



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

Case Number: 17671/2023

In the matter between:

MKHUSELI MICHAEL MTAKATA

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

First

Respondent

PRASA BOARD

Second Respondent

HISHAAM EMERAN

Third Respondent

JUDGMENT

MAGARDIE AJ

Introduction

1. The applicant is the former Head: Corporate Security of the first respondent, the Passenger Rail Agency of South Africa ("PRASA"). On 10 April 2017 he was dismissed for misconduct pursuant to a disciplinary hearing chaired by a practising advocate and member of the Johannesburg Bar.
2. On 13 October 2023, some six years later, the applicant instituted the present application seeking in effect to challenge and overturn his dismissal. The application was brought as a matter of urgency. The substantive relief originally sought by the applicant was a declaratory order "...confirming the validity of the applicant's contract of employment." A further order was sought compelling PRASA to "...unblock and pay October 2023 salary (sic) immediately and subsequent to this, all outstanding salaries due with full benefits to be paid retrospectively from April 2017 to October 2023 on a date to be determined by the Honourable Court."
3. According to the applicant, the trigger for the application and its professed urgency, was an advertisement published by PRASA inviting suitably qualified applicants to apply for a number of vacant executive positions. The applicant says that he saw this advertisement in the City Press newspaper on Sunday 30 July 2023. One of the positions so advertised was that of Chief Security Officer: Corporate Office. The applicant contends that this particular position was the position which he occupied before his dismissal. He contends that PRASA acted unlawfully in seeking to fill the position because the disciplinary proceedings which resulted in his dismissal, were unlawful and invalid to begin with.
4. The application was initially enrolled for hearing on 20 October 2023. The matter did not proceed on that date. A comprehensive answering affidavit had in the meanwhile been filed by the respondents' attorneys, Bowman Gilfillan Inc ("Bowmans").
5. The application was then set down for hearing on 10 November 2023. On 8 November 2023, two days before the hearing, the applicant filed a Notice in terms of Rule 28(1) seeking to affect a series of amendments to the relief

sought in his notice of motion. The amended relief sought differed significantly from the orders initially sought in the applicant's notice of motion. The respondents objected on various grounds to the proposed amendments.

6. On 10 November 2023 the matter came before Pillay AJ. That morning, the applicant applied in terms of Rule 28(4) for leave to effect the amendments sought in his Rule 28(1) Notice.
7. In the course of oral argument, counsel for the applicant moved for yet another amendment. The latter was an interim interdict restraining PRASA from continuing with any conduct with the intention of employing a new Head of Security.
8. In a judgment handed down on 23 November 2023, Pillay AJ granted all the amendments except the belatedly sought order for an interim interdict relating to the employment of a new Head of Security by PRASA. That order was dismissed. The remainder of the amended relief was postponed *sine die*. Pillay AJ ordered the applicant to pay the costs of the application including the costs of the application including the costs in respect of the amendment.¹
9. This judgment deals with the merits of the amended relief sought by the applicant. That relief, as set out at paragraphs (c) to (f) of the applicant's amended notice of motion, are orders:

7.1 "that the the appointment of those who constituted the disciplinary hearing was not in accordance with the procurement policy of PRASA, including section 217 of the Constitution and as such, was unlawful and invalid;

7.2 the proceedings of the disciplinary hearing were, as such, vitiated and accordingly invalid;

¹ Matakata v Passenger Rail Agency of South Africa (PRASA) and Others (17671/2023) [2023] ZAWCHC 313 (28 November 2023).

- 7.3 the result of the said disciplinary hearing was equally vitiated and accordingly invalid;
- 7.4 the applicant's contract of employment was never terminated; as such, the applicant has a right to return to his workplace immediately upon the granting of this Order and to be paid his salary retrospectively, which shall include all increments effected since his purported dismissal;
- 7.5 costs of the application."
10. The applicant advances three main contentions in support of this relief. Firstly, he contends that the persons who constituted the disciplinary proceedings were improperly and unlawfully appointed. Secondly, it is contended that the chairperson of the disciplinary hearing acted outside the terms of reference set out in his appointment letter. On this score, an alternative argument is advanced that PRASA had no right or power to outsource or delegate to the chairperson, the power to discipline and dismiss the applicant. Thirdly, the applicant contends that his dismissal was unlawful because the first and second respondents failed to give him written notice of the termination of his employment.

Factual and litigation background

11. The events set out above are but a snapshot of the lengthy and acrimonious litigation history between the parties. PRASA's answering affidavit was deposed to by Ms. Desiree Le Roux, who is employed by PRASA in the position of Senior Manager: Employee Relations. Her affidavit sets out the litigation background in detail. That background and the chronology of events leading to the the present application, was not disputed by the applicant in any material respect.
12. The applicant was employed by PRASA in the position of Head: Corporate Security on 10 June 2013. On 21 November 2016 he was given written notice

to attend a disciplinary hearing to answer several charges of misconduct. The disciplinary hearing convened on 6 and 7 December 2016 and 12 to 13 January 2017. The hearing was chaired by an independent chairperson, Advocate Timothy Boyce (“the chairperson”). PRASA was represented by Advocate Nazeer Cassim SC, who acted as initiator and employer’s representative in the disciplinary hearing. Both advocates were briefed by Bowmans on the instructions of PRASA.

13. The chairperson found the applicant guilty in respect of one of the several charges of misconduct. This charge related to the applicant acting in a grossly unprofessional and unacceptable manner by issuing a defamatory and false media statement on or about 12 October 2016 and disclosing sensitive and internal PRASA matters to the media.
14. In a sanction finding issued on 9 March 2017, the chairperson concluded that given that the applicant’s misconduct had destroyed the trust relationship and made continued employment intolerable, the only appropriate sanction was one of dismissal. The chairperson’s sanction finding recorded that the applicant was accordingly dismissed on one month’s notice, with the effect date of dismissal being 10 April 2017.
15. On 9 March 2017, the same day that the chairperson issued his sanction finding in terms of which the applicant was dismissed on one month’s notice, the applicant referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (“CCMA”). The applicant referred his unfair dismissal dispute to the CCMA notwithstanding that his dismissal was at that stage not yet effective. As set out in the chairperson’s sanction finding, the applicant had been dismissed on one month’s notice. His dismissal would therefore only be effective from 10 April 2017. The unfair dismissal dispute referred by the applicant to the CCMA on 9 March 2017 was therefore clearly premature.²

² Section 190(1) of the Labour Relations Act 66 of 1995 (“the LRA”): ‘the date of dismissal is the earlier of (a) the date on which the contract of employment terminated; or (b) the date on which the employee left the service of the employer.’

16. The CCMA nonetheless entertained the applicant's unfair dismissal dispute, which then proceeded to arbitration. On 2 August 2017 CCMA Commissioner Dekker handed down an award finding that the applicant's dismissal by PRASA was both substantively and procedurally fair.
17. On 27 September 2017 the applicant filed an application in the Labour Court seeking to review the arbitration proceedings.
18. On 25 October 2018, approximately twelve months after service of the review application, the applicant purported to serve a file a notice in terms of Rule 7A(8) of the Labour Court Rules, indicating that he abided by his 27 September 2017 notice of motion in the review. The respondents' attorneys objected to this approach by the applicant. The reason for their objection was that the applicant had failed to file a transcribed record of the arbitration proceedings as required by the Labour Court Rules.
19. The applicant's 28 September 2017 review was subsequently deemed to have been withdrawn and lapsed, which was confirmed by a directive issued by the Labour Court on 19 February 2019. Shortly before this and on 9 February 2019, the applicant filed a transcribed record of the arbitration proceedings. This was followed on 6 March 2019 by an application instituted by the applicant in the Labour Court for leave to reinstate the 2017 review application.
20. On 15 September 2020, Rabkin-Naicker J dismissed the applicant's application to revive and reinstate the 2017 review application. The learned Judge held that both the conciliation and the arbitration conducted by the CCMA were a nullity as the certificate of outcome of the conciliation was dated 7 April 2017, three days before the applicant's dismissal had taken place. The CCMA consequently had lacked jurisdiction to conciliate the dispute. The Court noted that the only recourse for the applicant would be to refer his dispute afresh to the CCMA and apply for condonation for the lengthy delay.

21. The applicant duly filed a condonation application in the CCMA on 9 October 2020. PRASA opposed the application and filed an answering affidavit. The condonation application was granted by the CCMA on 13 August 2021. The condonation ruling was however erroneously granted without regard to PRASA's answering affidavit. This resulted in PRASA filing an application to rescind the condonation ruling, which application succeeded and was granted by the CCMA on 10 November 2021.
22. The applicant in turn filed his own rescission application, seeking to rescind the 10 November 2021 rescission granted in favour of PRASA. This application was unsurprisingly opposed by PRASA on the basis that the CCMA lacked the jurisdiction to effectively appeal and/or review the 10 November 2021 rescission ruling. On 8 December 2021 Commissioner Breedts of the CCMA issued a jurisdictional ruling ("the Breedts ruling") concluding that the applicant had failed to comply with the CCMA Rules, had failed to serve an LRA Form 7.11 on PRASA and that there was consequently no valid referral by the applicant to the CCMA at all.
23. On 24 February 2022 and 10 March 2022 the applicant filed another review application and an application for condonation, this time seeking to review and set aside the Breedts ruling ("the 2022 review application"). On 5 April 2022 PRASA filed a notice to oppose the review application. The applicant thereafter and on 13 May 2022 served a notice of withdrawal of the 2022 review application.
24. According to PRASA, the applicant did not provide reasons for the withdrawal of the 2022 review application nor did he tender any costs. This in circumstances where PRASA is a public body utilizing public funds in its defence of litigation by the applicant.
25. This was followed by the applicant filing on 1 December 2022 an application for direct access to the Constitutional Court. PRASA opposed the application. On 13 February 2023 the Constitutional Court issued an order refusing the application on the basis that no case had been made out for direct access.

26. The applicant continued undeterred. On 9 March 2023 he served a third Labour Court review application (“the 2023 review application”). According to PRASA, the application was served without a Labour Court case number. Enquiries by the respondents’ attorneys with the Labour Court revealed that the latest review application had in fact not been filed by the applicant with that Court. Further enquiries were made by PRASA’s attorneys with the applicant himself, who informed the attorneys that he had informed the Labour Court that he was no longer interested in prosecuting the 2023 review application.
27. On 27 June 2023 however, the applicant served further legal proceedings on PRASA. This time it was an urgent application issued under Labour Court case no. 328/23 dealing with the circumstances surrounding his dismissal. PRASA opposed the application and filed an answering affidavit. On 10 October 2023 the applicant withdrew the application, again without any explanation or tender of costs incurred by PRASA in opposing the matter.
28. On 13 October 2023, three days after withdrawing his 27 June 2023 urgent application in the Labour Court, the applicant instituted the present application in the High Court.

Evaluation

29. The grounds relied on by the applicant in support of the relief sought in this application are spread over his founding affidavit, a supplementary answering affidavit, a replying affidavit and a further supplementary replying affidavit. The respondents objected to this approach by the applicant. The respondents submitted that not only was the applicant’s case a consistently moving target, it was also a case characterized by numerous instances in which the applicant impermissibly sought to raise new matters in reply.
30. The respondents have in this regard brought a substantive application for the striking out of a number of paragraphs of the applicant’s supplementary affidavit. The grounds relied on for the striking out application are that the

impugned paragraphs raise matters for the first time in reply and provide further detail in reply on matters which were only vaguely foreshadowed in the applicant's supplementary founding affidavit.

31. In the alternative and in the event that the striking out application fails, the respondents seek leave to introduce an affidavit by Mr. Mfanimpela Dingiswayo, the former General Manager: Group Legal Services of PRASA. The stated purpose of this affidavit, was to address allegations by the applicant concerning the appointment of Bowmans and the compilation of the disciplinary body, being both the chairperson Adv Boyce and the initiator Adv Cassim SC.
32. The respondents contend that Mr. Dingiswayo's affidavit should be admitted as he was directly involved in the matter at the time and has personal knowledge of the circumstances relating to the appointment of Bowmans and counsel engaged by PRASA in the applicant's disciplinary proceedings. The respondents submit that in the event that the impugned paragraphs of the applicant's supplementary replying affidavit are not struck out, PRASA would be prejudiced and that it would be in the interests of justice for the relevant facts set out in Mr. Dingiswayo's affidavit to then be placed before the Court.
33. A court may in the exercise of its discretion and in exceptional cases allow new matter to remain in a replying affidavit, subject to the respondent being afforded a further opportunity to deal with the new matter in reply. In my view, the interests of justice and finality are best served by a determination of each of the main grounds relied upon by the applicant in support of the relief sought, as opposed to a piecemeal excision of individual paragraphs of the applicant's affidavits by way of their striking out. I shall accordingly determine the application on the basis of the affidavits as a whole. In order to address any prejudice arising from the applicant's reliance on new matter in reply, I grant the respondents' application for leave to introduce the affidavit of Mr. Dingiswayo.

The characterization of the applicant's cause of action and relief sought

34. A further issue must be addressed before evaluating the merits. That issue relates to the correct characterization of the applicant's pleaded cause of action and the relief sought in consequence thereof. The respondents submit that the applicant's case amounts in both form and substance to review relief. According to the respondents, the reference in the relief sought to the terms "unlawful", "invalid" and "vitiating and accordingly invalid", make it clear that the applicant is in effect seeking to review and set aside the disciplinary proceedings. The respondents contend that the framing of prayer (c) of the applicant's amended notice of motion, would have the effect of reviewing and setting aside the appointments of the persons who constituted the disciplinary hearing. The respondents submit that for the applicant to argue otherwise, is mere sophistry.
35. On the basis of their characterization of the applicant's case as being review relief, the respondents submit that such review relief faces an insurmountable obstacle. That being that the review is seven years late. The respondents submit that a seven-year delay by the applicant in impugning PRASA's decisions relating to the constitution of the disciplinary proceedings, is not reasonable. The respondents contend that the applicant has in any event failed to provide a proper explanation for the delay.
36. Proceedings for judicial review, even those that relate to legality review, must be brought within a reasonable time. The Constitutional Court has made it clear that the standard to be applied in assessing both delay in legality reviews and reviews in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), is whether the delay was unreasonable.³
37. The applicant, on the other hand, repeatedly states that his application is not based on judicial review either as his cause of action or remedy. The applicant states that he is not reviewing the decision by PRASA to appoint the persons who constituted the disciplinary hearing. In addition, he states that he is not reviewing the chairperson's decision-making process in relation to his

³ Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited (2019 (4) SA 331 (CC) at para 48.

dismissal. According to the applicant, "...the true nature of the relief sought in my application is a declaratory order". He submits that because he does not seek review relief, there are no time constraints imposed upon him as to when he should have brought his application.

38. The applicant has therefore emphatically disavowed any reliance on review relief as his cause of action. He then however goes on to contradictorily state, for the first time in reply, that "...even if the relief sought in the present application was a review in nature", the delay in bringing the review was not unreasonable "considering the history of the matter", and that any delay should be condoned in the interests of justice.
39. This, in my view, the applicant cannot do. He has nailed his colours to the mast of declaratory relief. He expressly denies that he seeks review relief. It is not permissible for the applicant to then plead in the alternative a mutually inconsistent factual basis for his cause of action. He cannot say '...this is *not* a review and the delay rule does not apply' and at the same time say '...in the alternative, this *is* a review and my delay was not unreasonable.'
40. A party is entitled to know precisely what case it is expected to meet and to answer that pleaded case. Holding parties to their pleadings is therefore not merely pedantry but an integral part of the principle of legal certainty which is an element of the rule of law.⁴
41. There is, to be sure, much force in the submissions by counsel for the respondents that the relief sought by the applicant has a number of features of review relief. The applicant's emphatic eschewing of review relief and the application of the delay rule may also indicate, as counsel for the respondents sought to argue, a tactical approach by the applicant given the extent of the delay and what counsel submitted were the applicant's poor prospects of success in any review.

⁴ South African Transport and Allied Workers Union and Another v Garvas and Others (2013 (1) SA 83 (CC) at para 114.

42. On balance however, I am of the view that the interests of finality require this matter to be determined on the basis of what the applicant pleads his cause of action to be, rather than how it is characterized by the respondents. The applicant must in my view be held to his pleaded cause of action and the consequences which flow from it. That cause of action, on the applicant's version, is declaratory relief.

Requisites for declaratory relief

43. In terms of section 21(1) of the Superior Courts Act 10 of 2013 ("Superior Courts Act"), this Court has the power to:

"in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

44. The granting of declaratory relief is a discretionary remedy which in the first place requires an applicant to establish an interest in an existing, future or contingent right. In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*⁵, Jafta JA said the following regarding section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, the predecessor to section 21(1)(c) of the Superior Courts Act:

'Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person interested in an "existing, future or contingent right or obligation" and nothing more is required (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrif Dam* 1995 (4) SA 1 (A) at 14F). In *Durban*

⁵ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* (2005 (6) SA 205 (SCA) at para 16.

City Council v Association of Building Societies 1942 AD 27 Watermeyer JA with reference to a section worded in identical terms said at 32:

“The question whether or not an order should be made under this section has to be examined in two stages. First the court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.”’

45. I address next the various grounds on which the applicant contends that he has made out a case demonstrating the existence of an existing right justifying the declaratory orders sought in his amended notice of motion.

The unlawful and/or improper appointment ground

46. The first ground advanced by the applicant is the contention that the persons appointed to constitute the disciplinary hearing which found him guilty of misconduct, were improperly and/or unlawfully appointed. The applicant’s founding affidavit is in this regard lengthy on argumentative submissions, but short on detail and factual evidence.
47. The “crux of the matter”, as identified by the applicant in his founding affidavit, is alleged to be that Mr. Dingiswayo, “...used his proximity to Bowmans and assisted by Ms. Martha Ngoye, his executive, brought Bowmans through a back door to conduct a purported disciplinary hearing.” No factual details are provided for these generalized and speculative allegations. The applicant goes on to allege that that Bowmans was never on the panel of PRASA and could not be used to conduct any business on behalf of PRASA. This allegation is refuted in terms by both PRASA and Mr. Dingiswayo, an aspect to which I shall later.

48. Further allegations are made by the applicant in his founding affidavit that the appointment of Bowmans "...was a parallel process not approved by the board and executive of procurement" and that Mr. Dingiswayo "...failed to disclose that he worked for Bowmans before joining the first respondent." As to the latter allegation, it is unclear what relevance Mr. Dingiswayo's previous employment history would conceivably have to the disciplinary proceedings brought against the applicant or for that matter, to the relief sought in the present application.
49. An argument is then advanced in the founding affidavit that Bowmans was precluded by a conflict of interest from being appointed by PRASA to initiate the disciplinary proceedings against the applicant. The basis for this contention, so the applicant argues, is that during the period that Bowmans was tasked by PRASA to conduct his disciplinary hearing, Bowmans had at that stage been mandated by National Treasury to investigate various procurement contracts exceeding R10 million awarded by PRASA from 2012 to 2017.
50. In its answering affidavit, PRASA points out that the National Treasury investigation was limited to procurement contracts and did not bar PRASA from utilizing the services of Bowmans, which was on its panel, from assisting with PRASA disciplinary matters. PRASA denies that Bowmans was conflicted in being mandated to deal with the applicant's disciplinary proceedings. None of this was disputed by the applicant in reply.
51. The applicant has in my view misapprehended the concept of disqualification conflict of interest. A conflict of interest arises and disqualifies legal practitioners from acting in a matter where they have competing interests of such a nature as to compromise the ability to act impartially or in the best interest of their client. The law requires an actual conflict of interest, not a notional one.⁶ The existence of a conflict of interest disqualifying a legal practitioner from acting for a client in a particular matter is also a fact specific enquiry. Merely alleging a conflict of interest, as the applicant has done, does not suffice. Furthermore, it is generally speaking the potentially prejudiced client

⁶ Knoop and Another NNO v Gupta (Tayob Intervening) 2021 (3) SA 88 (SCA) at para 142.

that is entitled to rely on and seek the disqualification of a legal practitioner based on an actual conflict of interest. In this application, PRASA has emphatically denied that there was any conflict of interest in Bowmans representing it in the applicant's disciplinary proceedings.

52. No sustainable factual basis has been advanced which demonstrates that the National Treasury's appointment of Bowmans to investigate procurement contracts at PRASA, compromised the ability of Bowmans to act impartially or in the best interest of PRASA when dealing with the applicant's individual disciplinary proceedings. There is furthermore no factual basis established by the applicant which suggests that any individual attorney employed by Bowmans or counsel instructed by Bowmans, had any personal or financial interest in the applicant's disciplinary proceedings which affected their professional judgment.
53. The applicant has not established a factual foundation for his allegations, in correspondence attached to his founding affidavit, that Advocate Boyce and Advocate Cassim SC acted improperly or unethically in the course of the disciplinary proceedings. Not only were these specific allegations and additional allegations by the applicant of "gross dishonesty" by PRASA factually unsupported, they were entirely jettisoned by counsel for the applicant in his written and oral argument. No apology or explanation was proffered for why the applicant had made such serious allegations in the first place and then later not sought to substantiate or rely on them.
54. The applicant's conflict of interest point in relation to Bowmans, is in my view entirely without merit. Having effectively abandoned conflict of interest by Bowmans as a ground vitiating the disciplinary proceedings, the applicant's focus then shifted entirely to a different line of attack. It was now contended by the applicant, in his supplementary founding affidavit, that by virtue of a certain report by the Auditor-General of South Africa ("the Auditor-General") relating to PRASA, the appointment of the persons who constituted his disciplinary hearing was unlawful and improper and that consequently, his dismissal was a nullity.

55. To his supplementary founding affidavit and in support of this ground of alleged nullity of the disciplinary proceedings, the applicant annexed a grand total of two pages extracted from a 2016/17 Annual Report by the Auditor-General on PRASA (“the Auditor-General’s report”). The first page is the cover sheet. The applicant relies entirely on the second page of the report, where under the heading, “Report on audit of compliance with legislation”, the following is stated:

“Expenditure Management

34. Effective steps were not taken to prevent irregular, and fruitless and wasteful expenditure, as required by section 51(1)(b)(ii) of the PFMA. The expenditure mainly resulted from non-compliance with legislative prescripts and entity policies. The irregular and fruitless and wasteful expenditure disclosed in notes 42 and 41 does not reflect the full extent of the fruitless and wasteful expenditure incurred as indicated in the basis for qualification paragraphs.

Procurement and contract management

35. Goods, works and service were not procured through a procurement process which is fair, equitable, transparent and cost effective, as required by section 51(1)(a)(iii) of the PFMA and Section 217 of the Constitution of the Republic of South Africa. This included instances where:

- supply chain management processes were not followed when procuring services from suppliers
- professional services were sourced from a panel that did not comply with the requirements of PRASA’s supply chain management policy

- contracts were issued in excess of the contract period stipulated on PRASA supply chain management policy
- payments were made to contractors without a valid contract
- contracts were awarded to suppliers based on deviations that were not recorded and approved by the delegated authority
- some deviations from the supply chain management polict were approved by the delegated..." (sentence incomplete)

56. It is on this tenuous basis of a single page extracted from the Auditor-General's report, that an argument is advanced by the applicant that the findings of the Auditor-General set out above, have the effect of rendering the composition of the disciplinary panel and the applicant's dismissal, unlawful and invalid. The applicant further submits that these findings of the Auditor-General remain binding unless reviewed and set aside and that neither PRASA or Bowmans have sought to challenge the findings made by the Auditor-General. The applicant's counsel in this respect spent a considerable portion of his written and oral argument on inter-alia submissions relating to the constitutional powers afforded to the Auditor-General under section 188 of the Constitution and the statutory duties of that office in terms of the Public Audit Act 25 of 2004.

57. The immediate and obvious difficulty is that the extracts of the Auditor-General's report which the applicant relies on, make no mention at all of the appointment of Bowmans or the appointments and proceedings of the applicant's disciplinary hearing. Counsel for the applicant was driven to accept, as he had to, that this was so. The submission advanced on behalf of the applicant, however, was that while it was true that the Auditor-General had not mentioned those who constituted the applicant's disciplinary hearing as service

providers or suppliers that were procured unlawfully, the Auditor-General had not excluded them either.

58. Thus, by virtue of Bowmans, Advocate Boyce and Advocate Cassim SC not being expressly excluded by the Auditor-General in his report, or so the argument went, they were included in the report. Their very exclusion in fact meant inclusion.
59. The argument flies in the face of logic and ordinary common sense. It is unclear on what possible legal or factual basis the invalidity of a specific procurement process or service provider's appointment by PRASA, arises as a consequence of being included in generalised statements in the Auditor-General's report solely because such a procurement or service provider has not been expressly excluded from the said report. Nor does there appear to me to be any genuinely arguable answer by the applicant to PRASA's retort that the Auditor-General's report was never challenged by Bowmans precisely because it never mentions Bowmans or the applicant's disciplinary proceedings.
60. I reject as wholly without merit and untenable, the applicant's contentions that the disciplinary proceedings and his dismissal were unlawful as a consequence of the Auditor-General's report.
61. I am of the view that the applicant has in any event failed to establish any sustainable basis to reject the evidence of PRASA and Mr. Dingiswayo that Bowmans, the chairperson and the initiator of the disciplinary hearing were properly appointed. Mr. Dingiswayo explains in his affidavit that Bowmans was placed on a database of attorneys that were service providers to PRASA, that he instructed Ms. Keshni Naicker, an attorney at Bowmans, to deal with the applicant's matter on behalf of PRASA and that Bowmans was acting on a duly authorized mandate sanctioned by the then Group CEO and himself.
62. Mr. Dingiswayo further confirms that it was PRASA who decided that Advocate Boyce and Advocate Cassim SC should be appointed and that they were properly appointed following the steps ordinarily followed by PRASA at the time

to procure these services. The contents of Mr. Dingiswayo's affidavit were confirmed by Ms. Naicker, who set out in detail the engagements between herself, Mr Dingiswayo and Mr. Letsoalo, the then Group CEO of PRASA, relating to Bowmans' instructions on the matter of the applicant's disciplinary hearing.

63. Save for generalized and in my judgment largely irrelevant criticism relating inter-alia to the late filing of Mr. Dingiswayo's affidavit, the contents of Mr. Dingiswayo's and Ms. Naicker's affidavits were not disputed by the applicant in any meaningful degree. These being motion proceedings, I am of the view that there is no basis to dismiss the versions of PRASA, Mr. Dingiswayo or Ms. Naicker regarding the lawfulness of the appointment of Bowmans, the chairperson and initiator of the disciplinary proceedings, as being either far-fetched or untenable. The applicant's challenge to the legality of the appointment of Bowmans, the chairperson and the initiator of his disciplinary hearing, is without merit.
64. No infringement of rights or existing right has in my view been established to justify the applicant being granted declaratory relief on the grounds of unlawful and/or improper appointment of the persons who constituted his disciplinary hearing. The relief sought in prayers (c), (d) and (e) of the applicant's notice of motion fails.

The ultra vires and failure to give written notice of termination grounds

65. The applicant alleges that this dismissal by PRASAA was unlawful on three further bases. The first is that the chairperson allegedly acted outside of his mandate as set out in his letter of appointment and terms of reference. The second basis is alleged to be that PRASA had no power or right to outsource or delegate to the chairperson, the power to discipline and dismiss the applicant. Thirdly, the applicant contends that his dismissal was unlawful because he was not given written notice of termination of his employment by PRASA. On these bases, the applicant founds prayer (e) of his notice of motion, which seeks inter-alia an order that his contract of employment "...was never terminated"

and consequential orders that the applicant is entitled to return to his workplace immediately and paid his salary retrospectively, including all increments effected since his dismissal.

66. The applicant's challenge on these grounds is in my judgment dead on arrival irrespective of the merits of the contentions advanced by him, for the first time in reply, relating to specific clauses of his contract of employment and the chairperson's terms of reference. The reason for this is that having tied his case to being one for declaratory relief as opposed to review relief, the difficulty for the applicant is that because his dismissal has not been set aside, it must be found to be valid and legally effective. That is the effect of the principle established in *Oudekraal*, which holds that administrative decisions, whether lawful or not, stand until reviewed and set aside.⁷
67. The granting of declaratory relief in terms of section 21(1) of the Superior Courts Act requires the applicant to demonstrate in the first place the existence of an existing, future or contingent right. The applicant does not dispute the fact that the chairperson's sanction finding made it crystal clear that the applicant was dismissed on one month's notice with the effective date of the dismissal being 10 April 2017. The statement by the applicant in his founding affidavit that his contract of employment was "never terminated" is simply inconsistent with the facts and his own version, which is that he was unlawfully dismissed.
68. However, even if the applicant had been unlawfully dismissed, which is far from clear and has not been established in this application, it is the very consequence of the *Oudekraal* principle that even an unlawful administrative act is capable of producing valid consequences for as long as the unlawful act is not set aside.⁸ The applicant's employment has not been reinstated by any order of the CCMA or the Labour Court, these being the specialist tribunals established to determine the lawfulness of dismissal.

⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

⁸ *Oudekraal* at para 126.

69. The applicant has therefore failed to establish the existence of a valid contract of employment giving rise to an existing right capable of being determined in the form of declaratory relief. This conclusion is fatal to the relief sought for a declaration that the applicant's contract of employment was never terminated.
70. Having reached this finding, it is in my view unnecessary to consider the merits of the further grounds advanced by the applicant relating to alleged *ultra vires* conduct by the chairperson and alleged failure to provide the applicant with written notice of termination of his employment. The declaratory relief sought in prayer (e) of the applicant's notice of motion fails fundamentally at its first hurdle, the presence of an existing right, which is a necessary pre-condition for the exercise of the court's discretion to grant or refuse declaratory relief.

Conclusion

71. The application is dismissed with costs.

S G MAGARDIE
Acting Judge of the High Court
Western Cape Division

Appearances:

For the applicant: Mr. K Lingani
Instructed by: Lingani & Partners

For the first, second and third respondents: Adv L Ackerman
Instructed by: Bowman Gilfillan Inc

Date of hearing: 13 June 2024
Date of judgment: 18 February 2025