



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

Case Number: 17671/2023

In the matter between:

MKHUSELI MICHAEL MATAKATA

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

First Respondent

PRASA BOARD

Second Respondent

HISHAAM EMERAN

Third Respondent

**JUDGMENT DATED 31 JULY 2025
APPLICATION FOR LEAVE TO APPEAL**

MAGARDIE AJ

1. The applicant applies for leave to appeal against the whole of the judgment and the order of this court in *Matakata v Passenger Rail Agency of South Africa*

(PRASA) and Others (17671/2023) [2025] ZAWCHC 52 (18 February 2025) (“the principal judgment”). The principal judgment dismissed with costs an application for declaratory orders sought by the applicant in the following terms:

- 1.1 “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;
 - 1.2 the proceedings of the disciplinary hearing were, as such, vitiated and accordingly invalid;
 - 1.3 the result of the said disciplinary hearing was equally vitiated and accordingly invalid;
 - 1.4 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.”
2. The application for leave to appeal sets out various grounds on which the applicant contends that an appeal against the principal judgment has reasonable prospects of success. In the alternative, the applicant contends that there are compelling reasons why an appeal should be heard. The main grounds of appeal, insofar as it has been possible to distill them from the application for leave to appeal, are essentially three-fold. Firstly, the applicant contends that the court erred and misdirected itself by failing to address all the grounds of attack advanced by the applicant in relation to his purported dismissal by the first respondent (“PRASA”). Underpinning this ground of appeal is a contention by the applicant that the court erred in its findings regarding the application of the *Oudekraal* principle in relation to the termination of the applicant’s employment with PRASA.
3. Secondly, the applicant contends that based on the common cause facts, an appeal court would reasonably confirm or declare that the applicant’s employment was never terminated. Thirdly, the applicant contends that the

court erred and misdirected itself in rejecting the applicant's ground of attack in relation to alleged unlawful procurement of the professional services of the persons who constituted his disciplinary hearing.

4. The principal judgment sets out the factual background in some detail. No useful purpose would be served by unduly rehashing it again. Suffice to say that the applicant was the former Head: Corporate Security at PRASA. On 10 April 2017 he was dismissed for misconduct pursuant to a disciplinary hearing. The disciplinary hearing chairperson and the initiator / employer's representative at the disciplinary hearing were advocates from the Johannesburg Bar briefed by PRASA's attorneys, Bowmans, on the instructions of PRASA. The applicant contends on various grounds that the appointment of the persons who constituted the disciplinary hearing and the disciplinary proceedings were unlawful and invalid. The key issue to be determined was whether the applicant had established the requirements for declaratory relief in terms of section 21(1)(c) of the Superior Courts Act 10 of 2013 ("Superior Courts Act"). That section provides that a court may "...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."
5. The applicant's cause of action in the main application was limited to declaratory relief. This is an important consideration when deciding whether an appeal against the principal judgment has any reasonable prospects of success. As set out in the principal judgment, the applicant eschewed any reliance on judicial review either as his cause of action or the remedy being sought in the application. He stated that he did not seek to review the decision by PRASA to appoint the persons who constituted the disciplinary hearing. Nor, according to the applicant, was he reviewing the chairperson's decision-making process in relation to his dismissal.
6. According to the applicant, the true nature of the relief sought in the application, was a declaratory order. Consequently, so went the applicant's argument, there were no time constraints imposed upon him as to when he should have brought

his application, as would have been the case in a review based on either the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") or the principle of legality.

7. The lengthy history of the litigation instituted by the applicant against PRASA which followed his dismissal on 10 April 2017 is set out in detail in the principal judgment. That litigation involved various applications by the applicant in the Commission for Conciliation, Mediation and Arbitration ("CCMA"), four applications in the Labour Court, an application for direct access to the Constitutional Court and applications to this Court firstly for interim interdictory relief and thereafter the declaratory orders which resulted in the principal judgment. Counsel for the applicant submitted that the litigation background was common cause and unnecessarily included in the principal judgment. The train of events and the applicant's conduct of his litigation against PRASA speaks for itself. I fail to see why that litigation background would not be relevant. The granting of declaratory orders in terms of section 21(1)(c) of the Superior Courts Act is a discretionary remedy. That the applicant seeks an order effectively re-instating his employment in a position from which he was dismissed approximately 8 years ago and which dismissal has not been set aside by the Labour Court or the CCMA, is a factor relevant to the exercise of that discretion. So too are the uniformly failed outcomes of the plethora of applications by the applicant in relation to his dismissal on 10 April 2017 and the findings of the various courts and bodies which dealt with those applications.
8. I shall deal first with the ground of appeal advanced on the basis that the court erred in dismissing the applicant's ground of attack that the persons appointed to constitute the disciplinary hearing which found him guilty of misconduct, were improperly and/or unlawfully appointed. There were two foundations to the applicant's argument in this regard. The first was that Bowmans, PRASA's attorneys, were by virtue of conflict of interest disqualified from conducting the applicant's disciplinary hearing.

9. The second was that the disciplinary hearing proceedings were unlawful and invalid on the basis of certain findings made by the Auditor-General in his 2016/2017 Annual Report on PRASA. The principal judgment sets out the reasoning for the court's rejection of the applicant's various contentions in his founding affidavit that Bowmans were by virtue of conflict of interest disqualified from conducting his disciplinary hearing. The applicant's contentions in this regard and his unfounded allegations in relation to the legal practitioners concerned, were found to be devoid of factual substance and singularly lacking in merit. I am not persuaded that a court of appeal would find otherwise. In any event, none of these findings are challenged in the application for leave to appeal.
10. As to the second foundation for the applicant's improper and/or unlawful appointment challenge to the disciplinary proceedings, the applicant in his supplementary answering affidavit contended that by virtue of the Auditor-General's 2016/2017 Report on PRASA ("the Auditor-General's report"), the appointment of the persons who constituted his disciplinary hearing was unlawful and improper and that consequently, his dismissal was a nullity. In support of this ground of alleged nullity of the disciplinary proceeding, the applicant annexed to his affidavit certain extracts from the Auditor-General's report. The said extracts amounted to a total of two pages. That included the report's covering page.
11. Under the heading, "Report on audit of compliance with legislation", the Auditor-General's report stated in relation to PRASA that "...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, 1996. This included instances where:....*professional services were sourced from a panel that did not comply with the requirements of PRASA's supply chain management policy.*" It was in reliance on this italicized statement and apparent finding in the Auditor-General's report, that the applicant argued that its effect was to render the composition of the disciplinary panel and his consequent dismissal, unlawful and invalid.

12. The extracts of the Auditor-General's report which the applicant relies on make no mention of the appointment of Bowmans to the panel referred to in the report. The report does not refer to the appointments of persons to the proceedings of the applicant's disciplinary hearing. That much is obvious. Mr. Mtshemla, counsel for the applicant, however argued that the Auditor-General's report need not have done so. It was not necessary for the Auditor-General, counsel submitted, to have mentioned by name each and every supplier / service provider to which his findings related. According to the applicant's application for leave to appeal, this was "...because they were all and collectively included by virtue of being in a panel for the period affected by the AG report." Unlawfulness and invalidity of their appointment was thus visited on these suppliers or service providers not because they were included and referred to in the Auditor-General's report. On the contrary, says the applicant. It was because those service providers, including those who constituted his disciplinary hearing were not specifically excluded from the Auditor-General's report, that were in fact included in the report.
13. I have dealt with this argument in some detail in the principal judgment. It is untenable and has no merit. The applicant disagrees. In his application for leave to appeal, the court's findings in this regard are described as being "*constitutionally and statutorily (sic) perverse*". I leave aside for a moment the appropriateness of that description. There are in my view no reasonable prospects of another court concluding that persons who rendered professional services to PRASA during the period covered by the Auditor-General's report, did so unlawfully because although they were not specifically mentioned in the report, they were somehow impliedly included and hence subject to its adverse findings by implication. The applicant sought to buttress this novel argument by reliance on the interpretive maxim *inclusio unius est exclusio alterius* (the specific inclusion of one implies the exclusion of the other). The maxim does not apply conversely. It does not mean the specific exclusion of one implies the inclusion of the other. The interpretation of the Auditor's General's report contended for by the applicant turns this common sense rule of interpretation on its head.

14. Nor for that matter am I persuaded that there are any reasonable prospects of a court of appeal rejecting the undisputed evidence of PRASA that the chairperson and the initiator of the disciplinary hearing were in fact properly and lawfully appointed in accordance with PRASA's internal procurement procedures and that Bowmans was acting on a duly authorized mandate sanctioned by the then Group CEO of PRASA. No sustainable factual or legal basis was established by the applicant that the appointment of the persons who constituted his disciplinary hearing breached section 217 of the Constitution, PRASA's procurement policy was unlawful and invalid. There was consequently no basis for a declaratory order to that effect. There are in my view no reasonable prospects of a court of appeal granting the declaration sought in paragraph (c) of the applicant's amended notice of motion and the consequential orders sought in paragraphs (d) and (e) thereof.
15. The applicant set great store in a ground of appeal based on the contention that the court erred in failing to deal with all his grounds of attack and in its reliance on the principle established in *Oudekraal*.¹ In prayer (f) of his amended notice of motion, the applicant sought a declaratory order that "...*the Applicant's contract of employment was never terminated as such, has (sic) a right to return to his workplace immediately upon the grant of this order and to be paid his salary retrospectively, which shall include all increments effected since his purported dismissal.*" The applicant's grounds of attack in support of this relief, advanced for the first time in a supplementary replying affidavit, were that his dismissal by PRASA was unlawful on three further bases. The first was that the chairperson allegedly acted outside of his mandate as set out in his letter of appointment and terms of reference. The second was 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 alleged that his dismissal was unlawful because he was not given written notice of termination of his employment by PRASA.

¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA).

16. The main judgment held that having tied his case to being one for declaratory relief as opposed to review relief, the effect of the *Oudekraal* principle was that because his dismissal had not been set aside, it must be found to be valid and legally effective. The court further concluded that the applicant had failed to establish the presence of an existing right in respect of the relief sought in prayer (e) of his amended notice of motion, that being a necessary precondition for the exercise of the court's discretion to grant or refuse declaratory relief. Having failed fundamentally at this first hurdle, the court concluded that it was 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.
17. The applicant submits that the *Oudekraal* principle finds no application in the matter at hand and relies on various authorities which have concluded that the dismissal of a public servant does not constitute administrative action reviewable in terms of PAJA.² On this basis, the applicant contends that the court erred in failing to determine the merits of his alternative challenges to the lawfulness of his dismissal. The argument is without merit. Firstly, this was not an application for judicial review in which it is generally advisable for a court to deal with all the grounds of review advanced by a litigant seeking to impugn unlawful administrative action. Secondly, the applicant in any event failed to establish that there was a valid contract of employment giving rise to an existing right capable of being determined by declaratory relief. The declaratory order sought in paragraph (f) of the applicant's amended notice of motion was one for an order that his contract of employment was "never terminated". But it was. It was terminated by the chairperson of the disciplinary hearing on 10 April 2017 in his sanction finding. The applicant has not been re-instated by any order of the Labour Court or the CCMA and his dismissal has not been set aside.

² For example, the judgment of the Labour Appeal Court in *Public Servants Association of South Africa obo De Bruyn v Minister of Safety and Security and Another* (JA91/09) [2012] ZALAC 14; [2012] 9 BLLR 888 (LAC); (2012) 33 ILJ 1822 (LAC) (15 May 2012).

18. The declaratory order sought by the applicant that his contract of employment was never terminated and that as such he has the right to return to his workplace, is inconsistent with reality and the established common cause facts. The applicant referred an unfair dismissal dispute to the CCMA on 9 March 2017. This was the very day that he received his sanction of dismissal from the chairperson of the disciplinary hearing. He litigated repeatedly in the CCMA and the Labour Court on the basis that he had been unfairly dismissed by PRASA. The applicant's employment had in fact been terminated by PRASA and he knew it.
19. The test for leave to appeal is set out in section 17(1)(a) read with section 17(1)(b) of the Superior Courts Act. It is whether proper grounds have been established that there is a reasonable chance of an appeal succeeding or whether there is some other compelling reason why an appeal should be heard. This application establishes neither.

Order

20. The application for leave to appeal is dismissed with costs.

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