were found to have jurisdiction to determine issues of unlawfulness.

[20] In so far as this matter is concerned, this Court is called upon to determine unlawfulness of the dismissal based on section 77(3) read with section 77A(e) of the Basic Conditions of Employment Act. The three decisions referred to by the respondents above do not in my view suggest that this Court does not have jurisdiction to make a determination on unlawfulness. What is of essence is that a claim for unlawfulness should within the accompanying pleadings establish unlawfulness, meaning that whatever is pleaded should establish unlawfulness. The unfairness disputes are only determinable within the scheme of the Labour Relations Act. Since the unlawfulness in this instant case is claimed under the Basic Conditions of Employment Act to assert a right in terms of a contract, I find no reason to conclude that this Court has no jurisdiction. The question whether the applicants' pleadings do establish a case calling for the granting of the relief sought or otherwise, may be addressed through determination of the merits of the case. This will certainly receive attention herein below since this Court has jurisdiction.

Urgency

[21] A challenge to urgency is the next issue for this Court's consideration. The respondents are attacking the issue of urgency on two fronts. Firstly, the fact



that the application was filed on 5 February 2021 challenging the terminations that took place on 29 January 2021 and 01 February 2021 demonstrates that the applicants did not act with the necessary haste that enables this Court to deal with the matter on urgent basis. The second challenge is that financial hardship has never been a ground for urgency. The applicants argue otherwise and maintain that the matter was attended to with necessary urgency. The applicants accept that, as a general rule, financial hardship is in itself not a ground for urgency, as exceptional circumstances must exist for the Court to find this as a ground for urgency. Both parties referred to relevant case law in support of their arguments and are discussed hereunder.

- [22] When a final order is sought, as it is the position in this matter, the bar remains high for the applicants to establish a clear right, that they stand to suffer irreparable harm, they do not have alternative remedy and that balance of convenience favours the granting of the relief sought. In *Hultzer v Standard Bank of South Africa (Pty) Ltd*⁷ the Court held at paragraph 13 as follows:

"[13] Financial hardship or loss of income is not regarded as a ground for urgency. Mlambo J in the *University of Western Cape* matter (*supra*) found that loss of income cannot establish a ground for urgency in an attempt to obtain urgent interim relief from this court. The applicant, in its founding papers, has not put forward any evidencery detail with regard to injury to his reputation if he is not reinstated in his former position, by way of urgent interim relief."

- [23] The above decision was followed with approval in *Tshwaedi v Greater Louis Trichardt*⁸ where the Court had this conclusion to make at paragraph 10:

"[10] It was common cause between the parties that the rules which have been adopted by High Court in relation to urgent applications apply equally to this Court. Those rules are to the effect that an applicant who comes to court for urgent relief must explain the reason for his departure from the ordinary rules regarding service and time

⁷ [1999] 8 BLLR 809 (LC).

⁸ [2000] 4 BLLR 469 (LC).

periods and show that such departure is justified. He must depart from the rules as little as is possible under the circumstances. If an application is brought as a matter of urgency, there must be facts to show why relief at some later date or in the ordinary course would not have sufficed. In other words, in the present case the applicant must show that he will suffer harm which cannot be cured if relief is granted in the ordinary course."

[24] In *SACWU & Others v Sentrarchem*⁹ with regard to financial hardship it was held as follows at paragraph 20:

"[20] In my view, a medical aid benefit, *per se*, does not establish special circumstances. Virtually all employees, particularly those employed by large companies, are members of a medical aid fund. A medical aid benefit is often obtained on the same basis as the general remuneration package of an employee. Loss of income, probably the worst consequence of dismissal, is not a ground for urgency. Therefore, it is difficult to understand the argument that a loss of a medical benefit, *per se*, is a ground for urgency."

[25] In *Mthembu v Mpumalanga Economic Growth Agency*¹⁰ the Court held as follows at paragraph 22, per Tlhotlhamajane AJ (As then he was):

"[22] As already indicated, it is not always that this court should regard financial hardship and loss of income as grounds for urgency, but in this case the applicant has adduced sufficient evidence to support these grounds, which invariably extends beyond pure financial considerations. In conclusion on this issue, I am willing to further accept that the lack of diligence was not unreasonable given the circumstances of this case, and even if a contrary view was to be held, there are other factors in this case that are indeed compelling and exceptional to call for the court's intervention as illustrated below."

⁹ [1999] 6 BLLR 615 (LC).

¹⁰ [2015] ZALCJHB 184.

- [26] In *Ngqeleni v Member of the Executive Council for Department of Health, Eastern Cape*¹¹ the High Court found financial hardship to be sufficient reason for urgency based on the circumstances which the applicant found himself in due to termination of employment which its unlawfulness was subject matter of the application.
- [27] I find it highly necessary to first consider whether the applicants were dilatory in filing the application on 05 February 2021 in respect of the termination of contracts of employment that took place on 29 January 2021 and 02 February 2021. All applicants addressed letters to the Board of Control wanting to know the legal basis for termination. The first applicant dispatched her letter on 31 January 2021 and demanded a reply on 01 February 2021. The second applicant did the same on 01 February 2021 and anticipated a reply on the same date. The third applicant sent a letter on 03 February 2021 through his attorneys with a demand for a response on 04 February 2021. None of these letters were afforded a courtesy of reply. In view of this, I have no doubt that the applicants were active from the moment they were terminated. The period between 29 January 2021 and 05 February 2021 is extremely short, during which period the applicants made attempts to get clarity on their termination. I am as much constrained to accept that the applicants acted with necessary swift in prosecuting this application.
- [28] Turning onto financial hardship, it is now a well settled position that financial hardship cannot on mere mention be considered a reason for urgency. The argument that financial hardship is in fact a consequence of any form of termination of employment cannot fit in each and every case. In situations where an employee was afforded a notice prior to termination, whether in accordance with statutory provisions or contractual terms and conditions, the argument against a plea of financial hardship is likely to prevail. The argument against plea of financial hardship may also stick in situations where termination was effected without a notice to the employee, such as in a dismissal based on misconduct following a disciplinary action. From the above scenario, the

¹¹ [2018] ZAECHC 77 (22 November 2018).



underlying issue is that the employee would have had some time to revise his/her own affairs bearing in mind that a termination of employment will obviously bring about some form of financial hardship.

[29] What happened in this matter is that on 29 January 2021, the first and second applicants woke up as employees of PRASA, when they went to bed later in the day, they formed part of the unemployment statistics, and so was the case in respect of the third applicant on 01 February 2021. I am under these circumstances compelled to consider the abrupt manner in which the termination of employment contracts was effected, that is with *immediate effect*. There appeared no prior word or sign of caution that their contracts were facing termination. I find this on its own to raise exceptional circumstances.

[30] The fact that the termination of contracts was also accompanied by what was placed in the public domain that they face multimillion law suits and that they took advantage of the first respondent's instability at Board level. This draws a great deal of public interest. The public policy consideration on its own renders the application urgent particularly where the public funds are made a subject matter of the case¹². Furthermore, the applicants' reputation and good name are at stake in this matter. Two of the applicants have been branded as guilty of unauthorized and unlawful approval of R58 153 296.72 (in case of Ms Ngoye) and R25 million (in case of Mr Khenani).

The merits of the application

[31] The critical issue here is the authority on which the respondents relied upon to effect termination of the employment contracts. The issue of contract has been raised twice by the respondents, that is, in the letters of termination addressed to the applicants and through the address to the public by way of a media statement. One important thing came out of these respective addresses by the respondents, that is, the applicants exceeded their stay at PRASA the stay was

¹² See *solidarity v South African Broadcasting corporation* 2016 ILJ 2888 (LC) at paragraphs 67 to 69 where the court considered the responsibilities of the parties towards the public.



supposed to be not in excess of five years in terms of the fixed term contract extended to all executives.

- [32] The applicants refuted knowledge of their employment contracts being fixed to a term of five years. Their attempts to seek clarity through the letters to the Board drew blank. The very issue was raised as a persuasive factor to find urgency. The Court papers received no factual response from the respondents. It is not denied that the contracts of employment do not have expiry dates. The respondents elected not to produce documentation or to make averments to support the decision to terminate the contracts. It is not in dispute that clause 3 of the standard contracts signed by first and second applicants were designed to endure until terminated as provided for in the very contracts. Clause 9 which recognizes various forms of termination of employment, makes no mention of termination on ground of expiry of a five year fixed term contract.
- [33] The respondents' contention that the absence of plea of a breach of contract disentitles the applicants a claim of unlawfulness in respect of their termination cannot in my view be sustainable in the context of this matter. By acting in a manner that is contrary to the terms of a contract, on its own amounts to breach which is unlawful. It is immaterial on how it is pronounced. The unlawfulness may as a result occur. The *Court in Ngubeni v National Youth Development Agency & Another*¹³ found the employer's conduct to be in breach of contract for termination of the employee's contract in violation of the terms of the contract and concluded at paragraph 21 as follows:

"[21] In so far as the remaining requirements relevant to the relief sought are concerned, there is no alternative remedy that is adequate in the circumstances. Ngubeni has no right to pursue a contractual claim in the CCMA, and the law does not oblige him to have recourse only to any remedies that he might have under the LRA. Equally, he is fully entitled to seek specific performance of his contract, and is not obliged to cancel the agreement and claim damages. The balance of convenience dictates that the order sought should be granted – there is

¹³ [2014] 35 ILJ 1356 (LC).



little inconvenience to the NYDA should it continue with and complete the disciplinary hearing; the result may well be the same. For Ngubeni, the effect of the NYDA's decision to terminate his employment at this stage is to deprive him of his employment and livelihood. Similarly, I am satisfied that Ngubeni will suffer irreparable harm should the application not be granted. He stands to suffer financially, and the high public profile of this matter (it is not specifically denied that much of the raising of this profile has been at the instance of the NYDA) has ensured that Ngubeni has been branded as corrupt and dishonest, with little prospect of alternative employment."

- [34] The above decision was followed with approval in *Somi v Mutual Africa Holdings (Pty) Ltd*¹⁴ where the Court, per Molahlehi J, found the termination of employment unlawful based on the employer's failure to follow the incapacity procedures as stipulated in the employees' contract read with IR policies.
- [35] It deserves to be stressed that the third applicant does not have a standard contract similar to that of the first and second applicants. His appointment letter states that he was to sign an employment contract. Does this mean that the absence of the signed standard contract disentitles him a relief in terms of section 77(3) of Basic Conditions of Employment Act? The answer in my view is in the negative. There is no evidence presented to suggest that he was employed on terms that are different to those appearing in the first and second applicants' contracts. Although the first respondent states in the termination letter that there is no contract signed between itself and the third applicant, it is notable in the third applicant's termination letter that the first respondent acknowledges that all its executives have the same terms and conditions of employment. The appointment letter does not stipulate that he was appointed for a limited duration. On this note I do not find any reason to distinguish the third applicant's case from that of the first and second applicants.
- [36] Although there are controversies raised as to whether the Department of Transport was represented in the Board when the decision to terminate the

¹⁴ [2015] 36 ILJ 2370 (LC).



contracts was made, with the filing of the actual proof of appointment of Ms Ngwenya signed by the Minister, I find no reason to doubt that the Board was constituted in compliance with the enabling legislation. I therefore attach no weight to the second respondents' media statement made post the date of appointment of Ms Ngwenya that the Director General was the relevant Board member from the Department of Transport.

- [37] The resolution sought to be set aside is not attached to the applicants' founding affidavit and there are no details regarding the date on which it was passed. Therefore, there is no case made for the relief sought in respect of the constitution of the Board and the validity of the resolution. The case for all the applicants which remained uncontested has been made from the founding papers. By ruling on whether the supplementary affidavit should be admitted to evidence or not will not change the case that is already established in the founding papers. The respondents' act of terminating the applicants' contracts of employment with immediate effect gives rise to unlawfulness on account of violation of the terms and conditions of the applicants' contracts of employment.
- [38] The applicants sought specific performance consequent to the finding of unlawfulness of the termination of contracts. The only specific performance available to the applicants is in the form of reinstatement. There is no evidence to suggest that reinstatement will not be practicable particularly where the dispute is about the restoration of the applicants' rights in terms of the binding contracts of employment. That there is possible civil litigation against the first and second applicants cannot impact on the trust relationship since the matters forming subject of such litigation have been known to the respondents for some years whilst the applicants continued with their ordinary duties.
- [39] Regarding costs, the applicants have sought a cost order against the respondents. The respondents equally asked for a cost order against the applicants in the event of a dismissal of the application. In *Zungu v Premier*¹⁵ of the province of KwaZulu-Natal the Constitutional Court restated a developed

¹⁵ 2018 (4) BLLR 323 CC at paragraph 24



principle that: *The rule of practice that costs follow the result does not apply in Labour Court matter.* However a cost order may be made in accordance with the requirements of the law and fairness¹⁶.

- [40] In this regard there is sufficient course for this Court to make an order of costs against the respondents in view of their conduct as alluded to herein below. Upon receipt of the letters of termination of contracts of employment, all applicants addressed letters to all the respondents. Despite their contestations and reminders to the respondents that at no point did they enter into five year fixed term contracts, they never received any response from the respondents. Their attempts to seek clarity through the letters to the Board resulted in futility. The Court papers received no factual response from the respondents on the merits of the case founded on issues raised in the applicant's letters. The respondents failed to produce evidence to justify the decision to terminate the contracts.
- [41] The respondents' above-mentioned conduct is of great concern. In *Gangaram v MEC for the Department of Health, KwaZulu-Natal and Another*¹⁷, Tlaletsi DJP (as he then was) had this to say:

"[31] There is one matter which is of great concern to me. This relates to the conduct of the respondents' officials in their dealings with the appellant. Most of the time the appellant's letters could not solicit a courtesy of a response from the respondent. This is an unacceptable conduct from a public office such as that of the respondents run on tax payer's funds. The same applies to the failure by the respondents' officials to respond to the appellant's formal application for reinstatement. What is more perplexing is that their failure to respond is subsequently used as a defence to the review application that there had not been a decision taken that can be a subject of review. They

¹⁶ *Member of the Executive Council for Finance, KwaZulu-Natal v Wentworth Dorkin N.O* [2008] 6 BLLR 540 (LAC) at para 19. See also *Martin Vermaak v MEC for Local Government & Traditional Affairs, North West Province* [2017] ZALA 2 (10 January 2017)

¹⁷ [2017] 38 ILJ 2261 (LC); [2017] 11 BLLR 1082 (LAC); at paragraph [31].



are prepared to use their failure to do what is expected of them to their benefit."

[42] In conclusion, the respondents did not deny the applicants' allegations concerning the meeting held on 25 February 2020 during which the Director General openly said amongst other things, that:

42.1 PRASA was well-resourced to out-litigate any employee challenging their unlawful terminations and that the Administrator should employ the resources of PRASA to out-litigate any employee challenging their unlawful terminations; and

42.2 No individual employee will be able to succeed using their own Personal resources against the resources of the state.

[43] These are serious allegations which needed the respondents to have pleaded to them. In *Kalil NO and Others v Mangaung Metropolitan and Others*¹⁸, Leach JA had this to say:

"...This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in *Gauteng Gambling Board and another v MEC for Economic Development, Gauteng*, our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights."

¹⁸ 2014 (5) SA 123 (SCA) para 30

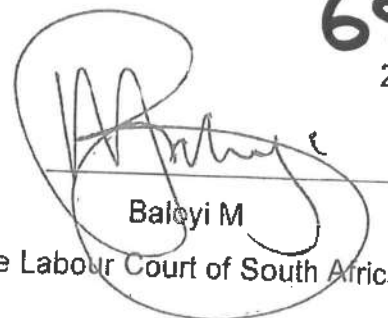
[44] Given the above there exist no reason that costs should not follow the result.

[45] The following order is therefore made:

Order

1. This application is found to be urgent and, insofar as the applicants might not have complied with the Rules of this Court, their failure to do so is condoned, and the Rules relating to forms and service are dispensed with and the application is dealt with as one of urgency.
2. It is declared that the contracts of employment concluded by the applicants and the respondents are extant.
3. It is declared that the respondents' termination of the applicants' contracts of employment by letters addressed to the applicants on 29 January 2021 and on 1 February 2021 is unlawful.
4. The termination of the contracts of the applicants' contracts of employment is set aside.
5. The respondents are ordered to reinstate the applicants with immediate effect and retrospectively from the date of the termination of their contracts of employment.
6. The first respondent is ordered to pay any salaries and benefits due to the applicants from the date on which the contracts of employment were terminated to the date of reinstatement.
7. The respondents are to pay applicants' costs except for costs of 11 February 2021.




Baleyi M
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Adv. B Makola SC with Adv. Mahlaku and Adv. Mokgotho
Instructed by: Gwina Attorneys

For the Respondents: Adv. A Mosam SC with Adv. Phehane
Instructed by: De Swardt Myambo Attorneys



"18B"
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IN THE LABOUR COURT OF JOHANNESBURG

HELD AT JOHANNESBURG

COPY

CASE NO: J111 / 2021

In the matter between:

ONICA MARTHA NGOYE

First Applicant

NKOSINATHI ALLEN KHENA

Second Applicant

TIRO HOLELE

Third Applicant

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Respondent

LEONARD RAMATLAKANE

Second Respondent

THINAVUYO MPYE

Third Respondent

DINKWANYANE MOHUBA

Fourth Respondent

SMANGA SETHENE

Fifth Respondent

XOLILE GEORGE

Sixth Respondent

NOSIZWE NOKWE-MACAMO

Seventh Respondent

MATODZI MUKHUBA

Eighth Respondent

THEMBA ZULU

Ninth Respondent

MS THANDEKA MABIJA

Tenth Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

ONICA MARTHA NGOYE






do hereby make oath and say:

- 1 I am an admitted attorney of 199 Pritchard Street, Olivedale, Randburg.
Save where the context indicates otherwise, the facts stated in this affidavit are within my personal knowledge and are true and correct.
- 2 I was the Group Executive: Legal Risk and Compliance at PRASA before my contract of employment was unlawfully terminated by the second respondent ("**the Acting GCEO**") by way of letter dated 29 January 2021. I commenced my employment with PRASA on 1 September 2014, having transferred from my previous position as Chief Executive Officer of Intersite Asset Investments SOC Ltd ("**Intersite**"), a wholly owned subsidiary of PRASA, on 22 August 2014.
- 3 I am authorised by the second and third applicants to depose to this affidavit as more fully appears in their affidavits. They confirm the contents of this affidavit insofar as they are affected.

THE PARTIES

- 4 The applicants:
 - 4.1 I am the first applicant in this application.
 - 4.2 The second applicant is **Mr. Nkosinathi Allen Khena** ("**Mr. Khena**"), of 157 Wilton Avenue, Bryanston, Johannesburg. Mr Khena was the Chief Operating Officer of PRASA until he too



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was unlawfully terminated by the Acting GCEO on 29 January 2021. He started his employment at PRASA at PRASA in 2012.

4.3 The third applicant is **Mr. Tiro Holele ("Mr Holele")**, of 142 12th Street, Parkhurst, Johannesburg, Gauteng Province. Mr Holele was General Manager: Strategy at PRASA. His employment with PRASA was unlawfully terminated on the evening of 2 February 2021 in a letter dated 1 February 2021. He started his employment at PRASA during or around June 2007.

5 Whilst my employment and that of Mr. Khena were terminated on 29 January 2021, Mr. Holele's employment was terminated on 2 February 2021 for the same reasons given to me and Mr Khena. By the time that Mr. Holele was terminated, Mr Khena and I had already consulted with our legal team and had begun drafting these papers. Mr. Holele expressed his desire to co-join this application on Wednesday 3 February 2021. By then this founding affidavit was near complete. Mr. Holele seeks the same relief as us. His full story is set out in a separate section elsewhere in this founding affidavit.

6 The Respondents:

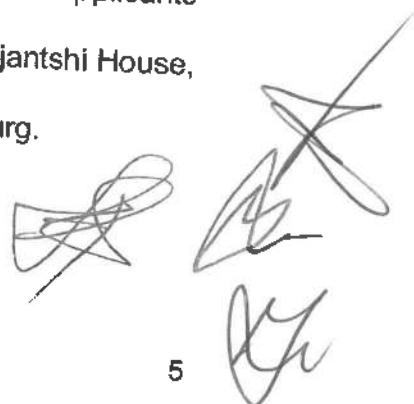
6.1 The first respondent is the **Passenger Rail Agency of South Africa ("PRASA")** established in terms of section 22 of the Legal Succession to the South African Transport Services Act, 9 of 1989 ("Legal Succession Act"). It provides rail commuter services within the Republic in the public interest, it also

provides for long-haul passenger rail and bus services in terms of the principles set out in section 4 of the National Land Transport Transition Act, 22 of 2000. The balance of its objects and powers are set out in section 23 of the Legal Succession Act. PRASA principal place of business is at Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg, Gauteng.

- 6.2 The second respondent is **Mr. Leonard Ramatlakane** who is the Chairperson of the Board of Control ("the Board") of PRASA, established in terms of section 24 of the Legal Succession Act. The composition and *modus operandi* of the Board are set out in section 24 of the Legal Succession Act. The second respondent's address for service is Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg, Gauteng.
- 6.3 The third respondent is **Ms. Thinavhuyo Mpye**, an adult female and the Chairperson of the Audit and Risk Committee of the Board of Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg.
- 6.4 The fourth respondent is **Mr. Dinkwanyane Mohuba**, an adult and who is one of the members of the Board of Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg.
- 6.5 The fifth respondent is **Mr. Smanga Sethene**, an adult male admitted advocate whose full and further particulars are

unknown to the applicants and who the Chairperson of the Human Capital Management and Remuneration Committee of the Board of Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg.

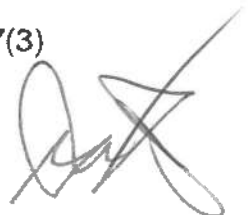
- 6.6 The sixth respondent is **Mr. Xolile George**, an adult male whose full and further particulars are unknown to the applicants and who is one of the members of the Board of Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg. Mr. Xolile George is a nominee of the South African Local Government Association ("SALGA") to the Board of PRASA.
- 6.7 The seventh respondent is **Ms. Nosizwe Nokwe-Macamo**, an adult female whose full and further particulars are unknown to the applicants and who is one of the members of the Board of Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg.
- 6.8 The eighth respondent is **Mr. Matodzi Mukhuba**, an adult male whose full and further particulars are unknown to the applicants and who is one of the members of the Board of Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg.



- 6.9 The ninth respondent is **Mr. Themba Zulu**, an adult male whose full and further particulars are unknown to the applicants and who is one of the members of the Board of Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg. Mr. Themba Zulu is a nominee of National Treasury to the Board.
- 6.10 The tenth respondent is **Ms Thandeka Mabija ("Ms. Mabija") Acting Group Chief Executive ("Acting GCEO") of PRASA**, who in her capacity as such unlawfully terminated my and Mr Khena's employment contracts on 29 January 2021. The second respondent's place of business is Mjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg, Gauteng.
- 7 Although the termination letters were signed by the Acting GCEO, a media statement issued by the Board states that the termination follows upon a review process undertaken by the Board. Following that review process, a decision was taken to terminate the employment contracts of certain executives of PRASA. It is alleged that this termination of employment contracts is because the norm at PRASA is a five-year fixed term contract extended to all executives. In the circumstances, we (the applicants) have cited the members of the Board as well as the Acting GCEO.

JURISDICTION

- 8 This Court has jurisdiction to hear this application by virtue of section 77(3) of the Basic Conditions of Employment Act, 75 of 1997.



THE PURPOSE OF THIS APPLICATION

9 At the heart of this application lies two issues:

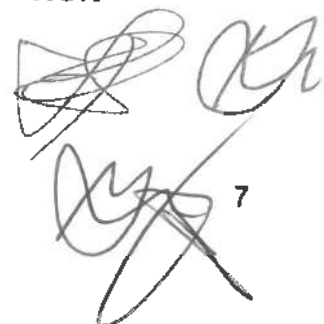
9.1 First, the lawfulness of the decision of the Board of PRASA in so far as it was not properly constituted in terms of section 24(2) of the Legal Succession Act. Amongst others, the Legal Succession Act requires that one of the members of the Board be an officer in the Department of Transport. This is a mandatory requirement. None of the members is such an officer. The proceedings and the decisions of the Board were accordingly unlawful and are of no force and effect as they were taken by the Board, not properly constituted.

9.2 Second, whether the respondents could in law validly terminate the applicants' employment contracts for the grounds set in the termination letters.

10 The respondents have, in the letters of termination and the media releases issued by the Board decided to include matters for which they state they intend to institute legal action against Mr. Khena and I. These issues are not stated as the reasons for the termination of our employment, however, we believe that it is important to take the court into our confidence and briefly state what our response is to these allegations.

THE STATED REASONS FOR OUR UNLAWFUL TERMINATION

11 My termination letter states that:



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- "5. In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives. In your current position, PRASA relies on you for issues concerning legal, risk and compliance and you out (sic!) to have brought this administrative defect to the attention of PRASA
6. Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect."
- 12 In the case of Mr Khena, he too was told in his termination letter of 29 January 2021 that:

"Having perused PRASA's records, the only contract of employment PRASA has is that of Chief Operating Officer dated 1 December 2012.

In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives.

Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect."

- 13 The media release of the Board states:

"PRASA Board of Control has embarked on the review of contracts of executives and other senior managers. Pursuant to the review process, it transpired upon analysis of employment contracts of executives that some of them [executives] ought to have left PRASA years ago. All executives of PRASA are employed for a period not exceeding 5 years with no expectation for extension of the employment contract. The Board also observed that the executives have been aware at all material times that their employment contracts were for five-year period and not more. However it appears the executives capitalized on the instability at the Board level culminating in their extended unlawful stay at PRASA. On 29 January 2021, PRASA has terminated the employment contracts of ... Ms. Martha Ngoye [and] ... Mr. Nkosinathi Khena"

Annexure "OMN1" and "OMN2" respectively are copies of the termination letters addressed to me and Mr Khena.



Annexure "OMN3" is the media release issued by the Board of 30 January 2021.

- 14 This statement that we *"capitalized on the instability at the Board level culminating in [our] extended unlawful stay at PRASA"* is untrue. In any event, the Board did not confront us about their observation that we ought to have left the employ of PRASA years ago. The Board simply did its review, came to its conclusions and caused the Acting GCEO to issue letters of termination dated 29 January 2021 and 1 February 2021 and issued a media release with the outcomes of the review of our employment agreements on 30 January 2021.
- 15 The Acting GCEO served us with termination letters without so much as to afford us an opportunity to make representations on the subject matter.
- 16 PRASA issued a publication dated 2 February 2021 under the hand of the third respondent announcing that it had *"released three executives from their responsibilities as their employment contracts have come to an end due to effluxion of time"*. This publication proceeds to name these executives as *"Mr. Rasheeque Zaman, Group Executive: Internal Audit, Mr. Zwelakhe Mayaba, Group Executive: Strategic Projects and Mr. Holele, Group Executive: CEO's Office"* The publication concludes by wishing these executives well in their future endeavours.
- 17 I wish to make the following observations about the stated reasons for our unlawful termination:



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17.1 Mr. Holele had ceased to be a Group Executive when his contract was unlawfully terminated on 2 February 2021. He had been told during July 2020 by Ms. Mabija and a Mr. Bongisizwe Mpondo (who was appointed as an administrator of PRASA) that his position as Group Executive in the Office of the Group CEO had become redundant. Mr. Holele was offered and he accepted the position of General Manager: Strategy. For this reason alone, the termination of Mr. Holele's employment contract is unlawful.

17.2 If the termination of Mr. Holele's employment is found to be lawful, then all the employment contracts of the following employees who are at the level of General Managers and have been at PRASA for more than 5 years should be terminated:

17.2.1 General Managers of PRASA;

17.2.2 CFO's of PRASA's business divisions and subsidiaries; and

17.2.3 Executive Managers of PRASA's divisions.

THE PROVISIONS OF OUR EMPLOYMENT CONTRACTS AND THE UNLAWFUL TERMINATION THEREOF

18 None of our contracts of employment provide for a termination date.

Mr. Khena's Employment Contract



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- 19 Mr Khena's termination letter only states that his records have been perused by the Acting GCEO and the only contract of employment is that of COO dated 1 December 2012.
- 20 Mr Khena joined PRASA as Chief Operating Officer: Office of Group Chief Executive Officer: PRASA Corporate in December 2012. His appointment is on a fulltime basis (clause 5).
- 21 Clause 9 of his contract deals with termination and it says that the agreement shall terminate without notice on the termination date. I have already said that there is no specified termination date, nor was the so-called five year tenure extended to executives part of his terms and conditions of employment.
- 22 The suggestion from the termination letter that his stay at PRASA has exceeded the *"normal five year fixed-term contract extended to all executives"* is contrary to the express terms of the agreement, in particular clause 9 read with the other provisions that deal with termination.
- 23 Clause 19.2 provides that neither party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded in the contract.
- 24 The contract further states that any addition, variation or agreed cancellation of the agreement shall be of no force and effect unless it is in writing and signed by the parties to the contract.

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- 25 I ask that the balance of the terms of the contract of employment be incorporated herein by reference.

Annexure "OMN4" is a copy of Mr Khena's employment contract.

- 26 The suggestion that his contract was for a fixed term of five years to the extent that it is asserted by PRASA, is contrary to the clear and express terms of the contract, including those that provide that unless recorded by the parties and agreed to, they are not part of the employment contract.

- 27 The Acting GCEO does not state:

27.1 The source of this *"normal five year fixed term contract"*;

27.2 When this *"normal five year fixed term contract"* was *"extended to all executives"*;

27.3 How the executives were notified that this *"normal five year fixed term contract"* was *"extended"* to them; and

27.4 Whether and how he agreed to this amendment of their contracts.

My Employment Contract

- 28 On or about 1 September 2012 I was appointed to the position of Chief Executive Officer of Intersite, a subsidiary of PRASA.

A copy of my contract of employment is attached as "OMN5".



29 The key provisions of my contract of employment with Intersite were as follows:

- 29.1 I was appointed Chief Executive Officer subject to the terms and conditions in the agreement and its annexures. Notwithstanding the date of signature, the agreement and the appointment commenced on 1 September 2011 and shall endure until terminated as provided in the Contract.
- 29.2 I was appointed as a fulltime employee devoting my time and attention during normal hours to the business and affairs of Intersite and shall not be engaged either directly or indirectly in any other form or business of employment without the prior written consent of the employer (clause 5).
- 29.3 Clause 9 provides that during the currency of this agreement the parties shall have the right to terminate the employment relationship on the following grounds, provided that the parties shall in all respect have complied with the Employer's internal policies and procedure and the provisions of the Labour Relations Act 66 of 1995 ("the LRA") prior to such termination summarily and without notice for any reason on the misconduct of the executive or any other cause recognised by law as sufficient.
- 29.4 In terms of the agreement, the employee will serve a three months' notice (clause 9.2). In lieu of the notice in 9.1.2 the Employer may elect to pay the executive the compensation to

which the executive would have been entitled if the executive had worked during the notice period. The executive may, in lieu of notice elect to forfeit the compensation to which she would have been entitled to if she had worked during the notice period.

29.5 The contract provides in clause 2.3.12 for termination and it is stated that it means the date of termination of employment of the executive specified in item 7 on annexure "A".

29.6 Annexure "A" in turn provides that:

"7. Termination Date: N/A."

30 Annexure "A" item 5 provides that my appointment would be "[p]ermanent".

31 On 11 August 2014, the Board of Directors of Intersite passed a resolution, amongst others, to *approve the transfer and appointment of Ms Martha Ngoye, Chief Executive Officer (CEO): Intersite Asset Investments SOC Ltd, to the position of PRASA Group Executive: Legal, Risk and Compliance, effective 01 September 2014, and on the same terms and conditions of her current employment.*

A copy of the resolution signed by the then Chairperson of Intersite, Mr Tshepo Lucky Montana, is attached as annexure "OMN6".

32 On 22 August 2014, Mr Montana who was also the Group Chief Executive Officer of PRASA, furnished me with a formal internal letter confirming my



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transfer from Intersite to PRASA in accordance with the above resolution of Intersite. The letter confirms, amongst others,

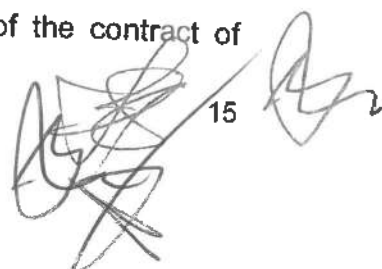
"We are pleased to advise that you have been transferred from the position of Chief Executive Officer: Intersite to that of Group Executive: Legal, Risk and Compliance, with effect from 1 September 2014. This transfer is due to operational requirements and restructuring within the organisation. You will report directly to the Group Chief Executive Officer.

Please note that this is a lateral transfer and all other terms and conditions not amended by this transfer shall remain unchanged."

A copy of this letter is an annexure to annexure OMN1.

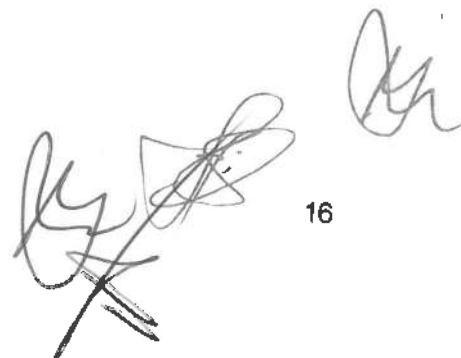
- 33 The resolution provides that my transfer from Intersite to PRASA was on the same terms and conditions of my employment. Properly interpreted, this means that the terms and conditions contained in my contract of employment with Intersite continued to apply in my new position as Group Executive at PRASA save for the obvious changes indicated in paragraph 15 above. This would include, amongst others, the fact that my appointment would be permanent in nature and would have no termination date, subject to the termination clause in the agreement.
- 34 I am advised and submit that our law does not recognise as sufficient the termination of my employment other than in accordance with the contract.
- 35 The reasons given to me by the Acting GCEO that my stay at PRASA has exceeded the "normal five year fixed term contract extended to all executives and the employment contract" with PRASA is terminated with immediate effect is not a cause recognised by law as sufficient. It is unlawful, invalid and contrary to a clear stipulation of the contract of

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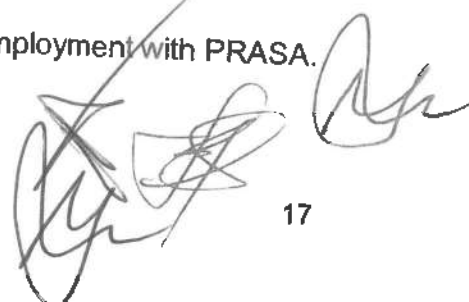


employment, in particular clause 9.1.1 thereof. In any event, the Acting GCEO does not state:

- 35.1 The source of this *"normal five year fixed term contract"*;
 - 35.2 When this *"normal five year fixed term contract"* was *"extended to all executives"*;
 - 35.3 How the executives were notified that this *"normal five year fixed term contract"* was *"extended"* to them; and
 - 35.4 Whether and how I agreed to this amendment of their contracts.
- 36 The alleged termination infringes upon my rights as enshrined in the employment contract.
- 37 I emphasise clause 19.2 of my employment contract which provides that neither party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein.
- 38 The contract further states that no addition to, variation, or agreed cancellation of this agreement and its annexures shall be of any force or effect unless in writing and signed by or on behalf of all the parties.
- 39 Whether expressly or impliedly from the letter from Mr Montana, nothing suggests that my tenure would be amended from an indefinite employment without a termination date subject to clause 9, to one subjected to a five-year limitation period.

The block contains several handwritten signatures and initials. There is a large, stylized signature in the center, and several smaller initials or signatures to its right and below.

- 40 Because I transferred from Intersite on the same terms and conditions, my employment contract did not reflect PRASA as a counterparty. However, there has never been any doubt about my status as an executive of PRASA. My letter of transfer annexed to my termination letter states that: "[p]lease note this is a lateral transfer and all other terms and conditions not amended by this transfer shall remain unchanged".
- 41 For the avoidance of doubt, the only things that were changed by the transfer letter are the following:
- 41.1 My position was no longer CEO of Intersite, it was now Group Executive: Legal, Risk and Compliance of PRASA; and I no longer report to the Board of Directors of Intersite, I now report to the Group CEO of PRASA.
- 42 The termination has no legal or factual basis. My tenure of employment was never amended either impliedly or expressly. It was not something that was raised with me when I transferred from Intersite on 11 August 2014 to join PRASA as Group Executive with effect from 1 September 2014. It was never raised with me in discussions.
- 43 Accordingly, the respondents' decision purporting to terminate our employment based on the averment that *"In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives"* is unlawful, invalid and of no force and effect. It never constituted any term or condition of our employment with PRASA.

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It was never something that PRASA discussed with us. It was never a term and/or a condition of our contracts of employment.

44 The termination was unilateral and is not in accordance with the terms and conditions which were preserved and which formed a core component of my transfer from Intersite to PRASA.

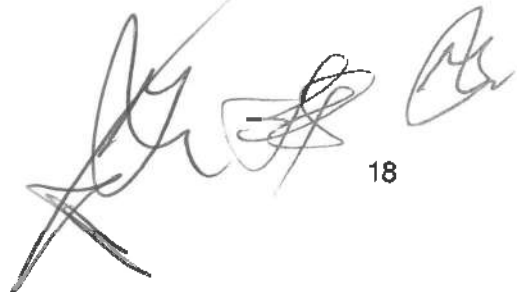
45 The only instances where termination can be effected, in my case, is in terms of clause 9 of the Agreement that provides for termination. That provision says nothing about the so-called *"normal five year fixed term contract extended to all executives"*.

Mr. Holele's contract

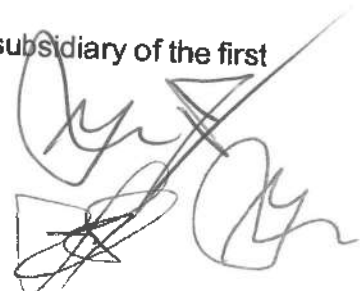
46 Mr Holele joined the predecessor of PRASA, the South African Rail Commuter Corporation ("SARCC"), on 1 June 2007 as General Manager in the Office of the CEO. A year later, Mr Holele was appointed as General Manager: Corporate Affairs. A copy of his letter of appointment is attached as **"OMN7"**.

47 Whilst the letter of appointment indicates that Mr Holele was to conclude an employment contract, no such contract was concluded.

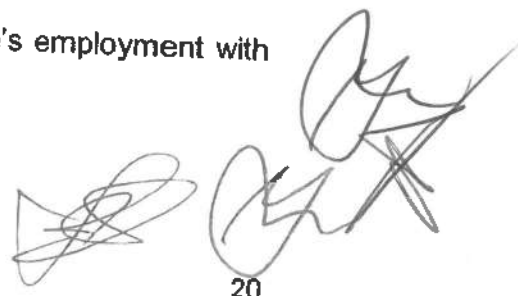
48 He became an employee of PRASA in December 2008 when SARCC was renamed PRASA by virtue of the Legal Succession Act. In this regard, he served as PRASA's Head of Corporate Affairs, including marketing and communications.

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- 49 On 1 December 2009 Mr Holele became the Executive: in the office of the GCEO. A copy of his letter of appointment is attached as "OMN8".
- 50 Similarly, whilst the letter of appointment indicates that Mr Holele was to conclude an employment contract, no such contract was concluded.
- 51 He served as the executive in the office of the GCEO and the *de facto* Head of Strategy until he was appointed as the Chief Strategy Officer at the first respondent in 2011.
- 52 On 31 July 2013, the first respondent's board resolved to transfer Mr Holele to the position of Executive Manager: Third Party Projects at Intersite. A copy of the first respondent's board resolution is attached as "OMN9".
- 53 On 1 November 2013, Mr Holele was appointed as Executive Manager for Third Party Projects at Intersite. A copy of the Intersite's board's resolution in this regard is attached as "OMN10".
- 54 In 2015 Mr Holele was transferred to the position of the first respondent's Corporate Office as Group Executive: office of GCEO.
- 55 Whilst holding the position at Corporate Office as Group Executive: Office of GCEO, Mr Holele was seconded, in December 2019, to the position of Acting CEO of Autopax. The latter is the bus service subsidiary of the first respondent.

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- 56 In March 2020 Mr Holele was recalled from his acting position at Autopax back to the first respondent. He was still holding the position at Corporate Office as Group Executive: Office of GCEO.
- 57 Mr Holele's employment in respect of all the above positions that he has held at SARCC, PRASA, Intersite and Autopax was not fixed for a period of five years.
- 58 Critically, on 31 July 2020 Mr Holele was offered the position of General Manager, Strategy at the first respondent. The offer letter states clearly that the position being offered to Mr Holele is "no longer a Group Executive position". Mr Holele accepted the offer on 3 August 2020. Copies of the offer letter and the letter of acceptance are attached as "OMN11" and "OMN12", respectively.
- 59 Whilst the offer letter indicated that Mr Holele was to conclude an employment contract, no such contract was concluded. Effectively, Mr Holele's position changed from being executive to being managerial however, his remuneration was never changed.
- 60 Importantly, this position of General Manager, Strategy at the first respondent is the position that Mr Holele was occupying prior to his unlawful termination of employment on 1 February 2021.
- 61 The letter of 1 February 2021 terminating Mr Holele's employment with PRASA is attached as Annexure "OMN13"..

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62 The letter provides in material terms that the Acting GCEO has perused PRASA's records and she came across a letter of appointment of 1 December 2009 that relates to "your last role as group executive: office of the GCEO".

63 It is stated in the letter that

"For your current position, Group Executive: Office of the GCEO, there is no contract of employment that was signed between yourself and PRASA in our records.

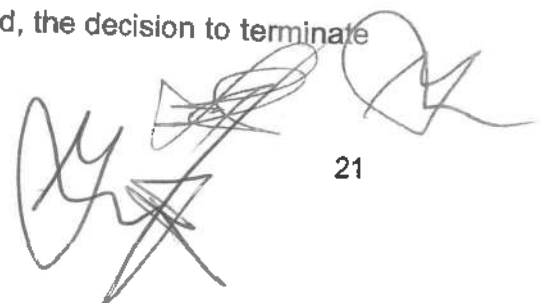
In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives.

Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect."

64 Mr Holele was at the time of termination not the Group Executive: GCEO's office, but rather occupied the position of General Manager, Strategy. So, to the extent that the letter terminating his employment with PRASA does so on the basis that he is the executive in the office of the GCEO, that is actually incorrect.

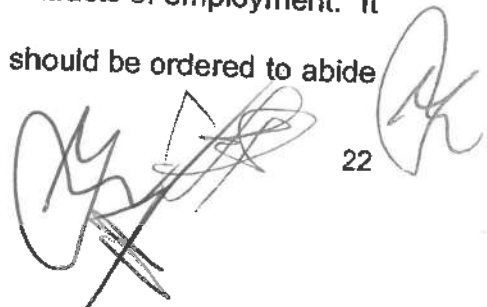
65 Secondly, his employment was never fixed and is indefinite, subject to legal processes being followed to terminate it. In this instance no process was followed. The termination was without placing the facts before him and without inviting him to make representations thereto.

66 To the extent then that the termination of Mr Holele's employment with PRASA, as announced by the Board in its second media statement is grounded upon a decision taken by that Board, the decision to terminate



him is unlawful and of no force and effect for the reasons that I have discussed above:

- 66.1 The Board was not properly constituted.
- 66.2 Mr Holele in any event does not occupy the position of executive in the office of the GCEO. He is the General Manager of Strategy, an appointment he took in or about July 2020. That appointment is effective from August 2020. In that capacity he is not an executive subject to these purported terminations.
- 66.3 He is not an executive whose tenure is fixed at five years.
- 66.4 He has not completed five years in his position as General Manager and is definitely not an executive.
- 66.5 Even as an executive, his employment with PRASA was not on the terms alleged, i.e. the five year fixed-term contract.
- 66.6 The Acting GCEO and the Board are not in a position to place before this Court evidence that his contract was subject to the so-called five year duration.
- 67 By summarily terminating our contracts of employment, the Acting GCEO and the Board ignored the applicable termination clauses in our contracts of employment.
- 68 The purported termination is contrary to our contracts of employment. It is unlawful and falls to be set aside. PRASA should be ordered to abide



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the contracts of employment. We should be reinstated to the positions we were in prior to the unlawful termination on 29 January 2021 and 2 February 2021 to continue with our contractual obligations as executives of PRASA.

69 For all these reasons, and the reasons I have discussed, I submit that, like Mr Khena and myself, Mr Holele has established a case and that the relief sought in the notice of motion falls to be granted.

70 The full extent of the relief sought is set out in the notice of motion to which this affidavit is attached.

THE APPLICANTS' RESPONSE TO THE TERMINATION LETTERS

71 In my letter to the Board and the Acting GCEO I responded as follows:

71.1 I acknowledged the letter which I said is unlawful;

71.2 There was no relationship between the conclusion recorded in the termination letter, the media statement and my contract of employment.

71.3 I set out my contractual transfer from Intersite to PRASA and the terms thereof.

71.4 I indicated that the termination letter did not set out the legal basis for the so-called "*normal five years fixed term contract extended to all executives*".

- 71.5 I indicated that the first time I learned about this five year tenure was in the termination letter and I was unaware thereof before then.
- 71.6 I noted that the letter did not set out the legal instrument that informs the *"normal five years fixed term contract extended to all executives"* and that this suggested to me that no such instrument exists. I made enquiries about this but no one at PRASA seems to know of it.
- 71.7 It was not contained in my contract of employment and I set out that there are approximately 20 employees who are in the category of executives and that the overwhelming majority of these employees have been at PRASA for more than five years. As stated above, I have learned that the Board and the Acting Group CEO have dismissed 3 more employees in this category on 2 February 2021 alleging this unknown and non-existent *"normal five year fixed term contract extended to all executives"*.
- 71.8 I called upon the Board to remedy this illegality by close of business on 1 February 2021 and that if this were not resolved I would urgently protect my legal rights and indicated that I would seek a costs order against members of the Board.

Annexure "OMN14" is a copy of my letter to the Board and the Acting GCEO.



Handwritten signatures and initials, including a large signature with a cross through it and another signature to the right.

72 As at close of business on 1 February 2021, no response had been received from PRASA, neither in respect of my letter nor that of Mr Khena.

73 I only received an acknowledgment of receipt of my letter from Ms Dinkwanyane Mohuba on 2 February 2021 however no response.

Annexure "OMN15" is a copy of my response letter to the termination letter.


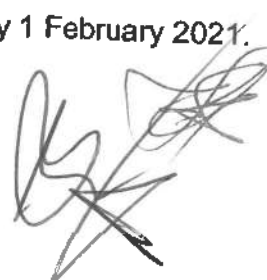
74 Mr Khena wrote a letter to the AGCEO and the Board. His response to the termination letter was as follows:

74.1 He sets out the history that PRASA has sought to dismiss him unlawfully around July 2020. It started a sham process that it referred to as "retrenchment". By the time the administrator, Mr Bongisizwe Mpondo was working with the Acting GCEO (in her substantive position as Group Executive: Human Capital Management on the sham retrenchment, they would have noticed that his contract does not have the *"normal five year fixed term contract extended to all executives"*.

74.2 He referred to the Acting GCEO's and the administrator's attempt, disguised as a retrenchment, to dismiss three executives, Mr Sebola who at the time was Group Executive: Strategic Asset Development, Mr Tiro Holele and himself. Mr Holele was the Group Executive in the Office of the Group CEO.

Handwritten signature and initials in black ink, appearing to be a stylized 'V' or 'U' followed by a large 'X' and a cursive 'B'.

- 74.3 He states that all of them had been at PRASA for more than five years, that Mr Sebola left PRASA after he was paid a settlement to leave PRASA and that another person has been appointed to act in his stead, suggesting that the position had, in fact, not become redundant.
- 74.4 Mr Khena launched urgent application in this court in order to challenge the purported retrenchment and PRASA filed opposition papers to the application, but on the eve of the hearing PRASA proposed that the termination will be withdrawn and he will remain employed by PRASA and that PRASA will, following the appointment of a Board, only exercise rights with regards to his employment as are lawfully permitted by the terms of the contract and the law.
- 74.5 Subsequently PRASA through its attorneys, and on the instructions of a lawfully appointed accounting authority disavowed the unlawful steps taken by the administrator and undertook to respect the law and his employment contracts.
- 74.6 There had been no "norm" in PRASA and there was no reference to a five year duration employment in his employment contract.
- 74.7 He called on PRASA not to act in an unlawful manner; that the termination letter be withdrawn and that he be reinstated to his position as Chief Operations Officer by 1 February 2021.



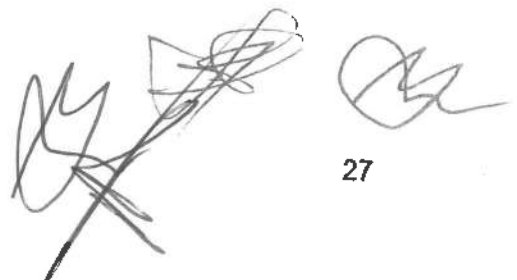
- 74.8 He asked for the report that concluded that he was unlawfully and without authority charged with approving an amount in excess of R25m. He was unaware of this allegation against him and he only found out about it once it had been published in the media. He indicated that if he did not receive a response that he be reinstated to his position by close of business on 1 February 2021 he will take the necessary steps to protect his interests.

Annexure "OMN16" is a copy of his letter.

- 75 Mr Holele's reply to his termination letter was sent by his attorneys, Messrs Crawford & Associates on 3 February 2021. This letter is attached as Annexure "OMN17".

- 76 In his letter Mr Holele:

- 76.1 challenges his termination as being unlawful;
- 76.2 contends the existence of the so-called 5-year fixed term contract in respect of his employment at PRASA;
- 76.3 states that he had been at PRASA in various roles for a period spanning some 14 years;
- 76.4 demands that the Board should respond by noon on 4 February 2021.

The block contains several handwritten signatures and initials in black ink. There are three distinct signatures, with the first being the most prominent and crossing through some text. To the right of the signatures is the page number 27.

BOARD IMPROPERLY CONSTITUTED


77 The media releases of the Board on 30 January 2021 and 2 February 2021 state that the review of our contracts of employment was undertaken by the Board which ultimately decided that, on the basis of what they say is a mandatory term of five year tenure for all executives, our employment contracts should be terminated.

78 The decision to terminate our employment contracts was therefore taken by the Board.

Annexure "OMN18" and "OMN19" are copies of the media releases. .

79 The Board however was not constituted in terms of section 24 of the Legal Succession Act. The provision states that the affairs of PRASA shall be run by a Board of Control of not more than 11 members, including the chairperson who shall be appointed and dismissed by the Minister.

80 Section 24(2) provides that at least one of the members of the Board of Control shall be an officer in the Department of Transport; it also provides for the mandatory membership of officers from the Department of Finance and the Department of State Expenditure. It also provides that one of the members of the Board of Control to be nominated by South African Local Government Association and that three of those members shall have the expertise and experience in the management of a private sector enterprise.



81 The decision to terminate our employment contracts was taken by a board that does not have a member who is an officer of the Department of Transport as required by section 24(2) of the Legal Succession Act.

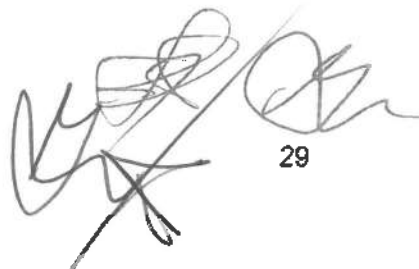
82 It follows then that the Board was not properly constituted, and its proceedings and its decisions are unlawful including the decision to terminate our contracts of employment. The purported termination is accordingly null and void.

PRASA'S MANAGEMENT OF EMPLOYEE RELATIONS

83 On 25 February 2020 there was a meeting between the Committee of Group Executives of PRASA ("Group EXCO") and the Director-General ("the DG") of the Department of Transport, Mr. Alec Moemi. The meeting was attended by the then administrator of PRASA, Mr. Mpondo, members of Group EXCO and senior officials from the Department of Transport. The second applicant was also present at this meeting and confirms my recollection of same.

84 The DG spoke in an unfriendly, aggressive, intimidating and threatening tone. As soon as the meeting was over, I took notes of the things that I could remember from the address of the DG. This is a summary of some of the notes that I took:

84.1 That Group EXCO was rogue and should not question the legality of the appointment of an Administrator for PRASA by the Minister of Transport;



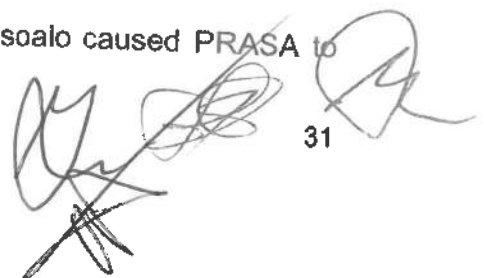
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- 84.2 That the members of Group EXCO had been employed in PRASA for too long and the Administrator should dismiss members of Group EXCO that were rogue without following any due process so that if these employees challenge their unlawful terminations, they must do so from outside of PRASA;
- 84.3 That PRASA was well-resourced to out-litigate any employee challenging their unlawful terminations and that the Administrator should employ the resources of PRASA to out-litigate any employee challenging their unlawful terminations; and
- 84.4 That no individual employee will be able to succeed using their own personal resources against the resources of the state.
- 85 Importantly, in January 2020 at a meeting of Group EXCO I gave Mr. Mpondo verbal advice relating to the lawfulness of his appointment as an administrator of PRASA and, on his request, had reduced that advice to writing and submitted it to him on 6 February 2020. In the advice we (Mr. Dingiswayo (former General Manager: Group Legal Services) and I) effectively stated *inter alia* that the appointment of an administrator for PRASA was unlawful and such an administrator's decisions would be susceptible to legal challenges.
- 86 It was therefore clear to me from the 25 February 2020 meeting that the opinion that I had co-written had rendered me a target through victimisation and that the meeting was called to humiliate and intimidate

me. The other person who had assisted in writing this opinion was unlawfully suspended by Mr. Mpondo on the 11th February 2020 and reinstated without any disciplinary process in September 2020.

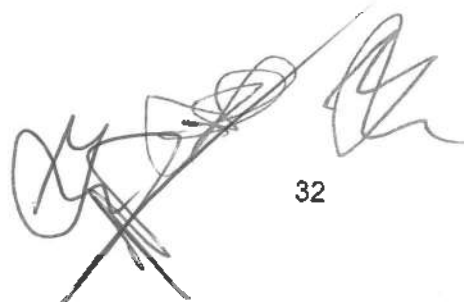
- 87 Significantly, after the 25 February 2020 meeting Mr. Mpondo dismissed the Group Chief Finance Officer ("Group CFO") who had been in this position for about six (6) months. In addition, Mr. Mpondo took steps to dismiss the Group Chief Procurement Officer ("the Group CPO") that had also been in this position for about 6 months. The Group CPO elected to take Mr. Mpondo's attempt to dismiss her to this court and this court per Connie Prinsloo J (on 9 June 2020) and André van Niekerk J (on 13 July 2020), twice stopped Mr. Mpondo in his tracks. In these judgments, this court mulcted PRASA with costs.
- 88 The actions of the Board and the Acting GCEO are symptomatic of a pattern that has been unfolding at PRASA for the last four to five years concerning Mr Khena and the counsel of the DG.
- 89 Mr Khena too has been a target of a witch-hunt by the various acting GCEO's of PRASA, including now, finally, the Acting GCEO who terminated our contracts of employment on 29 January 2021.

- 89.1 In 2016, Mr. Khena was unlawfully dismissed by the then Acting Group CEO, Mr. Collins Letsoalo. Group Legal Services had advised Mr. Letsoalo that the termination of Mr. Khena would be unlawful. Mr. Khena approached this court on an urgent basis and this court reinstated him. Mr. Letsoalo caused PRASA to



apply for leave to appeal against the judgment of this court and this leave to appeal was refused. Mr. Letsoalo has not been asked to account for the losses suffered by PRASA in this regard.

- 89.2 The next acting GCEO (Mr. Lindikaya Zide), suspended Mr Khena and charged him on a count of failing to comply with a lawful instruction. Mr Khena had in fact complied fully with the instruction. He then engaged legal assistance, where Mr Khena was represented by a counsel and PRASA was also represented by a senior counsel. On the day of the hearing, PRASA withdrew the charges.
- 89.3 The retrenchment process that was undertaken and which culminated in his purported retrenchment, was also reversed when PRASA withdrew the case against him and made the undertakings stated above.
- 89.4 Four months after the court ordered him to return to work, Mr Khena was not given work, despite his constant approach to the tenth respondent, the second respondent and the fifth respondent. Mr Khena stayed at home until the date of his unlawful termination, 29 January 2021.

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke.

OTHER ALLEGATIONS MADE IN THE TERMINATION LETTERS

90 As stated above, the allegations dealt with in this section are not core to the reasons for the unlawful termination however, we have decided to take this court into our confidence and deal with them.

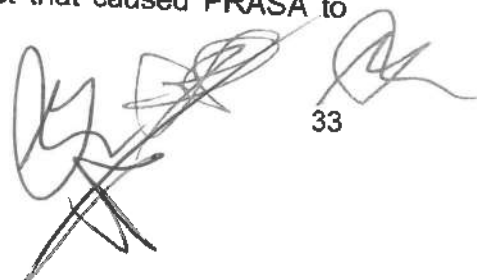
91 In mine and Mr. Khena's termination letters, the tenth respondent indicates that PRASA intends to approach court for necessary relief against us in respect of alleged unauthorised payment of about R58 million for me and R25 million for Mr. Khena. No details are provided in this communication that is meant to be private and confidential. In the media release of 30 January 2021, the Board elected to give the public the details of the thitherto unmentioned alleged irregularities and stated that:

91.1 In my instance this relates to me having unlawfully approved payment of R58 million to SA Fence & Gate (Pty) Limited ("SAFG") when I had no authority to do so;

91.2 In Mr. Khena's instance:

91.2.1 He reinstated the SAFG's contract knowing of the company's breach which breach was brought to this attention by National Treasury in a letter dated 21 April 2016;

91.2.2 When Mr. Khena was the Acting Group CEO he engaged in unlawful conduct that caused PRASA to



incur financial loss – this conduct and financial losses are not specified;

91.2.3 Mr. Khena reinstated me when I was lawfully suspended by Mr. Lucky Montana for unlawful approval of R58m to SAFG;

91.2.4 At the time of the termination of his employment on 29 January 2021, Mr. Khena was on suspension; and

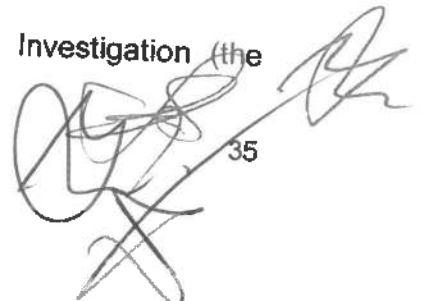
91.2.5 Mr. Khena's role in unlawfully appointing Werksmans Attorneys will also receive priority.

92 The above allegations were never put to us before they were published in the media release. This calls to question the bona fides of the respondents. It appears to have been thrown in gratuitously to cast aspersions on our characters.

93 We deny the allegations of irregularities. The facts about the Contract between SAFG and PRASA and the allegations stated in 91 above are the following:

93.1 PRASA and SAFG concluded an agreement for the fencing and access control of its 8 depots for about R209 million. During the currency of this agreement, the project manager of this project, a Mr. Palello Lebaka, was alleged to have irregularly and without authority increased the contract price by R58m. Mr. Lebaka was disciplined for this and was dismissed around 2013 or 2014.

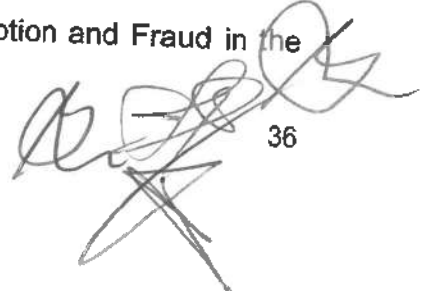
- 93.2 In December 2014 and January 2015, I was appointed to act as Group CEO of PRASA because Mr. Montana had taken leave. During this time, I received a memorandum requesting me to support the condonation of this irregular expenditure of R58m. In this memorandum I was informed that R33 million of this had been paid already and R24 million had already been committed.
- 93.3 I consulted with the then CEO of PRASA Technical, the end-user division, Mr. Saki Zamxaka and the then Group Chief Procurement Officer, the author of the memorandum, Mr. Josephat Phungula to obtain clarity on a number of issues that were not covered by the memorandum and requested them to cover those issues. I received a call from Mr. Montana and he asked me about this matter. I informed him of my discussions with Messrs Zamxaka and Phungula and that I was waiting for a memorandum that is complete. Mr. Montana agreed with my approach to the matter. I was of the view that Mr. Montana was in agreement with the condonation request.
- 93.4 When the memorandum that covered the issues that I had raised was received, I supported this request. This request was later sent to the Board, as the body with the authority to approve the condonation request and the Board condoned the irregularity in April 2016.
- 93.5 Mr. Montana reported this transaction and my involvement in it to the Directorate for Priority Crime and Investigation (the



35

Hawks). I was informed by the investigation officer that he had closed this matter as, after his investigation and my statement to him, he found no evidence of wrongfulness on my part

- 93.6 I did not approve payment of R58 million to SAFG. I supported a request for condonation in respect of expenditure that I was informed by Messrs Zamxaka and Phungula had been paid and had been committed. This means that other people within PRASA had already approved the payment of the R33 million and had already accepted on behalf of PRASA goods and services valued at R24 million.
- 93.7 Without the benefit of documents which are in PRASA's possession, our recollection is that the reinstatement of the contract between SAFG and PRASA was requested by Mr. Zamxaka after SAFG applied to court and PRASA was ordered to pay it R27 million and to appoint an Engineer to assess the work done by SAFG against the invoices paid by PRASA. This was done and culminated in the litigation that was initiated by PRASA and that I reported to the current Board about. The letter from National Treasury is a request for Mr. Khena to update the then Chief Procurement Officer of the remedial steps taken by PRASA. These remedial steps culminated in the claim instituted by PRASA against SAFG that the Board is aware of.
- 93.8 I have testified under oath at the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the



Public Sector including Organs of State that my suspension by Mr. Montana was unlawful and unfair. PRASA alleges that my suspension was lawful. I am not aware of anyone from PRASA having approached the Commission under oath to dispute this evidence. I did not even know that PRASA was investigating the lawfulness or otherwise of a suspension that happened in 2015. I hope that PRASA will come under oath in response to this application to show its basis for stating that this suspension was lawful.

- 93.9 At the time of his termination, Mr. Khena was not on suspension as alleged in the aforesaid media statement.
- 93.10 That Werksmans Attorneys was appointed by the Board to conduct a forensic investigation in PRASA is known to PRASA. Before the Auditor-General found this appointment to be irregular, they invited the then Company Secretary to provide management comments because of understanding that this was a Board appointment.
- 93.11 Mr Khena's involvement with Werksmans appointment was administrative in nature. He signed the engagement letter as part of his daily duties. Werksmans were directly engaged by the Board and Mr Khena had no dealing and is not privy to the work Werksmans did for the Board.
- 93.12 As regards the allegation pertaining to SAFG, Mr Khena's recollection is that this issue arose after he was appointed as

Acting Group CEO. The court had ordered PRASA to pay SAFG an amount approximating R22 million. The court order further stated that, for the disputed work, parties should appoint an engineer to assess and evaluate the disputed work claim. Mr Khena made the payments to SAFG in compliance with the court order. This matter was reported to the then board (led by Dr. Popo Molefe) and the Board was fully appraised in this regard.

URGENCY

- 94 I bear responsibilities as more fully set out in my contract. I am the Group Executive in charge of Group Legal Services, Group Compliance and Group Insurance. These functions are very key to ensuring that PRASA complies with the law and that, to the extent any financial risk is not capable of internal management, such risk is insured. A view of open sources will show that the department that I lead (Legal, Risk and Compliance) has acted as an able line of defence against people who have tried to fleece PRASA.
- 95 I submit that I have demonstrated that the employment contracts do not provide for a five year fixed term period as alleged by PRASA in the termination letters. Termination is thus in clear contravention of the contract. My legal team will argue at the hearing of this matter that the very act of unlawfulness itself grounds urgency.



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96 If we are constrained to await this matter to proceed in the ordinary course, we shall suffer prejudice, and will not be afforded substantial redress in due course. I say that because of the following:

96.1 Continuing and abiding lawlessness without cause;

96.2 We would have been deprived of my remuneration for as long as it takes for the matter to be heard in the ordinary course.

96.3 We shall have been rendered unemployed contrary to the clear provisions of the contract and without any legal cause.

96.4 Our prospects of obtaining employment would have been significantly dented as our characters and reputations have been besmirched by PRASA in its media statement as executives who, amongst other things, have committed the following:

96.4.1 Capitalised on the instability and extended the durations of their contracts of employment;

96.4.2 Unlawfully approved payments to contractors without authorisation;

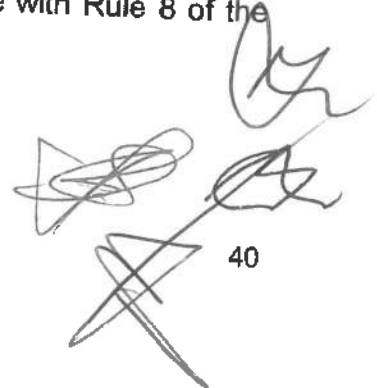
96.4.3 Assist each other by Mr. Khena lifting my suspension by Mr. Montana which suspension was lawful; and

96.4.4 Should be held responsible for losses suffered by PRASA (R58 million in my case and R25 million in Mr. Khena's case).



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- 96.5 Naturally, the consequent unemployment, in the midst of the current financial and economic environment in South Africa where jobs are difficult to come by, will expose us to irremediable financial hardship. We cannot be expected to sue PRASA at a later stage because first we do not have the means to sustain an interminable legal battle with PRASA. As stated earlier, the very act of terminating our responsibilities is to out-litigate us and for us to spend money on legal fees fighting for our rights.
- 96.6 To be expected to proceed in the ordinary course would typically, I am advised, take approximately 9 months for the matter to be heard and I need not mention the attendant legal fees which will be unaffordable after our unlawful termination.
- 97 Given the fact that our termination is unlawful, a matter which, with respect, is not complex, we should not have to wait for however long it takes for this matter to be heard in the ordinary course.
- 98 Insofar as my personal circumstances are concerned, I ask that the following be taken into account in assessing urgency and the certain financial hardship that will follow.
- 98.1 I submit on the basis of these considerations that the matter is urgent and should be heard in accordance with Rule 8 of the Rules of this Honourable Court.



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- 98.2 There is a clear harm to my reputation and my ability to financially sustain myself. I am a sole bread winner, and with an immediate termination of my employment contract, I will be unable to take care of my immediate family and pay my monthly debts when they become due and payable. I have not been given any termination notice in advance so that I may consider alternative employment. I am therefore hugely disadvantaged by the termination of my employment contract, particularly considering that I am an innocent party in this dispute. There have been several boards and GCEOs that have come and left PRASA and all of them have never raised any issues with my employment contract.
- 98.3 I am a sole breadwinner. I have a daughter who is aged seventeen (17). She is in grade twelve (12) and I pay for her schooling – in an amount of R13 000.00 (thirteen thousand rand) – monthly. She cannot afford to drop out of school at the moment as this will disrupt her prospects of succeeding in her schooling.
- 98.4 I have a mortgage bond for our residential home for an amount of R5 500.00 (five thousand five hundred rand). If I default on the home loan, given that I run the risk of being unemployed, my daughter and I will not have any residential home.
- 98.5 Given the current economic climate, if I start looking for employment, it is uncertain when I will find employment.



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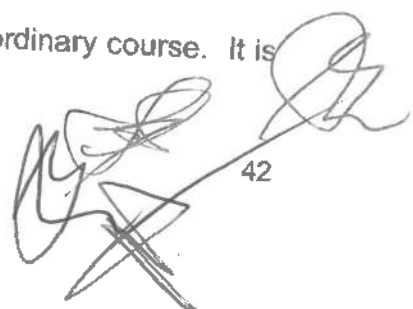
equivalent to the position, I held within PRASA. This is also affected by the professional reputation damage which I currently suffer given that the termination of my employment was also published in the media.

98.6 I have a vehicle, which is used to conduct my personal affairs, transport my daughter and engage in personal activities. I pay a monthly instalment to the bank, as this vehicle is financed. If I default on the payments, the vehicle will be repossessed and I run the risk of being blacklisted from being granted any credit from the banks.

98.7 I have a domestic helper who assists me and my daughter with arranging our domestic lives, if my employment is terminated and I am unemployed, I will be unable to remunerate her monthly. She will then be left without employment in an already jobless economy.

98.8 Even if I tried to access my retirement fund, it could take up to three (3) months before I can access those funds – during which time my family and I will be suffering financially, and it would affect all our lives beyond just finances.

99 I submit that in the light of the patent illegality that has been perpetrated against me, Mr Khena and Mr Holele, I should not be expected to put up with the illegality and suffer prejudice as a consequence. We should not be expected to await this matter to be heard in the ordinary course. It is



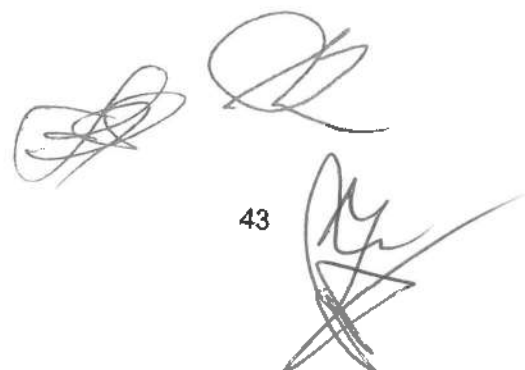
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sufficiently urgent on its facts and justifies, with respect, the discretion of this Honourable Court to deal with it on an expedited basis. By the time the matter is heard in the ordinary course, we will have suffered irreparable prejudice.

Mr Khena's personal circumstances

- 100 Mr Khena supports his wife and step-son. The step-son is in Grade 10 and Mr Khena also pays the son's school fees and his monthly income is critical for both supporting his family and keeping his son in school.
- 101 In addition, Mr Khena is paying two bonded properties, one of which is his residential home in Bryanston. The other home is in Durban. The bond repayment is in respect of the Bryanston property is in the amount of R30,755.00 (thirty thousand seven hundred and fifty five rand) and in respect of the Durban property R6,178.00 (six thousand one hundred and seventy eight rand). Without an income, Mr Khena will default on the bond repayments and this would lead to him and his family being rendered homeless.
- 102 Mr Khena owes his legal representatives R190,000 in respect of the unlawful retrenchment matter where PRASA, through the then Administrator (Mr B Mpondo) had unlawfully retrenched him and others. Not earning an income would result in him defaulting on the payments to his legal representatives.



103 Mr Khena, his covered under his medical aid which he pays monthly with Discovery medial aid. The unlawful termination of his employment will result in his inability to pay the monthly premiums for the medical aid. This is critical especially at this stage where the whole world is battling COVID-19.

104 Mr Khena employs a helper (domestic worker) and a gardener who will both be left unemployed if the unlawful termination of his employment is allowed to stand.

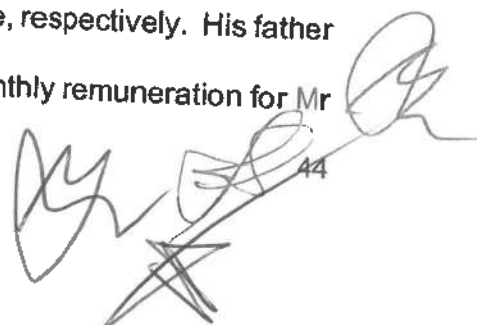
105 Considering all the above, awaiting judgment in the ordinary course (including any appeals) would result in an absence of substantial redress.

Mr Holele's personal circumstances

106 Mr Holele is a breadwinner in his household and he has two sons, one is 20 years old and the other is a 17 year old minor child. Both sons are still pursuing their studies and Mr Holele is responsible for paying their fees. In the event that Mr Holele would be unable to pay such fees, his sons' education will be jeopardised.

107 In addition, Mr Holele makes bond repayments for the home he and his family occupies. Should Mr Holele default on the bond repayments, he and his family would be without a home.

108 Mr Holele is responsible for the financial support of his mother and father, who are elderly persons of 80 and 86 years of age, respectively. His father is currently in a frail care centre. The lack of monthly remuneration for Mr



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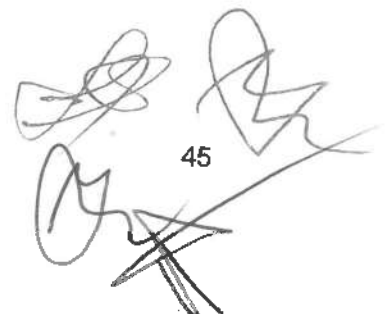
Holele would result in a large and negative impact on the care and well-being of his elderly parents.

109 He is also responsible for paying the medical aid and other insurance policies that cover him and his family. The inability to pay the monthly premiums will result in his family losing the medical and other critical insurance policies.

110 Moreover, PRASA's publications in the media suggests that Mr Khena and I are dishonest in that it alleges that we knew that our employment should have been terminated within five years of employment and that we effectively took advantage of the situation by continuing to stay employed. Not only is this incorrect, it is also damaging to our reputation and severely prejudices our prospects of obtaining new employment, particularly considering that Mr Khena is applying for the position of GCEO within PRASA.

111 I submit that the above, individually and collectively establishes urgency. It also shows that to await our turn in this Court in the ordinary course will expose us to irremediable prejudice. PRASA on the other hand, if we are reinstated as I submit we should, would suffer no prejudice. We would be reinstated in our positions, go to work, discharge our responsibilities in accordance with our contracts. PRASA benefits thereby.

112 There will be no prejudice for PRASA if we are reinstated and continue to discharge our responsibilities.

The block contains several handwritten signatures in black ink, some of which are crossed out with a large 'X'. Below the signatures, the number '45' is written.

My responsibilities towards PRASA

113 I mention the following to place it before this Honourable Court the information that, with respect, is also relevant to the matter being disposed of on an urgent basis. I have responsibilities towards PRASA and so does Mr Khena. I mention mine.

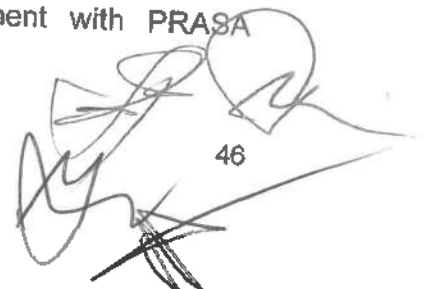
113.1 There are also matters that are outstanding that I have been attending to which impact on the proper administration of PRASA.

113.2 My legal team will argue that in the circumstances and the need to resolve this matter on an urgent basis will be considered against what my absence from PRASA would mean.

113.3 It is a matter of common and widespread knowledge that PRASA has been plagued by seemingly intractable problems in the last short while. I just provide examples to provide context to what I am about to say.

113.4 I have been called to give evidence before the State Capture Commission concerning major litigation between PRASA and Swifambo, Siyangena and Siyaya. PRASA has prevailed in these matters.

113.5 There are a number of matters that I have been dealing with. I need mention also that the General Manager for Group Legal Services, Mr Fani Dingiswayo's employment with PRASA



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ceased on 31 January 2021. As matters stand, there are no legal personnel attending to legal matters at PRASA.

114 I also mention the following matters:

- 114.1 Negotiations between PRASA and Gibela for the payment of an advance payment of R5,4 billion;
- 114.2 The acquisition of more than 20 locomotives from Stadler Rail;
- 114.3 An appeal launched by Siyangena Technologies against PRASA after PRASA successfully applied for the review and setting aside of contract worth about R6 billion. I am the deponent in the review application;
- 114.4 Several applications, appeals and counter-applications relating to security contracts between PRASA and private security contractors. The wholesale destruction of the network of PRASA that led to PRASA having limited operations;
- 114.5 The transfer of the business of Autopax Passenger Services (SOC) Limited ("Autopax") from Autopax to PRASA and the de-registration of Autopax;
- 114.6 The Competition Commission referral to the Competition Tribunal of alleged uncompetitive conduct of PRASA and Autopax in relation to the bus billing facility at Park Station; and
- 114.7 Advising PRASA on whether it should appoint parolees to clean its network.



47

114.8 Numerous interlocutory applications meant to derail the liquidation of Swifambo Rail Leasing (Pty) Limited (In Liquidation) and avoid a section 417 inquiry.

115 The above projects and litigation are crucial and some, like the desire to appoint parolees will expose PRASA to risk. My absence at PRASA will weaken the Legal Department and may lead to PRASA making decisions that will be detrimental to it in these matters.

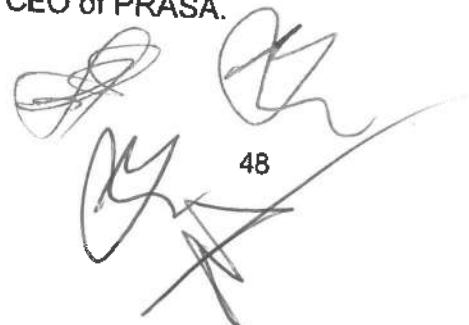
116 In any event, with the best of intentions, Group Legal Services cannot cope with all these matters. The function was stretched before this unlawful decision was taken particularly that 29 January 2021 was the last working day of the General Manager Group Legal Services who has resigned. At present Group Legal Services whose structure permits for seven (7) legal advisers (excluding my position) has only two legal advisers.

117 As demonstrated above, all indications are that the reason for the unlawful termination is so that we can fight PRASA from outside. There is no legal basis for the termination of our contracts.

Mr Khena's responsibilities as COO

118 Mr Khena has attended to various responsibilities in the broader PRASA Group, including being seconded during 2013 to Autopax as Acting CEO.

118.1 In 2015 he was appointed as Acting Group CEO of PRASA.

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118.2 In March 2019 he acted as CEO of PRASA Corporate Real Estate.

119 As the COO of PRASA he was responsible for, amongst other things, ICT, Risk and Insurance, and monitoring and evaluation of group performance.

120 I mention all these to indicate the nature of his responsibilities, the level at which these responsibilities are discharged and to demonstrate the irrationality of the course embarked upon by PRASA in the face of clear contractual provisions.

Mr Holele's responsibilities at PRASA

121 Mr Holele is responsible for the first respondent's strategy department and his duties include the following:

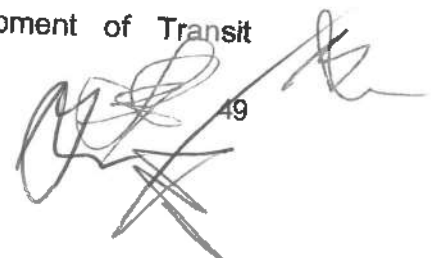
121.1 ensuring effective development and co-ordination of PRASA Corporate Strategy;

121.2 ensuring effective alignment and execution of PRASA Corporate Strategy;

121.3 monitoring and evaluating the implementation of PRASA Corporate Strategy;

121.4 reviewing strategy, reviewing progress in strategy implementation and advising the business accordingly; and

121.5 working with cities and transport authorities regarding Rail Transport Development and the development of Transit



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Oriented Developments (ToDs) especially in under-served areas of our cities.

122 PRASA's unlawful conduct must be assessed as against its own regulatory framework. It is a public entity subject to the Constitution and Public Finance Management Act.

123 The unlawful termination of our contracts of employment undermines our responsibilities under section 57 of the Public Finance Management Act which for convenience is reproduced here.

"195. Basic values and principles governing public administration

- 1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
 - a. A high standard of professional ethics must be promoted and maintained.*
 - b. Efficient, economic and effective use of resources must be promoted.*
 - c. Public administration must be development-oriented.*
 - d. Services must be provided impartially, fairly, equitably and without bias.*
 - e. People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
 - f. Public administration must be accountable.*
 - g. Transparency must be fostered by providing the public with timely, accessible and accurate information.*
 - h. Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
 - i. Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*



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2. *The above principles apply to*
 - a. *administration in every sphere of government;*
 - b. *organs of state; and*
 - c. *public enterprises.*
3. *National legislation must ensure the promotion of the values and principles listed in subsection (1).*
4. *The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.*
5. *Legislation regulating public administration may differentiate between different sectors, administrations or institutions.*
6. *The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration."*

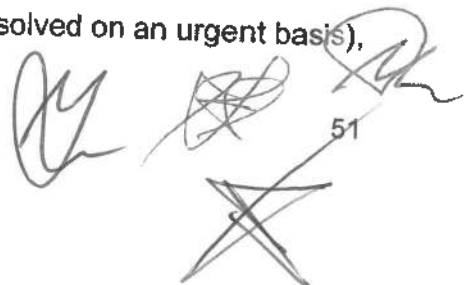
124 The unlawful termination of our contracts of employment is in clear contravention of the basic values and principles governing public administration.

125 The language of the provision is peremptory. Public administration must be governed by the democratic values and principles enshrined in the Constitution.

126 The unlawful termination of our contracts of employment goes against the following principles.

126.1 It offends against a high standard of professional ethics.

126.2 It undermines the principle of efficient, economic and effective use of resources (we are terminated in circumstances where our contracts provide otherwise and where, given the prospects of success, even if this matter is not resolved on an urgent basis),



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we are likely to succeed and by then, if the court is not minded to deal with this matter on an urgent basis, our matter if we do prevail, then PRASA will have to pay us out.

126.3 It offends against accountability.

126.4 It offends against transparency given the nature of how the resolution was taken in the light of clear and patent provisions to the contrary.

126.5 It undermines good human resource management.

127 The unlawful termination of our employment contracts also precludes us from discharging our responsibilities as set out in section 57 of the Public Finance Management Act, which also for convenience is also reproduced herein:

"57. Responsibilities of other officials. —An official in a public entity—

- (a) must ensure that the system of financial management and internal control established for that public entity is carried out within the area of responsibility of that official;
- (b) is responsible for the effective, efficient, economical and transparent use of financial and other resources within that official's area of responsibility;
- (c) must take effective and appropriate steps to prevent, within that official's area of responsibility, any irregular expenditure and fruitless and wasteful expenditure and any under collection of revenue due;
- (d) must comply with the provisions of this Act to the extent applicable to that official, including any delegations and instructions in terms of section 56; and
- (e) is responsible for the management, including the safeguarding, of the assets and the management of the liabilities within that official's area of responsibility."

No time wasted

- 128 We have not wasted any time in approaching this Court for urgent relief. Our contracts of employment were terminated on Friday 29 January 2021.
- 129 Over the weekend we did our best to consult with our legal team. Although some documents were exchanged, we were only able to hold a consultation on Sunday 31 January 2021.
- 130 Demand letters were sent, mine on 31 January 2021 and Mr Khena's on 1 February 2021. We afforded PRASA and its Board one day, Monday 1 February 2021, to respond to our demands. By close of business on 1 February 2021 they had not responded to our letters of demand.
- 131 The legal team met to draft the application and consulted with us throughout. The application was only finalised on Thursday 4 February 2021.
- 132 We have moved with the necessary swiftness, first to demand that PRASA retract the letters so that unnecessary litigation is avoided. They did not do so. We consulted with our legal team and the papers were then drafted.
- 133 The papers are not voluminous. They consist of relevant allegations to the determination of this matter as well as the relevant annexures thereto. The legal issue is very narrow. It concerns the lawfulness of our termination.

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- 134 So PRASA will have until Monday, 8 February 2021 which is sufficient time considering the exigencies of this matter. We have fixed the date of 11 February for the hearing of this matter. It will afford the parties an opportunity, in the case of the applicants, to reply and prepare for argument.
- 135 We have therefore approached this Court without wasting any time. We have set out the reasons why this matter should be disposed of on an urgent basis and why to await redress in the ordinary course would not grant us, the applicants, adequate relief. This also explains why the ordinary rules relating to applications could not be complied with.
- 136 We have set out why it is that a shorter period was fixed than would otherwise have been the case.
- 137 We ask that this Court exercises its discretion by condoning the noncompliance with the Rules and the forms as required under Rule 8.
- 138 The respondents will not suffer any prejudice if this matter is heard on the timelines fixed by the applicants. The time afforded to them is adequate to enable them to respond to the challenge put, i.e. that the termination of contracts of employment is unlawful and we should be reinstated.



54

COSTS

139 We have approached this Court on an urgent basis. We have not wasted any time. We placed PRASA on terms to purge itself of the illegality. We set out the reasons why we say that its conduct is illegal.

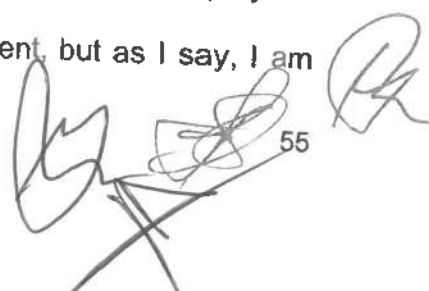
140 We do not have the resources to out litigate PRASA. It is unnecessary to do so given the indefensible illegality perpetrated by PRASA. Legally it is unnecessary. PRASA chose to terminate, and as I say this is a culmination of a pattern of victimisation at PRASA.

141 The application is not frivolous. It is not unmeritorious. If anything, on the contrary, it bears significant prospects of success.

142 In the event that this Court finds that the application is not urgent and should be prosecuted in the normal course, I ask, on account of the following set of circumstances, that each party bear its own costs and that we should not be made to pay in circumstances where we did not launch a frivolous application which is without merit.

142.1 We afforded PRASA an opportunity to purge itself of the illegalities;

142.2 PRASA's position is unsustainable, is not supported by the contracts; the provision that there is a fixed term five year contract offered to executives is simply, at least in our cases, not based in law or on fact. it may be the case with employees that joined subsequent to our employment, but as I say, I am



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unaware except in the case of Dr. Sithole and two or three other employees that I know are subject to the alleged five year tenure. None of the other executives have a five year limit to their employment.

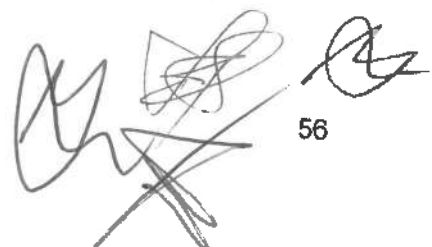
142.3 To compel us to pay, in the event of the matter being struck from the roll for lack of urgency, would effectively be crowning PRASA's illegality. I do mean to impute any malice or cast aspersions on the integrity on the Court. I simply make the point that PRASA would have achieved its goal of putting executive employees out of work, constraining them to approach Court and to incur costs and for the matter to be dragged out in the ordinary course.

143 It is likely that this matter will have various iterations, whether in this forum or other fora. That will place significant strain on our financial ability to sustain litigation. In fact, it may mean that in some instances we will have to forgo obviously winnable cases (final and interlocutory).

144 In the event that this Court is not minded to dispose of the matter on an urgent basis, then each party should pay their own costs.

CONFIRMATORY AFFIDAVITS

145 I attach hereto the confirmatory affidavits deposed to by **NKOSINATHI ALLEN KHENA** and **TIRO HOLELE**, marked as annexures "**OMN20**" and "**OMN21**" respectively.

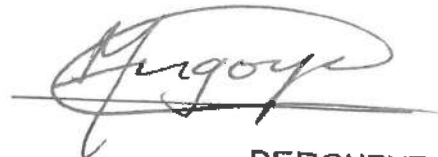


56

CONCLUSION

125

146 I submit that I have made out a case for the relief set out in the notice of motion and ask that it be granted on the terms.



DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at SANDTON on this the 4th day of FEBRUARY 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.



COMMISSIONER OF OATHS

FULL NAMES:

ADDRESS:

CAPACITY:

SETŠHEPHI JEHIEL THEMA
Commissioner of Oaths
Ex-Officio
Practising Attorney RSA
Lawtons Inc. practising as Lawtons Africa
140 West Street,
Sandton, Johannesburg



"18C"

126

IN THE LABOUR COURT OF JOHANNESBURG
HELD AT BRAAMFONTEIN

CASE NO.: J111/21

In the matter between:

ONICA MARTHA NGOYE

First Applicant

NKOSINATHI ALLEN KHENA

Second Applicant

TIRO HOLELE

Third Applicant

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Respondent

LEORNARD RAMATLAKANE

Second Respondent

THINAVUYO MPYE

Third Respondent

DINKWANYANE MOHUBA

Fourth Respondent

SMANGA SETHENE

Fifth Respondent

XOLILE GEORGE

Sixth Respondent

NOSIZWE NOKWE-MACAMO

Seventh Respondent

MATODZI MUKHUBA

Eighth Respondent

THEMBA ZULU

Ninth Respondent

THANDEKA MABIJA

Tenth Respondent

REPLYING AFFIDAVIT

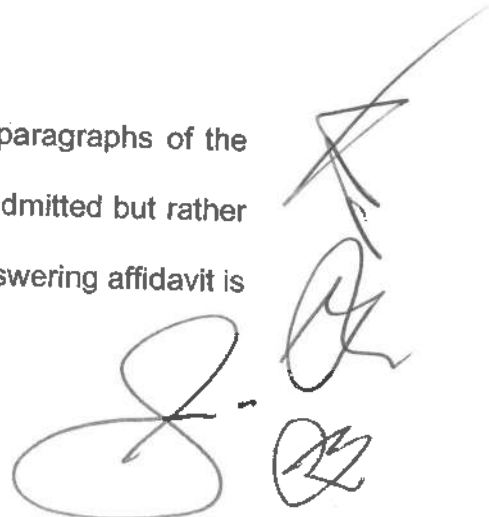
I, the undersigned

ONICA MARTHA NGOYE

A large, stylized handwritten signature in black ink, appearing to be 'X. Ngye', is written over a large, circular, loopy mark. To the right of the circular mark is a smaller, more compact signature.

do hereby make oath and say:

1. I am an admitted attorney of 199 Pritchard Street, Olivedale, Randburg.
2. Save where the context indicates otherwise, the facts stated in this affidavit are within my personal knowledge and are true and correct.
3. Where I make submissions of a legal nature, I do so with advice from my legal representatives, which advice I accept.
4. I was the Group Executive: Legal, Risk and Compliance at PRASA before my contract of employment was unlawfully terminated by the tenth respondent (the Acting GCEO) by way of a letter dated 29 January 2021. I commenced my employment with PRASA on 1 September 2014, having transferred from my previous position as Chief Executive Officer of Intersite Assets Investments SOC Ltd (Intersite), a wholly owned subsidiary of PRASA, on 22 August 2014.
5. I deposed to the founding affidavit in this matter and having read the answering affidavit deposed to by Ms Thandeka Mabija, the Acting GCEO of PRASA, I respond as follows.
6. To the extent that I do not deal with the individual paragraphs of the answering affidavit, they should not be regarded as admitted but rather denied. To the extent that what is contained in the answering affidavit is


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in conflict with the contents of this affidavit and the founding affidavit, I deny those allegations.

7. The answering affidavit does not dispute the respondents' unlawful termination of our employment contracts.
8. The answering affidavit only addresses points in limine. Both objections are without merit. We do not place reliance on the Labour Relations Act remedies.
9. Our version, all of which stands uncontradicted. It is admitted and the matter should be resolved on that basis.
10. I deal with the points raised by PRASA thematically.

URGENCY

11. PRASA says that there is no urgency and that it is self-created (para 6.8).
12. PRASA says that the personal circumstances as set out in the founding affidavit do not give rise to urgency and they also say that financial hardship in itself is not a ground for urgency.
13. I stand by what I said in the founding affidavit. The rest of the allegations in the answering affidavit section dealing with urgency constitutes legal

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argument and submissions will be made by my legal representatives at the hearing of this matter.

14. To be sure I deny that time was wasted as sought to be argued in para 6.3.
15. The respondents were in fact afforded four (4) days – from Friday, Saturday, Sunday and Monday. They only served their answering affidavit on Tuesday, 9 February 2021 at approximately 16H47 in the afternoon.
16. The other parts of the affidavit, as I say, were to provide context and background for the resolution of this matter. The issue remains, the question of whether our employment contracts at PRASA were validly terminated. That has been the cause of action pleaded in the founding affidavit, numerous from my perspective, Mr Khena's and Mr Holele's. Nothing has changed.
17. We persist with the relief that this Court should dispose of the matter on the basis of urgency.
18. To be certain, the termination letters were written by the Acting GCEO but the statements published by PRASA do make it explicit that it was the Board's decision and the conduct of both is the subject of the challenge.

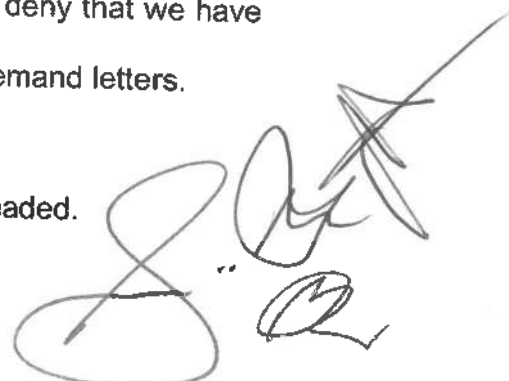
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JURISDICTION

19. The jurisdiction basis that we, as the applicants advanced, is founded in Section 77(3) of the BCEA, 75 of 1997. This matter is decidedly a matter that concerns an employment agreement.
20. It is quite obvious, from what is pleaded in the founding affidavit, that at the heart of this application is a vindication of our contractual rights. In particular we say that the conduct of the respondents was in breach of our contract of employment, but in particular they did not terminate our employment contracts in accordance with clause 9 of those contracts. We made it clear what we seek is specific performance. The contracts provide for specified instances of termination. The purported termination, by the Board and the Acting GCEO, is in breach of the contracts .

ALLEGED FAILURE TO PLEAD THE CAUSE OF ACTION

21. The cause of action is fully pleaded – it consists of (1) the agreement and its terms and conditions; (2) the respective rights and obligations; (3) PRASA's breach of contract which is undenied – it is an admitted fact; (4) remedy of specific performance sought.
22. The claim is framed in the pleadings. In any event I deny that we have not identified a breach and made a demand in the demand letters.
23. I therefore deny that no cause of action has been pleaded.

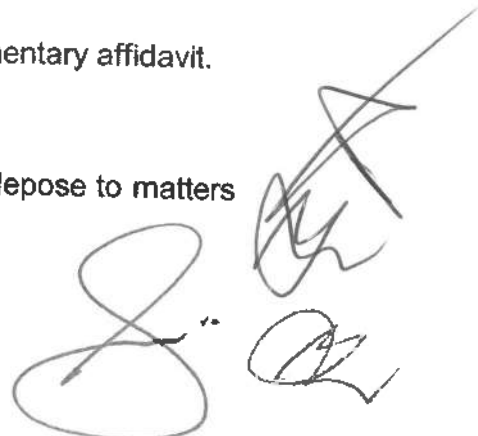
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24. The respondents are mistaken when they talk about the basis of a review or provisions of the Labour Relations Act, 66 of 1995 ("LRA") to bring the matter within the jurisdiction of this Court. I make it clear, as I did in the founding affidavit, that I approach this Court under Section 77(3) of the BCEA (founding affidavit, p 12, para 8).
25. I do not seek relief under any provisions of the LRA. I do not seek to review any decision under the provisions of the LRA.

ALLEGED INTRODUCTION OF A NEW CAUSE OF ACTION

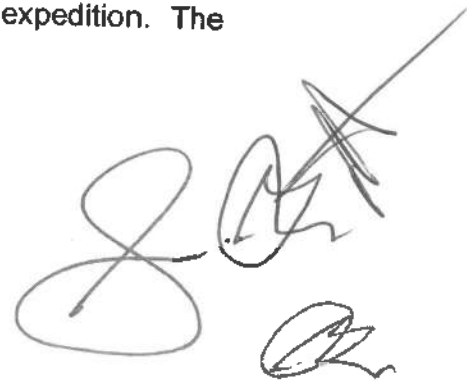
26. It is not true that Mr Holele seeks to introduce a new cause of action. It is based on a termination of his contract of employment. I have in the supplementray affidavit mentioned the circumstances under which this point was omitted. It will be prejudicial to his case if it is not incorporated. He too founds his cause of action in the unlawful and invalid termination of his contract of employment. That has been pleaded in the founding affidavit.
27. I accordingly deny that Mr Holele seeks to introduce a new cause of action. Mr Holele's cause of action is not required to be confirmed by the first and second applicants. It is separately pleaded and he wishes to supplement and amplify it by reference to the supplementary affidavit.
28. Mr Holele is a co-applicant in the matter and he can depose to matters that affect him.

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132

29. It is not necessary that I be the person who deposes to the supplementary affidavit. All that is required is that the person who deposes to the affidavit must be a person who has knowledge of the contents of the affidavit. No one is more qualified to speak about his case and the remedy he seeks than him.
30. I accordingly deny the allegations contained in paragraph 8.2.
31. I deny the allegations in paragraph 8.3. They are not an afterthought. The respondents cannot say that they have suffered any harm as a result of that, as they had not pleaded by the time the supplementary affidavit was served and filed.
32. The respondents say that the new issue is not a prayer for relief in the notice of motion. The notice of motion stands unamended. The applicants persist with the relief sought in the notice of motion. It is not necessary to amend the provisions of the notice of motion.
33. I have dealt with the issue of costs quite extensively in the founding affidavit. I stand thereby.
34. This matter is not frivolous. It raises important issues. It implicates a State entity. The applicants are not on a fishing expedition. The applicants are challenging important issues.

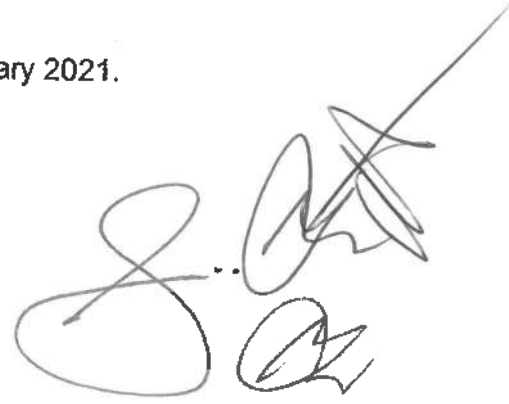
THE BOARD

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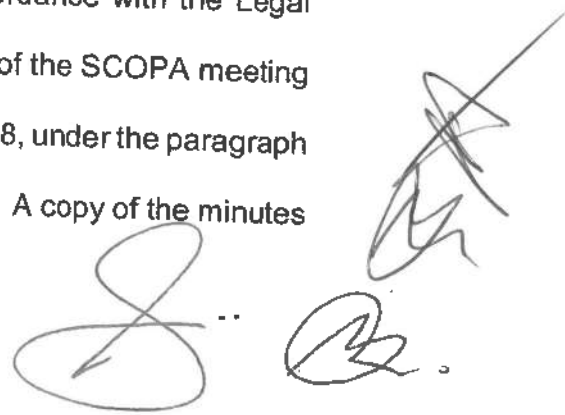
35. I am an invitee at ordinary Board meetings and I have personal knowledge of what transpires at such meetings. I attach emails with an extracted list of all the attendees of the two recent ordinary Board meetings as annexures "RA1A" "RA1B".
36. The letterheads on our termination letters do not have the name of a representative from the Department of Transport. The only names that appear are those of the Board members cited as respondents to these proceedings.
37. In the media statement dated 3 February 2021, issued under the hand of the second respondent, and in an attempt to refute the claims of a newspaper article that questioned the composition of the Board, the second respondent unequivocally states that *"[w]e call on GroundUp to manage the veracity of what it deems to be facts and not fiction before they publish an article riddled with falsehoods. Director General has been appointed by the Minister of Transport to sit in the PRASA Board. The current Board was appointed by the Minister of Transport consistent with the provisions of the Legal Succession Act and it includes officials from government departments such as the National Treasury, the National Transport and SALGA"*.

Annexure "RA2" is the media statement of 3 February 2021.

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134

38. The name of Mr Alec Moemi (supposedly the officer in the employ of the Department) does not appear on the letterheads of our termination letters.
39. Furthermore, the respondents have now produced a letter which on the face of it say the Minister has appointed Ms Hlengiwe Ngwenya. She was not invited to the Board meetings I attended. Also, like Mr Moemi her name does not appear on the letterhead.
40. None of these alleged appointees were invited to attend nor have they ever attended any Board meetings at PRASA before I received the termination letter. I attended all the ordinary Board meetings including the meeting of 28 January 2021 which was held a day before I and the second applicant received our termination letters.
41. If any changes were made to the letterhead of PRASA that change may have occurred after our termination.
42. I also wish to point out that the Auditor General reported to the national assembly public accounts standing committee ("SCOPA") that the new board of PRASA was announced by the Minister on 22 October 2020 but that the board is still not constituted in accordance with the Legal Succession Act. This is reflected in the minutes of the SCOPA meeting which took place on 3 February 2021 at page 4 of 8, under the paragraph headed "overview of audit outcomes" on PRASA. A copy of the minutes is attached as annexure "RA3".



CONCLUSION

135

43. We persist with the relief sought in the notice of motion and founding affidavit.


DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that she knows and understands the contents of this affidavit, which was signed and sworn before me at SANDTON on this the 10TH day of FEBRUARY 2021, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.


COMMISSIONER OF OATHS

ZIYANDA KGOTSO SIBEKO
Commissioner of Oaths
Practising Attorney R.S.A.
90 Rivonia Road
Sandton
2196



Nokulunga Mthembu

"180"

136

From: Gomolemo Mabokela
Sent: Monday, 01 March 2021 09:47
To: Mxolisi Myambo; Michelle Smith
Cc: Kase Mahlaku; Nokulunga Mthembu; Ngcebo Mfusi; Thato Telite
Subject: RE: OUTSTANDING LEAVE PAY IN RESPECT OF ONICA MARTHA NGOYE & NKOSINATHI KHENA
Attachments: LETTER FROM GAI TO DE SWARDT MYAMBO - 2021.03.01.pdf; B- TERMINATION LETTER - MR KHENA - 2021.01.29.pdf; A- Termination Letter - 2021.01.29.pdf
Importance: High

Dear Sirs,

Please find attached herewith correspondence for your urgent attention.

Kindly acknowledge receipt of this email.

Kind Regards

Gomolemo Mabokela
Candidate Attorney

Gwina Attorneys Incorporated

Switchboard : 011 666 7300
Direct : 011 666 7313
Mobile : 060 797 1223
Suite 22 Second floor 135 Daisy Street Sandown
Sandton 2196
mabokelag@gwinaattorneys.co.za
www.gwinaattorneys.co.za

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By Email

Date: 01 March 2021

Your Ref: SAP Number: 20101356 &
20101983
Our Ref: SD Gwina/KM/MAT462

Mr Mxolisi Myambo
DE SWARDT MYAMBO ATTORNEYS
941 Jan Shoba Street
Cnr Jan Shoba & Mackenzie Streets
Brooklyn
Pretoria
Gauteng Province
0181

Email: mxolisi@deswardt.co.za
Cc: michelle@deswardt.co.za

Dear Sirs,

RE: OUTSTANDING LEAVE PAY IN RESPECT OF ONICA MARTHA NGOYE & NKOSINATHI KHENA

1. The above matter refers.
2. We act on behalf of and with instructions from Ms Onica Martha Ngoye and Mr Nkosinathi Khena (collectively "our Clients") in the above-mentioned matter. We address this letter to you at a special request by your client after being addressed directly by our Clients on the specific matter addressed in this letter.
3. Please note that we have raised only those issues that we believe are necessary to deal with in this matter. Any failure to deal with any other issues should not be construed or deemed to be an admission, concession, waiver or agreement. Our clients reserve their right to do so at the appropriate time and in the appropriate forum, should it be necessary.



4. We refer to the letter from your client, Passenger Rail Agency of South Africa (PRASA) dated 29 January 2020 addressed to Ms Ngoye (titled as a "Termination of Employment") wherein your client terminated Ms Ngoye's employment contract with immediate effect. The letter is enclosed herein and marked "A".
5. In light of the above, we confirm that at the time of the termination of Ms Ngoye's employment contract, our Client had accumulated annual leave days which number is known to your client and can be determined in terms of your client's payroll system. Ms Ngoye has substantial outstanding leave days as a result of your client's refusal to approve her application for leave on a number of occasions. As a consequence, whenever your client would refuse to approve her leave application, Ms Ngoye would continue to perform her duties for your client as expected and as per her employment contract. Suffice to add that our client has never stayed away from work without permission from your client.
6. We further refer to your client's letter dated 29 January 2021 addressed to Mr Khena, wherein your client also terminated Mr Khena's employment contract with immediate effect. The said letter is enclosed herein and marked "B".
7. In light of the above, we confirm that at the time of the termination of Mr Khena's employment contract, Mr Khena had outstanding annual leave days which number is known to your client and can be determined in terms of your client's payroll system. It is worth mentioning that, like Ms Ngoye, Mr Khena has never stayed away from work without permission from your client.
8. We confirm that even though our Clients have challenged their termination in court and that matter remains *sub judice*, as you are aware, they are entitled to be paid out their leave in terms of your client's leave policy. Our Clients have addressed this matter directly with your client but to no avail. Your client's response was to direct our Clients to your office hence we address this letter to you.
9. In the circumstances, your client's withholding of our Clients' leave pay is unlawful, offends your client's own leave policy and amounts to abuse of power by your client. The withholding of our Clients' leave pay has caused our Clients further financial strain in



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addition to the unlawful termination of their employment. There is no basis at law or otherwise for your client to withhold our Clients' leave pay.

10. To this end, our Clients have instructed us, as we hereby do, to demand that your client pay our Clients' leave pay within 48 hours of receipt of this letter, failing which we have instructions to take steps to protect our Clients' rights.
11. Our Clients' rights remain strictly reserved.

Yours faithfully

KASE MAHLAKU
GWINA ATTORNEYS INCORPORATED
(Sent electronically thus unsigned)

A handwritten signature in black ink, appearing to be 'Kase Mahlaku', with a large, stylized 'X' or checkmark-like flourish extending from the bottom right of the signature.



prasa

PASSENGER RAIL AGENCY
OF SOUTH AFRICA

140

Umjantshi House
30 Wolmarans Str.
BRAAMFONTEIN
2001

Private Bag X101
Braamfontein, 2107
T +2711 013 1667

www.prasa.com

Dear Ms Ngoye
SAP Number: 20101356

29 January 2020

Re: Termination of Employment

1. You will recall that on 13 January 2021, the Chairperson of HCM & REMCO requested employment contracts of all executives, including yours. In response to the said request, you indicated by way of an email dated 13 January 2021, that there is no contract signed between yourself and PRASA on your current position.
2. Having perused PRASA's records, the only contract of employment PRASA has with you relates to your previous role as Chief Executive Officer: Intersite.
3. For your current position, only the letter of transfer [transferring you from Intersite to Group Executive: Legal, Risk and Compliance] dated 22 August 2014, could be found. For ease of reference, I attach the said letter as annexure "A".
4. According to the letter, your transfer was to commence on 1 September 2014 and the other conditions of service were not amended by the said letter.
5. In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives. In your current position, PRASA relies on you for issues concerning legal, risk and compliance and you out to have brought this administrative defect to the attention of PRASA.
6. Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.
7. Having said that, PRASA hereby informs you of its intention to approach court for necessary relief against you in respect of various matters including the unauthorised and unlawful approval of R 58 153 296.72 without requisite authority.

Directors

L. Ramatlakane (Chairman), Adv. S. Sethene,
M. Mukhuba, DK. Mohuba, X. George,
N. Nokwe-Macamo, TN. Mpye, T. Zulu

Acting Group CEO
T. Mabija

Group Company Secretary
S. Dlamini

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8. You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,



Ms Thandeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa



142 20101356



prasa

PRASA 001 800 11 1111
011 441 1111

PRASA HOUSE
1040 Theron Street
Hatfield
Pretoria

Private Bag X101
Braamfontein, 2017
t +27 12 744 7000

Ms Martha Ratslane
Chief Executive Officer: Intersite
SAP No: 20101356

Dear Martha

INTERNAL TRANSFER

We are pleased to advise that you have been transferred from the position of Chief Executive Officer: Intersite to that of Group Executive: Legal, Risk and Compliance with effect from 01 September 2014. This transfer is due to operational requirements and restructuring within the organisation. You will report directly to the Group Chief Executive Officer.

Please note that this is a lateral transfer and all other terms and conditions not amended by this transfer shall remain unchanged.

We wish to congratulate you on this appointment and wish that you may receive the necessary strength to cope with challenges that lie ahead and that you will continue to contribute significantly towards the achievements of PRASA's goals.

Yours sincerely

TSHEPO LUCKY MONTANA

GROUP CHIEF EXECUTIVE OFFICE

DATE: 22 AUGUST 2014

Directors: BN Bhishini (Chairman), TL Montana (Group CEO),
T Goshwami, X George, M Momo, N Mavunga,
M Satarje, M Vana

Company Secretary:
L Zide



prasa

This offer is only valid for 2 working days from the date of receipt by the applicant, where after it will automatically and without prior notice, expire, unless you respond to the offer within the specified period.

Please be reminded that all communication to you with regard to your package is strictly confidential

ACCEPTANCE OF TRANSFER:

Ms Martha Ratsiane

INTERNAL TRANSFER

I, Martha Ratsiane hereby ~~accept~~ not accept the transfer from the position of Chief Executive Officer: Intersite to that of Group Executive: Legal, Risk and Compliance: PRASA and I will resume duty on _____ 2014.

Signed at HATFIELD this 8 day of SEPTEMBER 2014.

Signature: [Signature]

on the basis that it is a lateral transfer.

I also however accept that I am transferring but not laterally

I had discussed my salary review with the CEO and have indicated same to

me

[Signature]



prasa

Public Relations
South Africa

This offer is only valid for 2 working days from the date of receipt by the applicant, where after it will automatically and without prior notice, expire, unless you respond to the offer within the specified period.

Please be reminded that all communication to you with regard to your package is strictly confidential

ACCEPTANCE OF TRANSFER:

Ms Martha Ratsiane

INTERNAL TRANSFER

I, Martha Ngope hereby ~~accept~~ not accept the transfer from the position of Chief Executive Officer: Intersite to that of Group Executive: Legal, Risk and Compliance: on the basis that it is a PRASA and I will resume duty on _____ 2014.

Signed at HATFIELD this 8 day of SEPTEMBER 2014. I accept lateral transfer.

Signature: [Signature]

I do however accept that I am transferring but not laterally

I had discussed my salary review with the CEO and have indicated same to him

[Signature]

[Signature]



prasa

PASSENGER RAIL AGENCY
OF SOUTH AFRICA

145

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30 Wolmarans Str.
BRAAMFONTEIN
2001

Private Bag 1101
Braamfontein, 2107
T +2711 013 1667

www.prasa.com

Mr. Khena
SAP Number: 20101983

29 January 2021

Dear Mr Khena

Re: Termination of Employment

1. Having perused PRASA's records, the only contract of employment PRASA has is that of Chief Operating Officer dated 1 December 2012.
2. In the circumstances, your stay at PRASA has exceeded the normal five years fixed-term contract extended to all executives.
3. Consequently, having considered the documents referred to above, the employment contract between PRASA and yourself is hereby terminated with immediate effect.
4. Having said that, PRASA hereby informs you of its intention to approach court for necessary relief against you in respect of various matters including the unauthorised and unlawful approval of an amount in excess of R 25 million without requisite authority.
5. You are to return with immediate effect any PRASA property that is in your custody.

Yours Sincerely,

Ms Thendeka Mabija
Acting Group Chief Executive
Passenger Rail Agency of South Africa

Directors
L. Ramatlakane (Chairman), Adv. S. Sethene,
M. Mukhuba, DK. Mohuba, X. George,
N. Nokwe-Macomo, TN. Mpye, T. Zulu

Acting Group CEO
T. Mabija

Group Company Secretary
S. Dlamini

"18E"
146

From: Kase Mahlaku
Sent: Thursday, 04 March 2021 11:02
To: Mxolisi Myambo; Michelle Smith
Cc: Nokulunga Mthembu; Ngcebo Mfusi; Thato Telite; Gomolemo Mabokela; Sandanathi Gwina; Mpumelelo Ngwenya
Subject: RE: RE: OUTSTANDING LEAVE PAY IN RESPECT OF ONICA MARTHA NGOYE & NKOSINATHI KHENA
Attachments: LETTER FROM GAI TO DE SWARDT MYAMBO - 2021.03.01.pdf; A- Termination Letter - 2021.01.29.pdf; B- TERMINATION LETTER - MR KHENA - 2021.01.29.pdf

Dear Sirs,

We refer to our letter dated 1 March 2021 and which was transmitted to your offices on 1 March 2021 under cover of the email below. The letter and its annexures is attached for ease of reference.

We note that you have neither acknowledged receipt of nor have you responded to our letter. The letter was sent to you as per your clients' direction to our clients. Your disregard of our letter is rather regrettable. Your clients have not provided any reason for withholding our clients' leave pay; therefore rendering their conduct unlawful. Their conduct is gravely prejudicial to our clients as our clients are without any income including their leave pay to which they are legally entitled. We place it on record that your clients' conduct amounts to unfair labour practice and abuse of power by your clients.

We have been instructed to demand that your clients should pay out our clients' leave pay immediately, failing which our clients will follow their rights in terms of law.

Kind regards

Kase Mahlaku
Director

Gwina Attorneys Incorporated

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Direct : 011 666 7308
Mobile : 072 548 8745
📍 Suite 22 Second floor 135 Daisy Street Sandown
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🌐 www.gwinaattorneys.co.za

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GA GWINA ATTORNEYS
Corporate and Commercial Law Specialists

From: Gomolemo Mabokela <mabokelag@gwinaattorneys.co.za>
Sent: Monday, 01 March 2021 09:47
To: Mxolisi Myambo <mxolisi@deswardt.co.za>; Michelle Smith <Michelle@deswardt.co.za>



Cc: Kase Mahlaku <mahlakuk@gwinaattorneys.co.za>; Nokulunga Mthembu <mthembun@gwinaattorneys.co.za>; Ngcebo Mfusi <mfusin@gwinaattorneys.co.za>; Thato Telite <Telitet@gwinaattorneys.co.za>

Subject: RE: OUTSTANDING LEAVE PAY IN RESPECT OF ONICA MARTHA NGOYE & NKOSINATHI KHENA

Importance: High

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Dear Sirs,

Please find attached herewith correspondence for your urgent attention.

Kindly acknowledge receipt of this email.

Kind Regards

Gomolemo Mabokela

Candidate Attorney

Gwina Attorneys Incorporated

Switchboard : 011 666 7300

Direct : 011 666 7313

Mobile : 060 797 1223

Suite 22 Second floor 135 Daisy Street Sandown
Sandton 2196

mabokelag@gwinaattorneys.co.za

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Corporate and Commercial Law Specialists

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Nokulunga Mthembu

"18F"
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From: Kase Mahlaku
Sent: Monday, 08 March 2021 15:52
To: Nokulunga Mthembu; Ngcebo Mfusi
Subject: FW: Martha- Termination - LEAVE PAY

Kase Mahlaku
Director

Gwina Attorneys Incorporated

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 **GWINA ATTORNEYS**
Corporate and Commercial Law Specialists

From: Martha Ngoye <malebethengoye@icloud.com>
Sent: Thursday, 25 February 2021 08:57
To: Kase Mahlaku <mahlakuk@gwinaattorneys.co.za>
Subject: Fwd: Martha- Termination - LEAVE PAY

Sent from my iPhone

Begin forwarded message:

From: Martha Ngoye <malebethengoye@icloud.com>
Date: 23. February 2021 at 08:52:20 GMT+2
To: Thandeka Mabija <Thandeka.Mabija@prasa.com>, Nonhlanhla Kondowe
<nkondowe@prasa.com>
Cc: Lungile Gabela <lgabela@prasa.com>, Rika Retief <RRetief@prasa.com>, Katleho Musa
<kmusa@prasa.com>
Subject: Re: Martha- Termination - LEAVE PAY

Dear Thandeka and Nonhlanhla



I refer to mail below and requested a courtesy of a reply. Clearly, I am not worthy of receiving one. I take it there is no basis for you two to instruct HR not to pay my leave pay and your silence is confirmation of same.

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Lungile and Katleho perhaps they will provide you with a response. Please enquire for me from the powerful people of PRASA why they have given the instruction to Rika not to pay my leave pay. I. Re-iterate the unlawfulness once again of their action.

All my rights continue to be reserved.

Ps. God has a way of showing people who God really is.

Regards

Martha Ngoye

Sent from my iPad

On 19 Feb 2021, at 07:41, Martha Ngoye <malebethengoye@icloud.com> wrote:

Dear Thandeka and Nonhlanhla

I refer you to the mail below from Rika. Please can i understand why you have instructed that my leave pay not be made. I have accumulated leave not because I did not want to take it, but every time i applied for leave, approval was not granted and i was expected to work and work I did.

I have work diligently for PRASA putting in long hours to what i was required to do. My performance has never been challenged and I have never stayed away from work without permission.

I am raising this with you because i understand that while other terminated employees will be paid their leave, i am not.

Please can I be made to understand why the unlawful decision was made in my regard. I cannot think of any explanation that will be granted that warrants me to suffer more prejudice in the hands of an organisation I have served well.

I am hoping that my mail will not be ignored and that this injustice will be remedied.

Regards

Martha Ngoye.

Sent from my iPad

Begin forwarded message:

From: Rika Retief <RRetief@prasa.com>
Date: 15 February 2021 at 09:10:31 SAST
To: Martha Ngoye <malebethengoye@icloud.com>
Subject: RE: Martha- Termination

Dear Martha

Kindly consult with Ms Kondowe acting HR Executive and Ms T

Mabija regarding your payments as Payroll are only paying your bonus saving that you provided for January 2021.

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Kind regards
Rika

-----Original Message-----

From: Martha Ngoye <malebethengoye@icloud.com>

Sent: Monday, February 15, 2021 8:41 AM

To: Rika Retief <RRetief@prasa.com>

Subject: Martha- Termination

Hello Rika

I hope you are well. In light of what has happened to us, please advise what we can expect at the end of the month.

Please also advise what is the process with our pensions etc.

Thank you

Kind regards

Sent from my iPhone

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"18G"

151

Nokulunga Mthembu

From: Michelle Smith <Michelle@deswardt.co.za>
Sent: Thursday, 04 March 2021 12:08
To: Kase Mahlaku
Cc: Nokulunga Mthembu; Ngcebo Mfusi; Thato Telite; Gomolemo Mabokela; Sandanathi Gwina; Mpumelelo Ngwenya; Mxolisi Myambo; Tshepo Hlahla; Koketso Nonyane
Subject: OUTSTANDING LEAVE PAY IN RESPECT OF ONICA MARTHA NGOYE & NKOSINATHI KHENA
Importance: High

Kindly acknowledge receipt hereof

Our ref: Mr MA Myambo/ms/P1014

Good day

We refer to the abovementioned matter as well as your e-mail below.

Kindly take note that we are consulting with client today and will revert back to you thereafter.

Trust you find the above in order.

Kind regards

Michelle Smith
(PA to Mr MA Myambo)



DE SWARDT MYAMBO

Attorneys, Conveyancers & Notaries

941 Jan Shoba Street (formerly Duncan Street)
Cnr Jan Shoba & Mackenzie Streets
Brooklyn, Pretoria
PO Box 6461, Pretoria 0001. Docex 244
Deeds Lodging No. 296
Tel: (012) 346-0050
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From: Kase Mahlaku <mahlakuk@gwinaattorneys.co.za>

Sent: 04 March 2021 11:02

To: Mxolisi Myambo <mxolisi@deswardt.co.za>; Michelle Smith <Michelle@deswardt.co.za>

Cc: Nokulunga Mthembu <mthembun@gwinaattorneys.co.za>; Ngcebo Mfusi <mfusin@gwinaattorneys.co.za>; Thato Telite <Telitet@gwinaattorneys.co.za>; Gomolemo Mabokela <mabokelag@gwinaattorneys.co.za>; Sandanathi Gwina <gwinas@gwinaattorneys.co.za>; Mpumelelo Ngwenya <ngwenyam@gwinaattorneys.co.za>

Subject: RE: RE: OUTSTANDING LEAVE PAY IN RESPECT OF ONICA MARTHA NGOYE & NKOSINATHI KHENA

Dear Sirs,

152

We refer to our letter dated 1 March 2021 and which was transmitted to your offices on 1 March 2021 under cover of the email below. The letter and its annexures is attached for ease of reference.

We note that you have neither acknowledged receipt of nor have you responded to our letter. The letter was sent to you as per your clients' direction to our clients. Your disregard of our letter is rather regrettable. Your clients have not provided any reason for withholding our clients' leave pay; therefore rendering their conduct unlawful. Their conduct is gravely prejudicial to our clients as our clients are without any income including their leave pay to which they are legally entitled. We place it on record that your clients' conduct amounts to unfair labour practice and abuse of power by your clients.

We have been instructed to demand that your clients should pay out our clients' leave pay immediately, failing which our clients will follow their rights in terms of law.

Kind regards

Kase Mahlaku
Director

Gwina Attorneys Incorporated

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GWINA ATTORNEYS

Corporate and Commercial Law Specialists

From: Gomolemo Mabokela <mabokelag@gwinaattorneys.co.za>
Sent: Monday, 01 March 2021 09:47
To: Mxolisi Myambo <mxolisi@deswardt.co.za>; Michelle Smith <Michelle@deswardt.co.za>
Cc: Kase Mahlaku <mahlakuk@gwinaattorneys.co.za>; Nokulunga Mthembu <mthembun@gwinaattorneys.co.za>; Ngcebo Mfusi <mfusin@gwinaattorneys.co.za>; Thato Telite <Telitet@gwinaattorneys.co.za>
Subject: RE: OUTSTANDING LEAVE PAY IN RESPECT OF ONICA MARTHA NGOYE & NKOSINATHI KHENA
Importance: High

Dear Sirs,

Please find attached herewith correspondence for your urgent attention.

Kindly acknowledge receipt of this email.

Kind Regards

Gomolemo Mabokela
Candidate Attorney

153

Gwina Attorneys Incorporated

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"18H"
154

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J 143/21

In the matter between:

NQOBILE PEARL MUNTHALI

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

Respondent

Heard: 18 February 2021 (via Zoom)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for the hand-down is deemed to be on 24 February 2021 at 18:00

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant approached this Court to obtain urgent relief declaring her employment contract with the respondent (PRASA) as remaining extant, and further ordering PRASA to comply with the terms of that agreement by retrospectively reinstating her in its employ.

Background:

- [2] To the extent that at the core of PRASA's opposition to this application is that it is not urgent, the following salient facts are relevant;

ISS

- 2.1 A contract of employment was concluded between the applicant and PRASA on 15 May 2009 effective from 1 April 2009. The applicant was employed as Chief Information Officer in Business Information Management. That contract was for an indefinite period, subject to the normal rules pertaining to termination, viz, resignation, death, retirement, dismissal for misconduct, capacity or operational requirements.
- 2.2 The applicant averred that between January 2012 and January 2021, she occupied various other senior and acting executive positions, including Group Chief Risk Officer; Group Executive: Business Development; Group Executive: Human Capital Management (HCM); Group Executive: Chief Information Officer, and CEO of PRASA Development Foundation. PRASA however disputed that she had occupied the positions of Group Chief Risk Officer and that of Group Executive Business Development. Nothing however turns on these disputed facts.
- 2.3 On 11 June 2019 the applicant was placed on precautionary suspension with full pay and benefits on the grounds of allegations of misconduct. Until 31 January 2021 when the applicant's services were terminated, she had not been called to an internal disciplinary enquiry to answer to any allegations of misconduct against her.
- 2.4 In June 2020, attempts were made by PRASA to engage the applicant in a potential retrenchment exercise, but those attempts appeared to have gone nowhere.
- 2.5 In July 2020, PRASA required the applicant to testify in internal disciplinary proceedings against another employee. The applicant had agreed after PRASA had in a letter dated 31 July 2020, agreed to uplift her suspension with effect from 4 August 2020. It was however agreed that she would be placed on 'special leave' pending attempts at amicably finding a solution to the dispute between the parties, or the finalisation of a retrenchment process to be initiated.



2.6 On 30 January 2021, PRASA had released a press statement, announcing a decision to terminate the applicant's contract of employment, together with those of two other executive employees. The substance of the public announcement was *inter alia*;

- (a) That the executives had overstayed their five year terms at PRASA, as all executives should not have exceeded that period in their positions;
- (b) The applicant was on suspension for alleged misconduct, and her contract of employment ought to have been terminated upon the expiry of a five-year term.

2.7 The basis upon which it was contended that the applicant had exceeded her five year term was clause 8 of PRASA's Recruitment and Selection Policy of 2018¹, which it was contended was in accordance with its clause 2, applicable to all employees at PRASA, including its divisions and subsidiaries. In the alternative, PRASA contended that the termination was based on the provisions of clauses 9.12.2 of the Recruitment and Selection Policy of 2020², which came into effect on 18 March 2020, and which was also applicable to all permanent and fixed term employees in all of PRASA's divisions and subsidiaries.

2.8 PRASA in these proceedings further justified the termination on the basis that the clause 15 of the applicant's contract of employment of 2009 provided that the contract was subject to its conditions of service, policies and procedures (as revised from time to time) that serve to regulate the employment relations. In this regard, it was submitted that at the time of termination, the applicant had since August 2014, *de facto* occupied the position of Chief Executive Officer: PRASA Development

¹ Which provides:

'Appointments to Senior Management, General management and Executive positions must be fixed on a fixed term contract for a period not exceeding five years and may be renewable'

² Which provide;

'Appointment of Executive Positions, i.e., Group Chief Executive, Chief Financial Officer, Chief Executive Officer of a division or subsidiary and any other Group Executive positions shall be made on the basis of fixed term contracts for a period not exceeding five years at a time'

Foundation, and that since no contract was signed, the terms and conditions of the contract insofar as the duration was concerned, was for a fixed term of five years, making the provisions of the 2018 and 2020 Policies applicable.

2.9 The applicant contends that the press release was widely publicised in the media. She averred that she only became aware of the termination of her contract upon receiving a 'WhatsApp' message from her colleague in PRASA on the day it was announced, who had allegedly further informed her that the termination of her contract was trending on social media.

2.10 A letter dated 29 January 2021 confirming the termination of the contract of employment was only sent to the applicant on 1 February 2021, after she had contacted the Head of Employee Relations at PRASA, Mr Le Roux, to enquire about the termination of her contract having been announced in the public media. In the letter, PRASA stated that the basis of the immediate termination was that;

- (a) The applicant's only employment contract on record was the one dated 31 July 2009;
- (b) There was no signed employment contract on record in respect of the position she had occupied at the time of termination;
- (c) Her employment had exceeded the normal five years fixed term contracts extended to all executives.

2.11 The applicant responded to the letter of termination through her attorneys of record on 5 February 2021, in which other than contesting the basis of the termination, she had demanded confirmation of her reinstatement by no later than 17h00 on 8 February 2021, failing which the Court would be approached on an urgent basis.

2.12 The short response from PRASA's attorneys of record on 9 February 2021 was that they would accept service on its behalf. The



urgent application was then launched on 10 February 2021 and filed the following day.

- [3] In opposing the application, PRASA's two principal contentions are that the application does not deserve the urgent attention of this Court, and that on the facts, there was no breach of contract.

Urgency:

- [4] The Court enjoys a discretion in according a matter urgency. In the exercise of its discretion, the Court will examine whether the applicant has in the founding papers, set out the circumstances which justifies that the application be heard as one of urgency, and the basis upon which it is said that substantial redress would not be obtained at a hearing in due course. Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case³.
- [5] Of equal importance is that urgent relief will be denied in circumstances where the applicant has failed to act with the necessary haste in approaching the Court, as the primary objective of approaching a Court on an urgent basis is to prevent harm or prejudice from occurring⁴.
- [6] The starting point is whether the applicant had approached this Court with the necessary haste. I agree that she did so. The public announcement of the termination took place on 30 January 2021, and she received written

³ See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* (2012) JOL 28244 (GSJ) at para 6 and 7; See also *Export Development Canada and Another v Westdown Investments Proprietary and Others* (6151/2018) [2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 – 64, where it was held;

"It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

⁴ See *Golding v HCI Managerial Services (Pty) Ltd and others* [2015] 1 BLLR 91 (LC) at para 24; *Ntozini and Others v African National Congress and Others* (18798/2018) [2018] ZAGPJHC 415 (25 June 2018) at para 11

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confirmation of the termination on 1 February 2021. It is accepted that she took a further four days prior to putting PRASA on terms, but that delay in the light of the circumstances of the case is negligible, in view of PRASA's response of 9 February 2021 to her letter of demand. Thus, to the extent that this application was launched on 10 February 2021, and the matter was set down on 18 February 2021, the applicant cannot be accused of having been dilatory.

- [7] The applicant's principal grounds for seeking urgent relief mainly relate to her personal circumstances and financial hardship. She conceded that a loss of income was on its own insufficient to justify urgency. She further complained about the defamatory statements made by PRASA and its conduct in effecting the termination, the irreparable reputational damage caused by the public announcement, and the consequences on her prospects of securing alternative employment.
- [8] The issue of whether financial hardship is a basis of seeking urgent relief has received attention in this and other Courts. In other decisions, it has been held that as a general principle, financial hardship does not establish a basis for urgency⁵. It has been held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to acquire the requisite urgency necessary to justify a departure from the ordinary court rules⁶. In other decisions however, it has been

⁵ See *Hultzer v Standard Bank of South Africa (Pty) Limited* (J 469/99) [1999] ZALC 46 (25 March 1999) at para 13; *Jonker v Wireless Payment Systems CC* (2010) 31 ILJ 381 (LC) at para 16.

⁶ *Ntefe J Ledimo & others v Minister of Safety and Security & Others* (2242/2003) [2003] ZAFSHC 16 (28 August 2003) at paragraph 32, where Rampai J held that:

"In the three cases I have quoted above the courts have held that the mere fact that irreparable financial losses have been suffered or would be suffered by the applicant was not, by itself, sufficient ground to ground the requisite urgency necessary to justify a departure from the ordinary court rules. In applying this principle, a judge will do well to keep the words of wisdom which were expressed through the lips of Kroon J on p 15 in **CALEDON STREET RESTAURANTS CC** (*supra*). I find it apposite to echo those sentiments here by quoting him verbatim:

"However, the following comments fall to be made. First, to the extent that these cases may be interpreted as laying down that financial exigencies cannot be invoked to lay a basis for urgency, I consider that no general rule to that effect can be laid down. Much would depend on the nature of such exigencies and the extent to which they weigh up against other considerations such as the interests of the other party and its lawyers and any inconvenience occasioned to the court by having to entertain an application on an urgent basis. Second, whatever the extent of the indulgence, the sanction of the court thereof that an application be heard as a matter of urgency, would not in general, in this Division, accord the matter precedence over

accepted that the general principle may be departed from if exceptional circumstances are established, depending on the merits of each case⁷.

[9] I agree with the proposition in *Ntefe J Ledimo & others v Minister of Safety and Security & Others*⁸ that there is no immutable rule that financial exigencies cannot be invoked to lay a basis for urgency. This is so in that Courts in any event enjoy a discretion in the overall determination of whether a matter should be accorded urgency or not. Inasmuch as factors surrounding financial hardship on their own are not a basis for according a matter urgency, these have to be determined together with other facts and circumstances pleaded in the founding papers, which points to a conclusion that those facts and circumstances are exceptional, thus necessitating that the matter should be treated as urgent.

[10] Again, inasmuch as it can be accepted and expected that dire consequences would flow from a loss of a job, including financial hardship, reputational damage, or dimmed prospects of securing alternative employment, the facts of this case given the manner with which the termination of the contract of employment took place, places this case in the category of exceptional circumstances. My conclusions are based on the uncontested facts, which are essentially the following;

- i. Notwithstanding the subsequent elevation to other posts, the applicant's 2009 contract of employment was indefinite. As shall further be illustrated below, it was readily conceded on behalf of PRASA that there was no legal basis upon which it could be said that the 2018 and 2020 Recruitment and Selection Policies relied upon had retrospective effect, to be therefore applicable the applicant's original contract of employment.

other matters and result in the disposal of the latter being prejudiced by being delayed."

⁷ See *Harley v Bacarac Trading 39 (Pty) Ltd* (2009) 30 ILJ 2085 (LC) at para 8 where it was held:

'If an applicant is able to demonstrate detrimental consequences that may not be capable of being addressed in due course and if an applicant is able to demonstrate that he or she will suffer undue hardship if the court were to refuse to come to his or her assistance on an urgent basis, I fail to appreciate why this court should not be entitled to exercise a discretion and grant urgent relief in appropriate circumstances. Each case must of course be assessed on its own merits.'

⁸ *supra*



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- ii. The reliance by PRASA on clause 15 of the applicant's contract of 2009 does not take its case any further, in that it cannot be read from the provisions of that clause that PRASA is as a matter of course, entitled to substantially revise an employee's terms and conditions of employment as it deemed fit, including invoking substantive conditions that were not bargained for when the contract was entered into.
- iii. The applicant was placed on precautionary suspension for over a period of 19 months with full pay (bar being placed on 'special leave' in August 2020), on the grounds of allegations of misconduct.
- iv. Despite the prolonged suspension of the applicant and at enormous financial costs to PRASA, at no point were any formal allegations made against her. In fact, PRASA readily conceded that the allegations of misconduct (which are still unknown) were withdrawn, and that the precautionary suspension was also uplifted.
- v. Without any warning, and without first extending any courtesy to the applicant, PRASA had publicly announced the termination of her contract of employment.
- vi. In terminating the contract, PRASA other than setting out its reliance on its policies surrounding the five-year term period, failed in its press release, to mention that the termination had nothing to do with allegations of misconduct against the applicant, or her alleged suspension.
- vii. In fact, PRASA went a step further by publicly announcing that the applicant was on suspension for alleged misconduct, when this was patently false, since the allegations in that regard were withdrawn and further since her suspension had been lifted as far back as July/August 2020.

[11] To the extent that PRASA had contended that the applicant's financial hardship was hardly a consideration when determining urgency, it was held in *South African Informal Traders Forum and Others v City of Johannesburg and Others*,



*South African National Traders Retail Association v City of Johannesburg and Others*⁹ that the ability of people to earn money and support themselves and their families is an important component of the right to human dignity, and that without that ability, they faced “humiliation and degradation”.

- [12] In the light of the above undisputed facts, I fail to appreciate how any conclusion can be reached that the conduct of PRASA of terminating the contract publicly and in doing so, also misrepresented the facts, cannot be said to have created exceptional circumstances. This is particularly so in the light of the potential or actual public humiliation and reputational damage caused by the public announcement.
- [13] In her founding papers, the applicant averred that any prospects of future employment are already dim in the light of the press release. She had made reference to one potential employer who had called her after the press release, to cancel any further discussions with her about potential employment. It follows that any further humiliation and degradation to the applicant arose not only from the mere termination of her contract of employment, but also from the manner with which that termination was effected.
- [14] Too much emphasis was placed by PRASA on the fact that the events leading to the termination should be viewed in the light of the history of it being embroiled in malfeasance, which is the subject matter of the ongoing ‘State Capture’ enquiry. It is understandable that PRASA is entitled to clean up its mess in the light of that negative history. However, the fact remains that the applicant in this case has not been formally charged with any form of misconduct in that regard. In fact, PRASA has abandoned any disciplinary steps against the applicant. In the light of these facts, the question that remains unanswered is why then would PRASA publicly announce the termination, and also falsely state that the applicant was on suspension for alleged misconduct at the time of termination when this was the case?

⁹ 2014 (6) BCLR 726 (CC) at paras [31] and [36]



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- [15] I further agree with contentions made on behalf of PRASA that this Court is inundated with urgent applications from well-heeled employees and executives, who may have a false sense of importance and entitlement. These individuals purposefully seek to jump the proverbial litigation queue, and habitually approach this Court on an urgent basis in respect of routine matters that ought to have initially gone through the dispute resolution procedures set out in the overall scheme of the Labour Relations Act (LRA).¹⁰ This Court has repeatedly taken a stand and expressed its displeasure against such individuals and application, and where appropriate, issued stern warnings through punitive costs orders¹¹.
- [16] This case however, even if it involves a highly paid executive, is not one of those that fall under the above category. This is based purely on the common cause facts already pointed out, which in turn makes the facts of this case exceptional. In any event, it would be improper for this Court to solely concern itself with the type and status of litigants that approach it for urgent relief, rather than determining whether a case has been made out for that relief. This is so in that section 34 of the Constitution of the Republic¹² guarantees everyone to have their disputes resolved by the application of law decided in a fair public hearing before a court.

¹⁰ Act 66 of 1995, as amended

¹¹ See *Manamela v Department of Cooperative Governance, Human Settlement and Traditional Affairs, Limpopo Province and Another* (J 1886/2013) [2013] ZALCJHB 225 at para 52; *Mosiane v Tlokwe City Council* (2009) 30 ILJ 2766 (LC) at para 15 – 16, where it was held:

"A worrying trend is developing in this Court in the last year or so where this Court's roll is clogged with urgent applications. Some applicants approach this Court on an urgent basis either to interdict disciplinary hearings from taking place, or to have their dismissals declared invalid and seek reinstatement orders. In most of such applications, the applicants are persons of means who have occupied top positions at their places of employment. They can afford top lawyers who will approach this Court with fanciful arguments about why this Court should grant them relief on an urgent basis. An impression is therefore given that some employees are more equal than others and if they can afford top lawyers and raise fanciful arguments, this Court will grant them relief on an urgent basis.

All employees are equal before the law and no exception should be made when considering such matters. Most employees who occupy much lower positions at their places of employment who either get suspended or dismissed, follow the procedures laid down in the Labour Relations Act 66 of 1995 (the Act). They will also refer their disputes to the CCMA or to the relevant Bargaining Councils and then approach this Court for the necessary relief. Other employees would still approach this Court for relief in the ordinary manner and not on an urgent basis."

¹² The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

- [17] To conclude then on the issue of urgency, I am satisfied that the applicant has made out a case for this Court to treat her application with urgency. From the common cause facts leading to the termination of the applicant's contract, if her application were to be struck off, the consequences of the manner and circumstances under which the termination of her contract took place, may not be mitigated by any redress she may obtain in due course.

The merits:

- [18] Given the concessions made by PRASA in regards to the lack of any legal basis upon which it can be said that the 2018 and 2020 Recruitment and Selection Policies had retrospective application to the applicant's contract of employment of 2009, and further in the light of my conclusions in regards to the provisions of clause 15 of the 2009 contract of employment, it follows that the invariable conclusion to be reached is that there was indeed a breach of the applicant's contract of employment. It is therefore not even necessary to deal with any submissions regarding the interpretation of these policies *vis-à-vis* the applicant's contract of employment. Furthermore, nothing needs to be said about the fact that out of about 20 Executives who were in a similar position as the applicant insofar as the application of these policies were concerned, only the applicant and other two executives were adversely affected by PRASA's ill-advised decision and its reliance on the policies in question.
- [19] In regards to whether the applicant has satisfied the requirements of the relief she seeks, on its plain reading, the applicant's original contract of employment was for an indefinite duration. That contract incorporated the standard clauses of non-variation or amendments unless these were reduced to writing between the parties, and further stipulated the notice periods in regards to termination. Clearly all of these clauses did not matter to PRASA, when it decided to publicly announce the termination of the applicant's contract of employment with immediate effect. Such conduct clearly amounts to an unlawful repudiation, entitling the applicant to enforce that contract.
- [20] It is not even necessary to address issues surrounding whether the applicant has an alternative remedy in the light of the facts that led to the termination of



her contract and the legal basis of her claim. The irreparable harm to her should urgent relief not be granted is apparent from the consequences of the circumstances and manner surrounding the termination of the contract as already dealt with. It follows therefore that her urgent applicant should succeed.

Costs:

- [21] The applicant seeks a costs order in the light of PRASA's conduct in terminating her services. She contended that PRASA acted in bad faith, knowing that there was no legal basis to justify its stance, and that its conduct smacked of gross abuse of power. I agree with these contentions based on the conclusions reached in this judgment.
- [22] It has already been stated that PRASA given its history of being embroiled in allegations of malfeasance, was entitled to act against individual employees proven to have been involved in such malfeasance. This however did not entitle it to act in a gung-ho manner, that grossly violated its employees' basic fundamental rights. As a side issue, various options were available to PRASA in dealing with the applicant to the extent that it could not pursue any disciplinary measures against her and/or saw her as redundant. It is common cause that attempts were made at initiating a retrenchment process, and it is not clear how that process faltered.
- [23] In the end, PRASA's conduct of publicly announcing the termination of the applicant's contract without first informing her, and in the course of doing so, misrepresented the true facts at the time of the termination, was not only appalling, but shockingly malicious and inhumane. As at the time the contract was terminated, the applicant was neither suspended nor was she facing allegations of misconduct. The consequences of that misrepresentation in the light of the public announcement of the termination of her contract are indeed colossal, and to a large extent irreparable. To this end, the requirements of law and fairness dictate that the applicant be entitled to her costs.

- [24] Accordingly, the following order is made;

Order:

A handwritten signature in black ink, consisting of a stylized 'G' followed by a large 'X'.

1. The non-compliance with the forms and service contemplated in the Rules of this Court is condoned and this matter is heard as one of urgency in terms of Rule 8 of the Rules of this Court.
2. It is declared that the employment contract between the Applicant and the Respondent remains extant.
3. The Respondent is ordered to comply with the terms of the employment contract, and to reinstate the Applicant in its employ retrospective from 29 January 2021.
4. The Respondent is ordered to pay the applicant's costs, on Attorney and own Client scale.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa



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APPEARANCES:

For the Applicant:

G. Fourie SC, instructed by Elliot Attorneys

For the Respondent:

A. Mosam SC with M.T.M. Phehane,
instructed by De Swartd Myambo Attorneys

LABOUR COURT



"18I"
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IN THE LABOUR COURT OF JOHANNESBURG
HELD AT JOHANNESBURG

CASE NO: J111/21

In the matter between:

ONICA MARTHA NGOYE

First Applicant

NKOSINATHI ALLEN KHENA

Second Applicant

TIRO HOLELE

Third Applicant

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Respondent

LEONARD RAMATLAKANE

Second Respondent

THINAVUYO MPYE

Third Respondent

DINKWANYANE MOHUBA

Fourth Respondent

SMANGA SETHENE

Fifth Respondent

XOLILE GEORGE

Sixth Respondent



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NOSIZWE NOKWE-MACAMO

Seventh Respondent

MATODZI MUKHUBA

Eighth Respondent

THEMBA ZULU

Ninth Respondent

MS THANDEKA MABIJA

Tenth Respondent


CONFIRMATORY AFFIDAVIT


I, the undersigned,

NKOSINATHI ALLEN KHENA

do hereby make an oath and state the following:

1. I am an adult male currently residing at 157 Wilton Avenue, Bryanston, Johannesburg, Gauteng Province.
2. The facts contained herein are within my personal knowledge, and to the best of my knowledge and belief, both true and correct.


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3. I confirm that I have read and understood the founding affidavit of **ONICA MARTHA NGOYE** in this matter together with annexures thereto and confirm the correctness of the allegations made therein in as far as they relate to me.

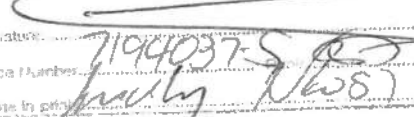


DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at DBN North on this the 08 day of March 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

71940375
CST LN N2087

I certify that this document is a true and correct copy of the original document which was signed by the deponent. I further certify that this copy is a true and correct copy of the original document and that no change has been made to the original document.

Signature: 

Police Number: 71940375

Name in print: Lucky Nkhomo

COMMISSIONER OF OATHS

FULL NAMES: Lucky Nkhomo
ADDRESS: 4 Norrie Avenue
CAPACITY: CST DBN North




"18J"
171

**IN THE LABOUR COURT OF JOHANNESBURG
HELD AT JOHANNESBURG**

CASE NO: J111/21

In the matter between:

ONICA MARTHA NGOYE

First Applicant

NKOSINATHI ALLEN KHENA

Second Applicant

TIRO HOLELE

Third Applicant

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA

First Respondent

LEONARD RAMATLAKANE

Second Respondent

THINAVUYO MPYE

Third Respondent

DINKWANYANE MOHUBA

Fourth Respondent

SMANGA SETHENE

Fifth Respondent

XOLILE GEORGE

Sixth Respondent

NOSIZWE NOKWE-MACAMO

Seventh Respondent

A handwritten signature in black ink, consisting of a stylized 'X' followed by a cursive flourish.

MATODZI MUKHUBA

Eighth Respondent

THEMBA ZULU

Ninth Respondent

MS THANDEKA MABIJA

Tenth Respondent


CONFIRMATORY AFFIDAVIT

I, the undersigned,

TIRO HOLELE

do hereby make an oath and state the following:

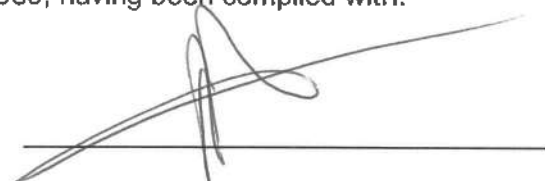
1. I am an adult male currently residing at 142 12th Street, Parkhurst, Johannesburg, Gauteng Province.
2. The facts contained herein are within my personal knowledge, and to the best of my knowledge and belief, both true and correct.
3. I confirm that I have read and understood the founding affidavit of **ONICA MARTHA NGOYE** in this matter together with annexures thereto and confirm the correctness of the allegations made therein in as far as they relate to me.

TH 

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**DEPONENT**

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at Jankar on this the 8th day of March 2021, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

**COMMISSIONER OF OATHS****FULL NAMES:****ADDRESS:****CAPACITY:****Philladelphia Kedibone Mothupi**

Commissioner of Oaths
Practising Attorney R.S.A.
12th Floor, The Forum
Sandton Square
No2 Maude street, Sandton



TH 3

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IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO.: J111/21

On _____

BEFORE THE HONOURABLE _____

In the matter between:

ONICA MARTHA NGOYE	First Applicant
NKOSINATHI ALLEN KHENA	Second Applicant
TIRO HOLELE	Third Applicant

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA	First Respondent
LEONARD RAMATLAKANE	Second Respondent
THINAVUYO MPYE	Third Respondent
DINKWANYANE MOHUBA	Fourth Respondent
SMANGA SETHENE	Fifth Respondent
XOLILE GEORGE	Sixth Respondent
NOSIZWE NOKWE-MACAMO	Seventh Respondent
MATODZI MUKHUBA	Eighth Respondent
THEMBA ZULU	Ninth Respondent
THANDEKA MABIJA	Tenth Respondent

DRAFT ORDER

Having read the documents filed of record and having considered the matter: -

IT IS ORDERED THAT:

- 1 Pending the finalisation of the application for leave to appeal in the above court dated 3 March 2021 and any further applications for leave to appeal or appeals, the order of this Court per Baloyi AJ dated 2 March 2021 under case number J111/21 is operational and enforceable.
- 2 The second to tenth respondents are ordered to pay the costs of this application, jointly and severally the one paying the other to be absolved, including the costs consequent upon the employment of two counsel.

BY ORDER

REGISTRAR

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO.: J111/21

On _____

BEFORE THE HONOURABLE _____

In the matter between:

ONICA MARTHA NGOYE	First Applicant
NKOSINATHI ALLEN KHENA	Second Applicant
TIRO HOLELE	Third Applicant

and

THE PASSENGER RAIL AGENCY OF SOUTH AFRICA	First Respondent
LEONARD RAMATLAKANE	Second Respondent
THINAVUYO MPYE	Third Respondent
DINKWANYANE MOHUBA	Fourth Respondent
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HELD AT JOHANNESBURG

CASE NO.: J111/21

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ONICA MARTHA NGOYE	First Applicant
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