



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 2058/2020

In the matter between:

#UNITEBEHIND

Applicant

And

THE MINISTER OF TRANSPORT

First Respondent

NATIONAL TREASURY

Second Respondent

BONGISIZWE MPONDO

Third Respondent

PASSENGER RAIL ASSOCIATION OF SOUTH AFRICA

Fourth Respondent

MINISTER OF FINANCE

Fifth Respondent

Coram: Erasmus J

Dates of Hearing: 26 May 2020

Date of Judgment: 25 August 2020

JUDGMENT

ERASMUS, J

INTRODUCTION

[1] In this application the applicant seeks a review of decisions taken by the first respondent (The Minister of Transport) and for same to be set aside. It further seeks final interdictory relief against the first respondent and interim relief, in that, the second respondent (National Treasury) should take certain steps. Lastly, declaratory relief is sought in relation to actions taken by the first respondent.

The relief it seeks was amended after a reply to the founding papers was filed and is styled as follows:

- “2. The First Respondent’s failure to appoint a Board of Control for the Fourth Respondent (PRASA) and the decision to appoint the Third Respondent as “the Administrator of PRASA” in lieu of a Board of Control for PRASA, is declared to be unlawful, and is reviewed and set aside.

- 2A. The First Respondent’s secondment and/or appointment of the Third Respondent as the Acting Group Chief Executive Officer and accounting authority of PRASA is declared unlawful, and is reviewed and set aside.

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- 2B. The Second Respondent's decision of 28 January 2020 to approve that the Group Chief Executive Officer of PRASA, or person acting in that position, be the accounting authority of PRASA is declared unlawful, and is reviewed and set aside.
3. The First Respondent is directed to appoint a Board of Control for PRASA, in accordance with section 24 of the Legal Succession to the South African Transport Services Act 9 of 1989, within three months of the date of this order, or such other period as the court deems appropriate.
4. Pending the appointment of the Board of Control under paragraph 3:
- 4.1 The Second Respondent is directed to instruct or approve, within seven (7) calendar days of the date of this order, another functionary of a public entity to be the accounting authority of PRASA, in accordance with section 49(3) of the Public Finance and Management Act 1 of 1999; and
- 4.2 The orders in paragraph 2, 2A and 2B are suspended until another functionary is appointed on the instruction or approval of the Second Respondent, in terms of paragraph 4.1 of the order.
5. It is declared that the First Respondent has breached his duty in section 63(2) of the Public Finance and Management Act (PFMA), by failing to exercise the Executive's Ownership Control Powers to ensure that PRASA complies **with**ⁱ (sic) the requirements of section 49 of the Public Finance and Management Act, 1 of 1999.

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6. Such parties as may oppose this application shall be jointly and severally liable for costs, including the cost of two counsel where so employed.
7. Further and/or alternative relief.”

[2] Although this matter was brought, styled as an urgent application, intervening developments no longer require me to deal with the question of urgency. All the issues were fully ventilated, after postponements and the filing of further affidavits. It is unfortunate, however, that this matter evolved rather than being pleaded once. The record consists of more than 600 pages. I was allocated this matter one day before a virtual hearing and was overloaded with additional documentation. At the end of the hearing I was requested not to proceed with a judgment as the parties were to attempt to reach agreement on the matter. This, however, did not succeed and hence this judgment.

[3] Subsequent to the hearing, further documents were uploaded into the Dropbox used for this matter, which included the following:

- (i) A PowerPoint presentation by the third respondent (Mr Mpondo)¹ and others to the Portfolio Committee on Transport dated 11 May 2020. It curiously included a slide named “the Administrator’s Turnaround Update”. Throughout the presentation the third respondent is referred to as the Administrator;
- (ii) Various news clippings;
- (iii) A judgment from the Labour Court delivered on 9 June 2020;

¹ Mr Mpondo will be used interchangeably with Third Respondent.

(iv) An order by La Grange J in case number 19976/2019 dated 30 of June 2020.

I had no regard to the various newspaper clippings, the judgment of the Labour Court or the order of Le Grange J in reaching the conclusions I do hereinbelow.

BACKGROUND

[4] The fourth respondent (PRASA) was established as a legal persona under section 22(1) of the Legal Succession Act, No 9 of 1989. Section 22(1) reads:

"On the date referred to in section 3(1) a legal person, which shall be called the Passenger Rail Agency of South Africa, shall be established."

[5] PRASA is also a public entity and "a National Government Business Enterprise" listed under Part B of Schedule 3 of the Public Finance Management Act, 1 of 1999 (PFMA), and is wholly owned by the State. Its main objective and business is set out in section 23 of the Legal Succession Act, which reads as follows:

"(a) ensure that, at the request of the Department of Transport, rail commuter services are provided within, to and from the Republic in the public interest; and

(b) provide, in consultation with the Department of Transport, for long haul passenger rail and bus services within, to and from the Republic ...

(2) The second objective and the secondary business of the corporation is to generate income from the exploitation of the assets acquired by it.

(3) In carrying out its objectives and business, the corporation shall have due regard to key government social, economic and transport policy objectives."

[6] PRASA is, in the words of the first respondent "... An important institution that plays a major role in South Africa's public transport value chain and its impact on the economy cannot be emphasised enough." On a daily basis millions of South Africans rely on the proper functioning of PRASA to go about their daily business and to enhance their livelihood. It is therefore imperative that this institution functions optimally to ensure a better life for all.

[7] The scale and importance of PRASA is reflected in its 2018/2019 Annual Report. It comprises of several divisions and subsidiaries which include:

- (i) PRASA-Rail which operates commuter rail services including suburban rail services (Metrorail) and regional\intercity rail services;
- (ii) Autopax, operating regional and intercity coach services, including Translux and City to City bus services;
- (iii) Intersite Property Management Services, a wholly owned subsidiary responsible for growing its property portfolio, investments and pursuing ad hoc developments;
- (iv) PRASA-Cres (Corporate Real Estate Solutions), manages its real estate assets and facilities; and
- (v) PRASA-Technical which is tasked to improve and modernise the current rolling stock, modernise depots and strategic infrastructure.

[8] PRASA's expenditure, for the last reported financial year, was R15.5 billion that exceeded its income by nearly R2 billion of which the vast majority is derived from the annual capital subsidy and operational subsidy from government. It is responsible for

huge public expenditure and capital intensive projects. It currently has 563 approved capital projects with a budgeted amount of R12.6 billion. It has also embarked on a 10-year modernisation and “rolling stock fleet renewal” program, at an estimated cost of R173 billion.

[9] In the 2018/2019 financial year, only 26% of its performance targets were met. Passenger patronage of its services continues to decline with an overall decline in paying passengers of 21%. The number of Metrorail coaches in service declined from 2511 to 2143. Bus availability climbed to 41% whereas an overall customer satisfaction was measured at 48.74%. A downward spiral of activity and efficiency is constantly met with incidents that negatively affect the general public. The applicant has set forth a number of outstanding incidents between the months of February and March 2020 that included safety issues to the rolling stock as well as general safety of the users. Staff salaries and utility bills went unpaid and services were suspended. The National Treasury had once again provided it with “relief funding”, as they were carrying an operating deficit of R1.8 billion as at 25 February 2020.

[10] The affairs of PRASA shall be managed in terms of the Legal Succession Act of which Section 24 thereof reads as follows:

“(1) the affairs of the corporation shall be managed by a Board of Control of not more than 11 members including the Chairman, who shall be appointed and dismissed by the Minister,

(2) at least-

- (a) one of the members of the Board of Control shall be an officer in the Department of Transport;
- (b) one of the members of the Board of Control shall be an officer in the Department of Finance;
- (bA) one of the members of the Board of Control shall be an officer in the Department of State Expenditure;
- (c) one of the members of the Board of Control shall be nominated by the South African Local Government Association recognised in terms of section 2(1)(a) of the Organised Local Government Act, 1997;
- (d) three of the members of the Board of Control shall have expertise in the management of a private sector enterprise.”

[11] The Act thus recognises the importance of the input from key departments and layers of government that have a particular interest. It is further apparent that the legislator recognised the expertise and experience needed for the management of PRASA.

[12] It is common cause that at least for the past five years, PRASA has been beset by chronic governance and management failures. There was a decline in public services and various financial and procurement irregularities came to the fore. At least four different boards and eight different group CEOs were employed. From 1 August 2014 when a Board was appointed for a three-year term until April 2019 it seems there was constant instability. The applicant, already during April 2018, submitted

nominations to the then Minister for members of a new permanent Board. The Minister appointed an Interim Board whose term of office was either extended and additional members appointed and that did not necessarily solve problems that included quorum problems. In the last financial year the Auditor-General reported irregular expenditure that have escalated to R27.3 billion.

[13] I now turn to the role played by the first respondent since his appointment. Mr Fikile Mbalula was appointed the Minister of Transport on 30 May 2019. Shortly thereafter (May I just interpose in saying that he inherited a mess), he extended the existing Board's appointment for a period of six months, "pending the finalisation of a new Board for PRASA". The Director-General of the Department of Transport, who deposed to the opposing affidavit, states that at the time of the Minister's appointment the process of the appointment of a permanent Board was still pending. According to the erstwhile Chairperson of the Board in a letter to the first respondent, nominations for the appointment of permanent Board members were called for with an end date of 28 June 2019. The applicant responded to that invitation and submitted a list of nominees willing to accept appointment. No Board of Control was however appointed.

[14] On 9 July 2019 the Minister announced an intervention called the Ministerial War Room. It was launched on 8 August 2019 and began its operations on 12 August 2019.

[15] At the announcement of the establishment of the so-called War Room the Minister issued a lengthy public statement wherein he said, inter alia:

“The continued decline of the quality of service PRASA provides to the commuting public requires urgency in the interventions we put in place... The urgency of the addressing PRASA's turn-around cannot be over emphasised and tangible results that people can see must be realized in the shortest possible time... Government has a constitutional obligation to ensure that citizens' rights as enshrined in the Bill of Rights, are not eroded when they use public transport. These include a right to a safe, reliable and secure public transport... We are therefore under no illusion about our obligations to transport our people safely, in a manner that enable sustainable livelihoods.”

[16] The War Room was to focus on three areas that included service recovery, safety management and an accelerated implementation of the modernisation programme. The set targets were to be met by 31 December 2019. Gleaning from the letter dated 3 December 2019 from the former Chairperson of the Board to the first respondent, it is instructive to note that the Board played an integral role in the War Room.

[17] On 25 September 2019 the Auditor-General issued a report on the audit of the consolidated and separate financial statements of the entity (being PRASA). The Auditor-General issued a disclaimer that it could not express an opinion because it was unable to obtain sufficient and appropriate audit evidence to provide an audit opinion.

[18] On 31 October 2019 the Government Technical Advisory Centre in National Treasury (GTAC) issued its report on the organisation of the system and of PRASA. The Report dealt extensively where there are shortcomings within the organisation and made certain recommendations, *inter alia*, it observed:

"Governance and leadership instability is widely regarded as the most important reason for the failure of PRASA's turnaround strategy, ie, the rapid turnover of minister, boards and senior managers (many of whom are currently in acting positions), has made it impossible to implement long-term strategies with the consistency and discipline that is required for success."

[19] The report noted claimed areas of improvement as encouraging but "the reality is that in most areas the improvements targeted by the War Room have not yet been achieved though action plans are in place... This is not unexpected given that most of PRASA's performance and service delivery problems are the result of deep systemic root causes, and even these are not addressed, any improvements will merely be temporary."

[20] The GTAC advised that "taking cognizance of the ongoing work of the War Room, including the successes and challenges, and the progress made in recent months to appoint key executives at PRASA are the most important action that the Minister can take to ensure better outcomes is to ensure leadership stability in the organisation, including the Board, the CEO and top executives. Stabilising the organisation means that new appointees should not seek to develop yet another turnaround program but should focus on the initiatives identified in the latest turnaround program..." (my underlining)

To be reminded, that report was in October 2019.

[21] Under the heading "Blueprint for Improved Organisational Performance" it sets out seven key themes all of which needed to be addressed either in the short, medium or long term. Short-term being within three months; medium-term within one year; long-term more than one year. The first of these key themes identified by the GTAC was to create leadership stability and recommended, as the first short-term step to be taken, is for the Minister to appoint permanent members of the Board and a Group CEO for a tenure of five years. It further advised that vacant executive positions be filled. This is identified as a short-term action therefore the Minister should act within three months according to the report.

[22] On 4 November 2019 the first respondent called a news conference to address the media on the progress of the War Room. The news conference was televised live². In this conference the Minister said that the Board will soon appoint a permanent CEO "that will seal the pack", the Board having already started a process of filling vacant senior executive positions, "the Interim Board in terms of its task is busy with employment of people...".

On a question from the Daily Maverick he went further to state:

"Daily Maverick, the Board will be appointed, once approved by Cabinet. I am busy with that process now, to place before Cabinet the new Board of PRASA and that will be finalised probably before end of year, in terms of the Cabinet cycle and I intend to announce that Board once Cabinet has approved."

² <https://youtu.be/exDC6SGziV4>; <https://youtu.be/9tUD4kSKC2o>

[23] On 10 November 2019 the Minister published an open letter in the Daily Maverick wherein he describes the dire state of PRASA. He wrote "The problem rather, is failure to implement this strategy and absence of able and capable leadership." He repeated his undertaking referred to above in relation to the appointment of a permanent Board by saying:

"While we applaud the progress made through the War Room interventions, we are under no illusion about the fact that in the broader scheme of things PRASA remains in a critical state. We have prioritised the appointment of a permanent board at PRASA and this process is nearing completion. This will be immediately followed by the appointment of a permanent Group Chief Executive and Chief Executive of its various divisions and subsidiaries.

Meanwhile, the process of filling critical vacancies is proceeding with the appointment of a Group CFO, Group Chief Procurement Officer and a Group Human Capital Management Executive in the last month.

Stabilising operations without full time leadership both at Board and Management levels is no different from attempting to fill a leaking bucket. "(my underlining)

[24] On 15 November 2019 the Minister offered Mr Mpondo (third respondent), a contract appointment as a special advisor in the office of the Minister for a period linked to the term of office of the Minister. This was done pursuant to the provisions of section 12A(3)(a) of the Public Service Act, 1994. The appointment offer, subject to four conditions that included the signing of a Performance Agreement with the Minister within three months from the date of assumption of duty and the signing of employment

contract within five working days from the date of assumption of duty, was accepted on the same day.

[25] On 20 November 2019 the Minister attended a meeting of Parliament's Standing Committee on Public Accounts (SCOPA). He was accompanied by his Deputy, the Director-General, officials as well as members of the Board. The minutes of the meeting record that the Minister assured the Committee that the processes to finalise the appointment of a permanent group CEO would be finalised by the end of the financial year. He went on to say:

"The department was also finalising the process appointing a permanent Board as first order of business would be to take extraordinary measures to stabilise PRASA's operations and ensure that it delivers its mandate."

During the course of this meeting, according to the Minutes, the Director-General indicated that by creating the War Room "the Minister had fallen short of placing the entity under administration because of its organisational collapse". In his closing remarks to the meeting the Minister repeated that "the Board was operating on an interim basis and the process of finalising its vacancies was underway... One of the crucial mistakes was that incoming Board Members for the Department's entities were not taken through an interview process; they would usually be appointed on consideration of the portfolios and recommendations. The ministry introduced interviewing processes as a way of evaluating whether the candidate had the requisite skills." He further reflected that the Chairperson hoped that the ministry would finalise the appointments of board members so that the Committee would have more meaningful engagement with the entity. (My underlining)

[26] On 22 November 2019 the Minister wrote to his Cabinet colleague, the Minister of Finance, as well as the President of the Republic, briefing them on the performance of the Passenger Rail Agency of South Africa (PRASA) Board and "My Intention to Dissolve the Board" is the heading. After summarising the shortcomings of the Interim Board and the intention to dissolve same he states:

"I intend to write to the individual Board Members to afford them an opportunity to make written representations as to why their membership to the Board should not be terminated and as to why the board should not be resolved.....

There are two options that I am currently considering in the post Board dissolution phase. Option one involved work to fast track the appointment of a full-time Board that is fully fledged in line with the provisions of the Legal Succession to the South African Transport Services Act, No 9 of 1989, and option two involves placing PRASA under Administration in line with the provisions of section 49(3) of the Public Finance Management Act, No 1 of 1999. I'm leaning more on option two considering the situation of the entity and wish to consult with yourself on invoking the provisions of section 49(3) of the PFMA in me appointing an Administrator, which should be a turnaround expert to assist in addressing the operational deficiencies of the entity...

I therefore seek your concurrence in invoking the provisions of section 49(3) of the PFMA. I fervently and eagerly await your response in this matter, which I shall highly appreciate."

The Minister, through the Director-General, indicated that he received guidance from the President and Cabinet before proceeding to serve the members of the Interim Board of Control with notices of his intention to dissolve the Board.

[27] On 26 November 2019 the Minister served on the individual members of the Board notices of his intention to terminate their membership as members of the Interim Board. They were given five days within which to make written representations as to why the membership should not be terminated.

[28] On 3 December 2019, members of the Board collectively submitted a representation on why they should not be dismissed. This response was 43 pages long.

[29] Applicant relies on media reports of what the Minister told Parliament in a question and answer session on 4 December 2019 in relation to the Board. It is reported that the Minister told members of Parliament that he had written to the Interim Board asking why they had failed to comply with their fiduciary obligations with regard to the Public Finance Management Act. He said he would evaluate the Board's response before determining the "correct" course of action. This must be in reference to the letter of 26 November 2019 that was responded to the previous day, but the Minister had not seen yet. He further stated that the Department was in the process of finalising a permanent Board "to restore stability", and that the process was "at an advanced stage".

[30] The next day, on 5 December 2019 the Minister dissolved the Board of Control by writing to the chairperson. He indicated that he considered the submissions contained in the letter of 3 December 2019. He stated "Please take note further that your appointment or extension was subject to the appointment of the new full-time Board or accounting authority and I have now decided to do so after consulting my colleagues in Cabinet. I have therefore concluded and inform you that I am herewith dissolving the board of PRASA from date of this letter (5 December 2019)."

[31] On the same day, 5 December 2019, the Minister terminated Mr Mpondo's employment contract as special advisor and simultaneously offered him a contract appointment as project manager and secondment to the Passenger Rail Agency of South Africa (PRASA). In the document his rank is described as "Project Manager" (Acting Group: CEO: PRASA). The offer was subject to similar conditions as to his appointment as Special Advisor described above. He accepted the offer on the same day.

[32] The following day, 6 December 2019, the Minister and Mr Mpondo entered into a "Permanent Employment Contract for a fixed term or a specific project in accordance with chapter 5 of the Public Service Regulations, 2016, for members of the Senior Management Service" (SMS). (My underlining)

[33] Clause 1.1 of the contract states that the contract is concluded in terms of section 9 of the Public Service Act, 1994, as amended, and that it is for a period of 12

months from 6 December 2019. It is further envisaged in terms of the contract that a Performance Agreement will be entered into that will set out the responsibility and key performance areas.

[34] On 9 December 2019 the Minister wrote to the acting company secretary of PRASA informing her of the appointment of the third respondent as the Acting Group Chief Executive Officer of PRASA with effect from 9 December 2019³. On the same day the letter is addressed to the third respondent in which the Minister purports to vest him with the powers of the Accounting Authority under section 49(2)(b) of the Public Finance Management Act.

[35] On the same day the Minister released a media statement in which he stated:

"Merely replacing an Interim Board with a permanent Board will not address the deep-rooted fault lines at PRASA..... I arrived at a conclusion that a more incisive intervention that enables quick turnaround times in decision-making, with a view to stabilise operational performance, is more urgent than an appointment of a permanent Board. This view was supported and agreed to by Cabinet." (my underlining)

[36] I pause here to note that a statement on the Cabinet meeting of 13 December 2019 was attached to the papers which indicated that the meeting was held on Friday, 13 December 2019 where Cabinet approved the dissolution of the Interim Board of

³ The Board ceased to exist on 5 December 2019.

PRASA and placing of the entity under administration. It also approved the appointment of an Administrator.

[37] The Minister continued in his media statement: "I have therefore decided to dissolve the Interim Board and place PRASA under administration with immediate effect. The Administrator will run the affairs of PRASA as a de facto Board of Control as envisaged in the PRASA founding law and as an accounting authority terms of the PFMA... The role of the group CEO will be integrated into the role of the Administrator as an integral part of the intervention... This intervention will continue for 12 months, whereafter a permanent Board will be appointed to run the affairs of PRASA. We will ensure that the process to recruit a permanent Board is initiated at least six months into the tenure of the Administrator to ensure a seamless transition at the end of the intervention. I am pleased to announce the appointment of Mr Bongisizwe Mpondo as the newly appointed Administrator of PRASA with immediate effect."

The six months into the tenure would henceforth have passed already.

[38] The following day, on 10 December 2019, the applicant addressed a lengthy letter to the Minister. They pointed out that whilst they trust the decision to resolve the Interim Board and place PRASA under administration, was done in good faith and with the right intentions, they had concerns that the actions taken by the Minister was not lawful. They requested the Minister to clarify the legal basis for appointing an Administrator and whether the Minister intended to involve National Treasury or Parliament as contemplated in law. It seems, to date, they received no response.

[39] On 14 January 2020 the Group Executive: Legal, Risk and Compliance and the General Manager: Group Legal Services provided an internal memorandum to the Administrator on two issues, namely:

- a) Whether PRASA requires a Memorandum of Incorporation?
- b) What is the legal standing of the Administrator in relation to PRASA?

In respect of the second question, they came to the conclusion that the appointment of the Administrator is unlawful, having regard to both the Legal Succession Act and section 49 of the PFMA. They also point out the risks of continuing with the situation as is.

[40] The following day, 15 January 2020, yet another media event was held. The transcript of this media briefing seems to be prepared by internal persons at PRASA, as it appears in the annexure under a heading and logo of PRASA Media. It seems the Minister, the Deputy Minister and the Director-General were present at this meeting. It is headed "Administrator's Brief to the Media". The third respondent elaborated on his mandate as the Administrator and his turnaround strategy which would include, inter alia, issues such as serious restructuring and, on the face of it before me, all the functions of the Board, placing functions under what is called, the Office of the Administrator. It seems that the Minister's Media Statement dated the same day was released prior to this media briefing as reference is made to the Minister's Media Statement of earlier that day wherein the Minister indicated the winding down of the War Room and without any confusion referring to the third respondent as an Administrator.

In both the Administrator's Media Address as well as the Minister's Media Statement mention is made of the "Shareholders Compact" with the Administrator that was agreed to on 13 December 2019. Although the details are scant in these documents, a better understanding is gleaned from the presentation made to the Portfolio Committee on Transport dated 11 May 2020 styled as "Administrator's Turnaround Update".

[41] I revert to the timeline. On 28 January 2020, a few days before the launch of this application, the Director-General of the National Treasury issued a letter to the Director-General of the Department of Transport for the appointment of the accounting authority for PRASA. The authority was granted in terms of section 49(3) of the PFMA, to approve that the Group Chief Executive Officer of PRASA, or a person acting in that position, be the accounting authority for a period of twelve (12) months.

[42] The application was launched on 4 February 2020. After the exchange of affidavits it was eventually set down for hearing before me, albeit it seems there were aborted attempts for a hearing before that, on 26 May 2020.

[43] I turn briefly to the conduct of the parties that led to a delay in the finalisation of the papers herein. The Director-General, on behalf of the Minister, in his opposing affidavit made it clear that it was obvious that the applicant's application was made without the full knowledge of the events that led to the appointment of the third respondent and the applicant was clearly wrong in the construction of the provisions of the Legal Succession Act and the PFMA. He makes no mention of the letter dated 10

December 2019. It is instructive to note that he failed to deal with the perception created by the Minister and the Department as to the true state of affairs before the application was launched. The applicant, as far back as 10 December 2019, requested the Minister to clarify the situation and they simply failed to do that. It is disingenuous, in my view, for the Director-General, and for the Minister to have confirmed under oath, that;

"I conclude this part of the affidavit by pointing out that the Minister has colloquially referred to Mr Mpondo as "the Administrator" of PRASA. That, of course, is not legally the case. Mr Mpondo is the new accounting authority whose appointment was lawfully made from and with the approval of National Treasury, in terms of the relevant provisions of the PFMA....."

[44] The first respondent's answering affidavit, deposed to by the Director-General is dated 6 March 2020. Not only did the Director-General and the Minister, at various instances as pointed out above, publicly declare that the third respondent is "the Administrator" and "*de facto* Board of Control" of the entity, but also as indicated above, it was the third respondent himself that made a presentation on the 11 May 2020 to a Portfolio Committee in Parliament still calling himself something else. The two YouTube videos hyperlinked hereinabove clearly shows the Director-General and the Minister jointly together on more than one occasion using the terminology and explaining same. It is clear that the first respondent had no answer to the legality issue of the appointment of an Administrator instead of a Board of Control as I shall point out hereunder.

[45] Nowhere in the papers is there any indication but for the approval dated 28 January 2020 that National Treasury had pre-approved the appointment of the third

respondent as the accounting authority. In fact, in the document filed does not refer to an individual by name.

[46] The Minister's answer in the opposing affidavit, through the Director-General, as to the status of the third respondent and his appointment, led to the applicant requesting further documents from the Minister. The shareholders contract/compact for 2018/2019 and 2019/2020 as well as the employment contract of the third respondent were provided. Absent to these documents was the performance contract/shareholders compact or any service level agreement that was according to them signed on 13 December 2019 was attached nor any of the items upon which the employment was conditional. This condition was applicable to both agreements, being the first as a special advisor and the second of 5 or 6 December 2019.

[47] The disclosure of these additional documents to the employment contracts led to an amendment being sought by the applicant. They, inter alia, criticised the Director-General and/or the Minister in not disclosing the requisite Performance Agreement. The first respondent then filed a supplementary answering affidavit, through the Director-General, attaching further documents. What is obvious is that no further Performance Agreements or Service Level Agreements were attached. I repeat that it needs to be noted that at the announcement on 9 December 2019 the Minister publicly declared that within the coming week he would enter into a Service Level Agreement with the third respondent. In the papers and other instances, it is noted that an agreement was

allegedly entered into on 13 December 2019. No such agreement was however attached to the papers.

[48] In answering the concern of the applicant that the performance contract was not disclosed, the Director-General answered that the third respondent did not stay in his position for the three-month period after the assumption of duty. This response is unhelpful as on the date of the affidavit being 6 March 2020, and the second affidavit dated 7 April 2020, the three-month period would either have expired on 6 March 2020 insofar as it relates to the second employment contract and could have been attached to the second affidavit which it was not.

[49] In the supplementary answer referred to above, the offer of employment as project manager and acting GCEO of PRASA attached. The duties to be performed by the third respondent was left blank and, as indicated, by 7 April 2020 there was still no agreement attached.

[50] The applicant then filed a further supplementary affidavit wherein it is clearly stated that the first respondent's affidavit was out of time in non-compliance with the court order, despite various enquiries from the applicant's attorneys to the first respondent's attorneys. As noted above the further affidavits on behalf of the first respondent was filed on 7 April 2020 with no further supplementary affidavit filed by the Minister. It is noted that the Minister's counsel advised the applicant's counsel on 31 March 2020, four days after it was due to be filed in terms of the court order, that the

Minister intended filing a supplementary affidavit. Although the affidavits purport to be signed on 7 April 2020, until 16 April 2020 the attorney acting on behalf of the first respondent still indicated that he only had an unsigned version.

[51] One of the purposes of the supplementary affidavit filed on behalf of the first respondent was to oppose the amendment sought. This opposition flies in the face of the fact that an agreement was reached by the parties to postpone the matter on a previous occasion and that the pragmatic approach should be followed that the applicant's file an amended notice of motion and the Minister be given an opportunity to respond. They took an order by agreement with a timetable for the filing of further pleadings. The opposition to the amendment sought is unfortunate and opportunistic and cannot be upheld. Not only was no prejudice suffered by the first respondent but it was of their own making.

DISCUSSION

[52] The parties are at odds as to the interpretation of certain sections of various pieces of legislation that impacts on this matter. I am thus guided by the principles as set out by the Constitutional Court in *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) where, at paragraph 28 it is stated:

"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so will result in an absurdity. There are three important inter-related riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) The relevant statutory provision must be properly contextualised; and

- (c) All statutes must be construed consistently with the Constitution, that is, where reasonably possible legislative provisions or to be interpreted to preserve their constitutional validity. "

LEGAL SUCCESSION TO THE SOUTH AFRICAN TRANSPORT SERVICES ACT, 9 OF 1989 (THE SUCCESSION ACT)

[53] The applicant relies on the provisions of this Act, inter alia, to support their argument that the Minister acted unlawfully in effectively to bestow on the third respondent all the powers and responsibilities of the Board of Control as well as that of a Group Chief Executive Officer.

[54] The respondents in turn argue, that because the Minister has the right to dismiss the members of the Board, it envisages a period that they refer to as an interim period, where there is no Board of Control. I have referred to sections 22 (1), 23 and 24 in paragraphs [4], [5] and [10] above. Sections 22 and 23 primarily deals with the establishment and the main objective and business of PRASA. Section 24(1) of the Succession Act vests the management and control of PRASA in the "Board of Control" whose members are appointed and dismissed by the Minister. The Succession Act recognises that a multiplicity of skills and experience is required in the management of the affairs of PRASA. The effect of the provisions referred to above, read together is that, as a matter of law, the legal entity has a composite Board of Control, whose composition is prescribed in the Act. It is instructive to note that the word "shall "is used. This Act also does not grant any person other than the Board of Control, which is responsible for the management, to appoint or dismiss the executive management, as

the Minister purports to have done. The period, absent a Board of Control, that the respondents referred to as an Interim period might be remedied by the provisions of the PFMA.

[55] Before I, however, turn to the PFMA, insofar as it is still relevant, given the stance of the respondents that they disavow their previous claims of appointing the third respondent as an Administrator, the provisions of section 29 of the Act is applicable. In the announcement on 9 December 2019 the Director-General indicated that the appointment of an Administrator is akin to Business Rescue. The Act does not make provision for placing the entity under any form of administration and the closest that it can be related to is to be found in section 29 of the Act which reads:

"29. Liquidation

For as long as the state is a shareholder of the corporation, the corporation shall be liquidated or placed under judicial management only on the authority of an Act of Parliament. "

Counsel for the first respondent were constrained in arguing this point at all. It is clear that the Minister had no power to place the entity under "administration" and appoint an "Administrator". It is therefore not unsurprising that the use of the term is now blamed on colloquial speak.

THE PRASA SHAREHOLDER'S CONTRACT/COMPACT

[56] The shareholders contract for 2019/2020 was signed on 29 March 2019 between the Government of the Republic of South Africa, represented by the Minister of

Transport, and PRASA. It delineates the roles and responsibilities of the Minister and the Board of Control as the accounting authority. The contract reinforces the position that the Board of Control is responsible for the governance of PRASA. It remains the accounting authority and is responsible for the appointment of the executive. The Minister therefore had no authority to appoint Executive Officers that would include an acting GCEO.

THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000 (PAJA)

[57] There appears to be no dispute that the decision to appoint the third respondent to PRASA and his corresponding failure to appoint a properly constituted Board of Control under section 24(1) of the Legal Succession Act, is administrative action reviewable under PAJA and is also the exercise of public power to be reviewed under the constitutional principle of legality.

PUBLIC SERVICE ACT, 1994 AND REGULATIONS, 2016

[58] The relevance and context of the Public Service Act and its regulations is clearly illustrated by the appointment of an accounting authority in the letter dated 28 January 2020 from the Director-General of the National Treasury. In this letter he approved the Group Chief Executive Officer of PRASA or a person acting in that position, to be the accounting authority. It is therefore imperative to determine the position of the third respondent as the acting GCEO. The first question that arises is whether the third respondent was an “employee” capable of secondment.

[59] Section 1 of the Public Service Act defines an employee as a person contemplated in section 8 of the Act, but it excludes a person appointed under section 12A.

[60] Section 15 (3) reads as follows:

“(3)(a) The executive authority of a department may second an employee of the department to another department, any other organ of state, another government or any other body-

(i) for a particular service or period not exceeding the prescribed period (if any); and
(ii) on the prescribed conditions (if any) and such other conditions as agreed upon between the executive authority and the relevant functionary of the body concerned.

(b) The secondment of an employee of a department may occur only if-

(i) the employee requests, or consents to, the secondment; or
(ii) in the absence of such request or consent, after due consideration of any representations by the employee, the secondment is in the public interest.”

[61] As indicated above the third respondent was appointed on 15 November 2019 under section 12A of the Public Service Act as a special advisor. This employment was terminated on 5 December 2019 when the third respondent was offered an appointment as project manager and secondment to PRASA as an acting Group Chief Executive. The termination of the first agreement and appointment was clearly a strategy to place the third respondent in a position to be seconded in terms of section 15 of the Act. However, he was not an existing employee capable of secondment.

[62] In the event that he was capable of secondment, the parties still had to comply with the conditions set in section 15(3) as there was clearly no agreement between the Minister and any other functionary within PRASA. The Board of Control was not capable of agreeing to the secondment as it was dissolved on 5 December 2019. The acting company secretary was simply advised on 9 December 2019 of the secondment. No Performance Agreement had been concluded in terms of regulation 88 of the Public Service regulations which reads: "The Minister shall develop and improve a system for performance management for members of the SMS or categories of the SMS." Furthermore, the Minister of Public Service and Administration issued directives which came into effect on 1 April 2018 which also have not been complied with. No deviation was sought nor approved by the Minister of Public Service and Administration. As indicated above, even at the time of filing their affidavits no Performance Agreement had been entered into. Furthermore, clause 6 of the employment contract was simply left blank.

[63] Regulation 82 read with regulations 25(2), 26, 57(2) and 57(3) describes certain requirements to be met. Whilst the Minister was called upon to show that the requirements were met for the third respondent as a Project Manager, no answers were given.

[64] Consequently I am of the view that not only was the third respondent's appointment as the acting GCEO unlawful but also his appointment as Project Manager

in the Minister's office and this is reviewable under section 6(2) of PAJA and should be set aside.

PUBLIC FINANCE MANAGEMENT ACT 1 OF 1999 (PFMA)

[65] PRASA is a form of public entity listed in Part B of Schedule 3 of the PFMA and is therefore obliged to have “an Authority which must be accountable in terms of this Act”. Section 49 reads:

“49. Accounting authorities.—

(1) Every public entity must have an authority which must be accountable for the purposes of this Act.

(2) If the public entity—

(a) has a board or other controlling body, that board or controlling body is the accounting authority for that entity; or

(b) does not have a controlling body, the chief executive officer or the other person in charge of the public entity is the accounting authority for that public entity unless specific legislation applicable to that public entity designates another person as the accounting authority.

(3) The relevant treasury, in exceptional circumstances, may approve or instruct that another functionary of a public entity must be the accounting authority for that public entity. ...”

[66] The first respondent argues that he was entitled to apply section 49 in order to appoint the third respondent as the accounting authority. The first respondent is of the

view that the existence of a board or a controlling body must be interpreted as a matter of fact rather than a matter of law. He is further of the view that section 49(2)(b) is an empowering provision that empowers him to vest the powers of the accounting authority in a designated person. Having dissolved the Board of Control he was thus empowered to vest powers in the third respondent.

[67] In my view in order to determine whether the Minister was thus empowered one has to have regard to the language and structure of section 49, in its proper context, with regard to the object thereof. Section 49(2)(b) in my view, applies by operation of law only to public entities that does not have as a matter of law a board or a controlling body and it does not vest the responsible minister with the power to designate a functionary in a public entity as the accounting authority. Section 49(3) on the other hand is an empowering provision that vests such power exclusively in the relevant Treasury with a discretion and have no automatic legal effect. As it caters for "exceptional circumstances" , in the instant matter such exists, National Treasury would have been empowered to act in terms of section 49(3) to appoint an accounting authority. The unfortunate situation was that absent a Board of Control, a new GCEO or an acting GCEO lawfully appointed could have been assisted by the letter of 28 January 2020. However, under the circumstances where the appointment is ruled to be unlawful, and the Minister implementing section 49(2)(b) it seems to be reviewed and set aside.

[68] Having regard to the seriousness of this matter I am of the view that an order should be granted that allow National Treasury, in a short period of time, to appoint an accounting authority pending the appointment of a permanent Board of Control.

THE BOARD OF CONTROL

[69] As indicated above the Minister has a duty to appoint a Board of Control. The vacancies on the Board has been advertised more than once. The process of appointing a permanent Board of Control has been delayed for more than two years. The current Minister extended the term of office of the last Interim Board and indicated on more than one occasion publicly that he was to appoint a permanent Board before the end of 2019. In the report of the GTAC referred to above, it was highlighted as a short-term need to be fulfilled within three months of the report. Nominations were called for and received and particularly on 4 November 2019, as I have indicated, the Minister publicly declared that he was busy with the process of appointing a permanent Board that would probably be finalised before the end of that year and that members were being interviewed.

[70] At the announcement of the appointment of the third respondent as the Administrator the Minister sure the public that within six months of the Administrator's appointment the process to appoint a new Board should be started on. We are now eight months hence.

[71] *Mr Maleka* was specifically asked to ascertain during the hearing as to the timelines for the appointment of a permanent Board of Control. The Minister argues that he needs 12 months. In my view this process has been ongoing for longer than 12 months and whilst I am mindful of the enormity of the task and that one should not set up a Board of Control for failure, more than enough time was wasted.

[72] Consequently, I am of the view that a period of sixty (60) days from the date of this order should be sufficient for the Minister to complete the process, as he was ready in November 2019 to present his candidates that was interviewed to cabinet.

[73] The relief sought in paragraph 5 of the amended notice of motion was not strenuously pursued with and no order will be made in this regard.

CONCLUSION

[74] I am therefore satisfied that the applicant has made out a case for the relief sought in the notice of motion, as amended, and consequently they would be entitled to the cost that should follow the result.

ORDER

[75] I therefore make the following order:

1. The First Respondent's failure to appoint a Board of Control for PRASA (PRASA) and decision to appoint the third respondent as "the Administrator of PRASA" in lieu of a Board of Control for PRASA, is declared to be unlawful, and is reviewed and set aside.

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2. The First Respondent's secondment and/or appointment of the Third Respondent as the Acting Group Chief Executive Officer and accounting authority of PRASA is declared unlawful, and is reviewed and set aside.
 3. The Second Respondent's decision of 28 January 2020 to approve that the group chief executive officer of PRASA, or person acting in that position, be the accounting authority of PRASA is declared unlawful, and is reviewed and set aside.
 4. The First Respondent is directed to appoint a Board of Control for PRASA, in accordance with section 24 of the Legal Succession to the South African Transport Services Act 9 of 1989, within sixty (60) days of the date of this order, or such other period as extended by the court on good cause shown.
 5. Pending the appointment of the Board of Control under paragraph 4 above:
 - 5.1 The Second Respondent (National Treasury) is directed to instruct or approve, within seven (7) calendar days of the date of this order, another functionary of a public entity to be the accounting authority for PRASA, in accordance with section 49(3) of the Public Finance and Management Act 1 of 1999, and
 - 5.2 The orders in paragraph 1, 2 and 3 are suspended until another functionary is appointed on the instruction or approval of the Second Respondent, in terms of paragraph 5.1 of the order.

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6. The first respondent to pay the costs of this application, including the costs of 2 counsel where employed.



N C Erasmus
Judge of the High Court

Counsel for Applicant: Adv Janice Bleazard
Attorneys for Applicant: Bradley Conradie Halton Cheadle Attorneys

Counsel for First Respondent: Adv V Maleka SC
Adv N Mashava
Attorneys for First Respondent: The State Attorney

ⁱ My insertion