



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

JUDGMENT

Reportable

Case no: 2025-155065

In the matter between:

**PHUHLANI BAFAZI CONSTRUCTION (PTY) LTD
t/a CHUMA SECURITY SERVICES**

Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA LTD

First Respondent

**THE CHAIRPERSON OF THE BOARD OF THE
PASSENGER RAIL AGENCY OF SOUTH AFRICA**

Second Respondent

**THE GROUP CHIEF EXECUTIVE OFFICER OF
THE PASSENGER RAIL AGENCY OF S AFRICA LTD**

Third Respondent

**SECHABA PROTECTION SERVICES
WESTERN CAPE (PTY) LTD**

Fourth Respondent

**CHIPPA TRAINING ACADEMY CC
t/a CHIPPA PROTECTION SERVICES**

Fifth Respondent

Neutral citation:

Coram: ROUX AJ

Heard: 5 September 2025

Delivered: 1 October 2025

Summary: Pactum de non cedendo, subject to the prior written consent of a contracting party – Does not render an assignment between the other contracting party and a third party invalid – operates inter partes.

Non-variation clause – Does not prevent suspension of the enforcement of the right to resist a verbal assignment.

Arbitration clause – Inapplicable if the arbitrator lacks jurisdiction to determine one or more of the defences raised. Compliance by an organ of state with the legal framework for procurement raises a constitutional issue, and, if applicable, the exercise powers conferred on a court by section 172(1) of the Constitution, all of which fall outside the jurisdiction of an arbitrator.

Invalidity of contract - Alleged failure to comply with legal framework for procurement – General reliance on section 217 of the Constitution is insufficient in the case where the accounting official has given effect to section 217 of the Constitution and the Public Finance Management Act by establishing a lawful procurement system – Party relying on invalidity is required to allege and prove the specific breach of the relevant provision of the procurement system.

Notice of termination – Invalid notice does not preclude a contracting party from relying on a subsequent notice – Validity of notice depends on compliance with legal requirements and may, where applicable, be implied – Averments made in pleadings or affidavits in motion proceedings may constitute a valid notice.

Legitimate expectation to be heard – Where contractual rights are procured in a procurement setting through cession, thereby circumventing an open and public procurement process, the regulation of such rights through a no-cession clause cannot give rise to a legitimate expectation to be heard.

ORDER

- (a) The applicant is entitled to continue rendering services in terms of a month-to-month agreement concluded with PRASA in or about April 2022, on the terms and conditions contained in the master agreement, dated 3 May 2011, and attached to the founding papers under the

abovementioned case number as annexure “**LN1**”, until 30 November 2025.

- (b) The respondent is ordered to pay 50% of the applicant’s costs, including the costs of two counsel, on scale C in respect of the (senior) junior counsel and on scale B in respect of junior counsel.

JUDGMENT

ROUX AJ:

A. INTRODUCTION

- [1] The applicant seeks interim interdictory relief on the premise that the first respondent, being the Passenger Rail Agency of South Africa Ltd (“PRASA”) unlawfully terminated the parties’ contract. It is contended that, as a consequence, the applicant’s entire business, including the positions of its 329 employees, is placed at risk. PRASA disputes that the applicant has any prima facie or clear contractual right. It contends that the applicant is not without an alternative remedy, asserting its entitlement to claim damages, and further disputes that the balance of convenience favours the grant of the interim relief sought by the applicant.

- [2] The applicant, Phuhlani Bafazi Construction (Pty) Ltd trading as Chuma Security Services (hereinafter referred to as “**Phuhlani**”), is a private company duly registered in 2017. The second and third respondents are, respectively, the chairperson of the board and the CEO of PRASA. The fourth and fifth respondents are other security service providers engaged in the relevant sector.

B. BACKGROUND FACTS AND CIRCUMSTANCES

- [3] It is common cause that PRASA and High Goals Investments CC, which traded as Chuma Security Services (hereinafter referred to as “**High Goals**”), in 2011 concluded a written agreement in terms whereof High Goals t/a Chuma rendered security services to PRASA for a period of one year (“**the**

master agreement").¹ It is further common cause that from time to time the master agreement was extended in writing and continued to operate on a month-to-month basis on the same terms and conditions (hereinafter referred to as "**the extended master agreement**").²

- [4] Unfortunately for High Goals its commercial fortunes took a turn for the worse and it was finally wound up on 20 January 2021.
- [5] The liquidators proceeded to realise the value in the extended master agreement by 'selling'³ it to Phuhlandi. In terms of the sale agreement Phuhlandi purchased the business assets and name⁴ of High Goals, which assets included the agreement described as the "current month to month service agreement with PRASA", which was expressly stated to be subject to clause 5 thereof (hereinafter referred to as "**the sale agreement**"). Clause 5 of the sale agreement provides that the service agreement between High Goals and PRASA has expired and is operating on a month-to-month basis. It is also expressly recorded that Phuhlandi accepted the risk that the said agreement might not be continued. The liquidators, for their part, expressly disclaimed the ability to give any guarantee in that regard.
- [6] The sale agreement was concluded on 14 April 2022. On 25 April 2022 Phuhlandi, acting through its managing director Ms Ngcwangu, purported to notify PRASA's Western Cape regional manager, Mr Maseko, that it had acquired the business of Chuma t/a Security through a sale agreement, which was alleged to have been attached to the email. The notice was directed to the email address r[...]. The said email address is inconsistent with the email address subsequently employed for communication with Mr Maseko, namely R[...], which issue will be addressed hereinbelow.⁵
- [7] It is explained that the purported notification was intended to ensure the continuity of High Goals' ongoing operations. It is alleged that following the purported notification Phuhlandi continued to render security services under the

¹ Para 42-43 of founding papers.

² See footnote 1 above.

³ Properly characterised, the rights arising from the agreement were ceded for value.

⁴ That is the name 'Chuma Security Services'.

⁵ See annexures LN5, 6, 7 and 14 attached to the founding papers.

master agreement, thereby ensuring continuity of employment and uninterrupted protection of PRASA's infrastructure.⁶ In the circumstances it appears that the liquidators of High Goals continued to render services under the master agreement until Phuhlangi purported to step into the shoes of High Goals through the purported assignment of the extended master agreement.

- [8] Phuhlangi continued to render the services in question at various sites until 1 September 2025, when, at the instance of PRASA, employees of the fourth and fifth respondents were deployed to those sites, thereby displacing and excluding the employees of Phuhlangi from performing their duties.
- [9] The said displacement was preceded by a purported notice of termination, sent by PRASA to Phuhlangi on 29 August 2025 at 16h31, in which Phuhlangi was directed to vacate and handover all PRASA sites. In the said notice it was asserted that no lawful legal relationship existed between PRASA and Phuhlangi. It was alleged that Phuhlangi was unlawfully passing itself off as High Goals, and that the said conduct also constituted a contravention of section 217 of the Constitution of South Africa, as well as the supply chain management policies of PRASA. The notice thus served as the formal precursor to the displacement, framing PRASA's rationale for excluding Phuhlangi's employees from the sites.
- [10] Phuhlangi ultimately seeks the review and setting aside of PRASA's decision to terminate the services of Phuhlangi's by means of the said notice. For purposes of the present application, it seeks interim relief pending the review of the purported notice of termination, in the form of a declaratory order to the effect that Phuhlangi is entitled to continue rendering services on the same terms and conditions previously contracted for, as well as an order suspending the appointment of any other security service provider to perform such services.

C. LEGAL REQUIREMENTS

⁶ Para 52-53 of the founding papers.

- [11] It is trite that in order for Phuhlani to be successful it must establish a prima facie right – though open to some doubt – a reasonable apprehension of irreparable harm to the right if the interdict is not granted, that the balance of convenience favours the granting of interim relief, and the absence of another satisfactory remedy. The stronger the right is, the less need there is for the balance of convenience to be considered. The Court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is.
- [12] The proper approach in determining whether to grant an interim interdict is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial (or, in the present matter, on the date when final relief is sought: Erasmus *op cit* at E8-10; *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D-E). The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, it cannot succeed. It is not necessary for an urgent court to make a final determination on the legal issues.⁷
- [13] The main dispute in the matter relates to the question whether Phuhlani has established a contractual right enforceable against PRASA for the rendering of security services.

D. CONTRACTUAL RIGHT AND THE DEFENCES THERETO

- [14] In its founding papers, Phuhlani pinned its colours to the mast of the tacit assignment of the extended master agreement entered into between PRASA and High Goals. It is expressly alleged that PRASA from time to time issued extension letters to High Goals pursuant to which it continued to render security services to PRASA on the same terms and conditions, that is the same terms and conditions contained in the master agreement. In the

⁷ Ezaga Holdings (Pty) Ltd v National Student Financial Aid Scheme Coinvest Africa (Pty) Ltd and Others [2024] ZAWCHC 190

circumstances, the sale agreement purported to assign the rights and obligations contained in the extended master agreement to Phuhlangi.

- [15] Phuhlangi asserts that it notified PRASA of the said assignment. Thereafter, for a period of about three years, it rendered the same security services previously provided by High Goals, and claimed and received payment for those services. On this basis, it is contended, a tacit assignment of the extended master agreement was effected.
- [16] PRASA denies that Phuhlangi acquired any rights under the extended master agreement. In advancing the said denial, it relies on a number of provisions contained in the master agreement.
- [17] First, the master agreement contains a pactum de non cedendo (“the no-cession clause”). The language is clear – it provides that High Goals shall not cede, delegate or assign any of its rights and/or obligations under the agreement to any third party without the prior full written consent of PRASA, which consent may be withheld for any reason whatsoever.
- [18] Second, the master agreement provides that in the event that High Goals is liquidated PRASA shall be entitled, without notice, to cancel the agreement (“the cancellation clause”).
- [19] Third, the master agreement contains a standard non-variation clause.
- [20] Fourth, the Master agreement contains a standard arbitration clause.
- [21] PRASA also contends that the tacit agreement upon which Phuhlangi seeks to
- [22] rely is invalid and unenforceable, as it was not concluded in compliance with section 217 of the Constitution, the applicable public procurement legislation, nor with PRASA’s own supply chain management policies.

E. THE NO-CESSION CLAUSE

- [23] PRASA, invoking the no-cession clause, asserts that the sale agreement is invalid on the basis that it was concluded in breach of the no-cession clause. The said contention is legally unsustainable. It rests on the fundamentally flawed premise that a clause inserted exclusively for PRASA's own benefit — prohibiting cession without its prior written consent — has the legal effect of rendering void and of no force and effect any agreement of cession concluded between High Goals and a third party.
- [24] The said approach is inconsistent with the doctrine of contractual privity. It is trite that, as a general rule, a contract cannot confer rights or impose obligations on any person - except the parties to it. As such, third parties cannot sue or be sued on contracts to which they were not privy to.⁸ The said rule of contract law has many exceptions, one of which is cession.
- [25] That means, as between the parties to the master agreement, the rights procured by High Goals are not transferable through cession, that is a third party cannot through cession step into the shoes of High Goals, in its capacity as a contracting party to the master agreement, unless the jurisdictional requirement is met, being prior written consent.⁹
- [26] In addition, notwithstanding the absence of prior written consent, PRASA is also free to waive¹⁰ or suspend its right to insist upon prior written consent. In the case of a waiver the no-cession clause shall have no effect - in the case of a suspension, it shall have no effect for the duration of such suspension.¹¹
- [27] Accordingly, unless the jurisdictional requirements are met or PRASA otherwise elects not to exercise its said contractual right, the contractual right precluding cession operates only inter partes, that is between the contracting parties to the (extended) master agreement and not against third parties insofar as they contract independently or separately with one of the parties to the (extended) master agreement. The rights created in terms of the

⁸ Christie's, *The Law of South Africa*, 7th Edition, at p. 302.

⁹ *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 C; *Born Free Investments 364 (Pty) Ltd v Firstrand Bank Ltd* 2014 (2) All SA 127 SCA.

¹⁰ In terms of clause 39.1 it is required that any waiver be recorded in writing and signed by the parties.

¹¹ See the case law referred to hereinbelow under the heading 'pactum de non petendo'.

(extended) master agreement cannot be enforced against such third party in relation to a separate contract, as it was not privy to the (extended) master agreement. Simply put, the creation of personal contractual rights between A and B, cannot bind C, unless one of the exceptions to the doctrine of contractual privity is applicable.

[28] Cession constitutes an exception to the said rule for the reason that it has the legal effect of substituting one party with another. It is this act of stepping into the shoes of a contracting party that allows for the relaxation of the rule of contractual privity. Through the said act, the third party becomes privy to the contract, and therefore becomes bound to the rights and obligations created through such contract. Accordingly, it is the third party's act of enforcement of the rights purportedly ceded – against the holder of the right precluding cession without its prior written consent – which brings the two within the range of contractual privity. It is in this contractual setting that the holder of the said right is entitled to resist the enforcement of any of the rights purportedly ceded on the basis that, as between the parties to the said contract, such rights are incapable of cession, unless the jurisdictional requirements for their valid cession have been met or has been waived or the protection afforded against cession has been suspended by agreement.

[29] In the circumstances, the agreement of sale is not rendered invalid or of no force and effect, as contended for by PRASA. The no-cession clause does not constitute a public prohibition against cession as if it has legislative effect. The characterisation of rights as non-transferable simply means that such rights are non-transferable as between the parties to the contract. That does not mean that the liquidators of High Goals, who by operation of law stepped into the shoes of High Goals, cannot enter into a lawful contract in terms whereof it undertakes to cede the rights of High Goals, procured under the master agreement, to a third party such as Phuhlani.

[30] The law of contract acknowledges many instances where party A contracts with party B on the basis that B's performance owed to A would involve B having to buy something from a third party called C. For instance, B may sell C's property to A notwithstanding the fact that B has no right to sell C's

property. If B proceeds to enter into such an agreement with A's knowledge, on the basis that he undertakes to acquire C's property or to obtain the right to sell it to A, such an agreement would be perfectly valid. (See: **SA Mohair Brokers v Louw and Others** 2011 JOL 27450 (SCA) at para. 6 thereof.) The fact that A contracts with B on the basis that B will have to enter into some or other agreement with C is of no concern to A. It does not affect their consensus. Their consensus is that B will deliver the property to A. In this context, the reasoning of the Appellate Division in the matter of **Frye's (Pty) Ltd v Ries** 1957 (3) AD 575 at p. 581 B is illuminating:

“Furthermore, it matters little whether things are one's own or belong to others, insofar as the seller is put under obligation to buy up such property in the other person's hands and to make it good, unless it prefers to have judgment given against him for damages if he has knowingly sold the property of another ...”

- [31] Having regard to the aforesaid, it is clear that there is no principle of law which prevent parties from contracting in relation to the property of another¹², thereby contemplating some further agreement by one of the parties with the owner of the property. There is no conceivable reason why the said principle should not be equally applicable to the cession of rights for value or otherwise.
- [32] In the present matter the liquidators of High Goals expressly contracted on the basis that it could give no guarantee that the extended master agreement would be continued. Hence, the parties expressly regulated the risk of non-continuance, which - in the absence of any admissible evidence - means that Phuhlani agreed to bear all such risks, including PRASA's potential reliance on the no-cession clause. There are many legitimate business reasons for undertaking such a risk, one of which may be that Phuhlani felt confident that it could persuade PRASA to waive the said right of non-transferability or to agree to its suspension.
- [33] In the circumstances, PRASA's defence premised on the alleged invalidity of the sale agreement must fail. However, insofar as Phuhlani purports to

¹² The general principle is self-evidently subject to all the ordinary exceptions which vitiate consensus.

enforce the cession embodied in the sale agreement against PRASA, it is fully entitled to resist such enforcement through reliance on the no-cession clause.

[34] It is common cause that Phuhlandi has failed to establish that the jurisdictional requirement for a valid cession has been met – that is (full) prior written consent.

[35] In an attempt to avoid the reach of the no-cession clause Phuhlandi, in a note filed after the hearing, contended that the extended master agreement constituted a new agreement and not an extension of the master agreement. It further contended that the allegations made in the founding papers to the effect that Phuhlandi rendered services pursuant to the master agreement constituted concessions of law made in error which are not binding on the Court.

[36] The said contentions do not address the common cause facts that High Goals rendered services to PRASA on the same terms and conditions contained in the master agreement. The fact that a new agreement or multiple new agreements were concluded through each extension does not detract from the said fact.

[37] Accordingly, PRASA is fully entitled to rely on the terms of the extended master agreement to dispute that Phuhlandi acquired any right enforceable against PRASA under the extended master agreement through the sale agreement and the cession contained therein, unless Phuhlandi was able to overcome the barrier created by the no-cession clause.

F. PACTUM DE NON PETENDO

[38] Phuhlandi attempted to do so by relying on a tacit contract on the following facts and circumstances:

- (a) It informed Mr Maseko, the Western Cape regional manager of PRASA on 25 April 2022 that it had purchased High Goals in terms of the sale agreement and that it would continue rendering security

services to PRASA under the trading Chuma (Security Services) and would make available its bank account details for payment. The transmission of the said email was not addressed by PRASA in its answering papers, although the use of the email address r[...] is inconsistent with the email address subsequently employed for communication with Mr Maseko, namely R[...], raising doubts about the effectiveness and receipt thereof. However, the said doubt is dispelled by further evidence.

- (b) In a termination notice addressed to the liquidators of High Goals on 29 August 2025 by Mr Papadopulo, the acting group chief security officer of PRASA, he acknowledged that PRASA had discovered during a routine compliance review in **2022** that Phuhlani was rendering security services to PRASA since **2022** under the alleged 'false pretense' that it was High Goals. Most notably, it was alleged that Phuhlani, acting as such, defrauded PRASA. It was also alleged that the said conduct 'contravened' the no-cession clause. In addition, it was alleged that the rendering of security services by Phuhlani contravened the provisions of section 217 of the Constitution, the applicable legislation and PRASA's supply chain management policies. Consequently, it was asserted that the rendering of the said services did not vest any legal rights in Phuhlani.
- (c) The alleged discovery in **2022** renders the allegations of fraud and 'passing off' incomprehensible. The reference to the year 2022 either constitutes a colossal error on the part of PRASA – which was not corrected -, alternatively PRASA inexplicably failed to appreciate the significance thereof. In this regard Phuhlani continued to render security services to PRASA pursuant to the extended master agreement until the displacement of its employees on 1 September 2025, that is for a period of about three years depending on the exact date of the discovery made in 2022.

- (d) It is self-evident that PRASA's conduct in receiving security services from Phuhlani, in place of High Goals, from the date of discovery in 2022 to 29 August 2025, with full knowledge of the facts concerning the identity of the actual party rendering the services and the party who contractually was obliged to render it, in effect constitutes the substitution of High Goals by Phuhlani, which in turn amounts to the delegation of the obligation to render such services.
- (e) The said delegation must be considered in conjunction with the notices sent by Phuhlani to Mr Nkhuna of PRASA on 27 March 2024 and 3 April 2024 respectively. In the said notices it was made clear that payment was requested to be made into Phuhlani's bank account.
- (f) In addition, the liquidators of High Goals on 30 August 2024 addressed an email to Mr Papadopulo, in terms whereof it informed PRASA that Phuhlani had purchased the business of High Goals¹³ and requested that all payments for the rendering of security services by Phuhlani should be made directly into their bank account.
- (g) The said notice is significant, as it puts the only evidence adduced by PRASA on this issue in perspective. PRASA asserted that the fact that Phuhlani continued to render invoices in the name of High Goals constituted proof that it falsely represented to be High Goals. It attached all the said invoices to its answering papers and on the strength thereof asserted that PRASA did not contract with Phuhlani. However, it is clear that PRASA, for the reasons stated, knew that the services were rendered by Phuhlani. Accordingly, the inferences sought from the fact that invoices were issued in the name of High Goals are inconsistent with PRASA's own direct evidence on the issue.¹⁴ Furthermore, the inferences sought to be drawn are also

¹³ The heading read together with the contents make it clear that the reference to Chuma Security was meant to be a reference to High Goals t/a Chuma.

¹⁴ That it knew since 2022 that Phuhlani was rendering security services to PRASA.

inconsistent with the notices sent to Messrs Nkhuna and Papadopulo. In terms of the said notices, it is clear that Phuhlani, as well as the liquidators, not only informed PRASA that Phuhlani was the person who was claiming payment for the services rendered, but also attempted to correct the error that payments were continued to be made into High Goals' bank account.

- (h) Phuhlani in reply explained the said state of affairs by stating that a certain official of PRASA, one Mr Fusa, informed Mrs Ngcwangu, the managing director of Phuhlani, that it would be difficult to change the particulars on the system and that Phuhlani should in the meantime continue raising invoices in the name of High Goals.¹⁵ It was alleged that Mr Fusa assured Mrs Ngcwangu that the 'Hlophe order'¹⁶ would protect Phuhlani. The said explanation raises serious concerns. However, in the absence of any evidence from PRASA, apart from the attachment of the invoices, Phuhlani's explanation for the raising of invoices in the name of High Goals has to be accepted. Accordingly, on the papers PRASA made payment to High Goals for the security services rendered by Phuhlani, which is consistent with the cession of the right to payment in terms of the extended master agreement.
- (i) It is important to bear in mind that Mr Papadopulo, who is the acting head group chief security officer of PRASA deposed to the answering affidavit and did not deal with the notice sent to him by the liquidators. Furthermore, it is clear from Mr Papadopulo's emails attached to the papers that he communicated with Messrs Nkhuna and Fusa on the subject of security services rendered by security service providers who were party to the so-called 'Hlophe order'. Accordingly, the said gentlemen are persons who are required, as part of their duties owed to PRASA, to receive correspondence from Phuhlani.

¹⁵ Par 10.9, where this issue is dealt with in the replying affidavit, is illegible and incomplete. The Court was handed an unsigned copy of the said part of the affidavit, which properly set out Phuhlani's version. The unsigned affidavit was by agreement admitted as evidence.

¹⁶ The background to the said order will be addressed hereinbelow.

[39] In my view, the most probable conclusion from the aforesaid facts and circumstances is that PRASA and Phuhlandi entered into a tacit agreement, in terms whereof Phuhlandi replaced High Goals as the contracting party to the extended master agreement, and, pursuant thereto, rendered security services to PRASA in return for payment (hereinafter referred to as “**the tacit agreement**”).¹⁷ The no-cession clause was clearly intended to operate solely for the benefit of PRASA. PRASA, by entering into the tacit agreement, agreed to suspend the enforcement of the no-cession clause.¹⁸ Such an agreement is not precluded by the non-variation clause, as it does not have the effect of varying the terms of the extended master agreement.¹⁹ It only temporarily suspends PRASA’s right to insist on its prior written consent for any assignment (or cession or delegation). However, PRASA is fully entitled to enforce such right at any time upon reasonable notice.

G. CANCELLATION CLAUSE

[40] PRASA also relies on the cancellation clause. The said clause confers on PRASA the right to cancel the extended master agreement in the event of High Goals’ liquidation. It is common cause that High Goals was liquidated on 20 January 2021. Hence, PRASA acquired the right to cancel the extended master agreement, should it so elect. However, the said election had to be exercised within a reasonable time and, once exercised, PRASA was precluded from altering course - it became legally bound by its election.

[41] PRASA, on its own version, elected to continue with the extended master agreement after High Goals had been finally liquidated. In fact, it opposes the

¹⁷ *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornier Investments (Pty) Ltd* [1984] ZASCA 4; 1984 (3) SA 155 (A);

¹⁸ *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 T; *Kovacs Investments 724 (Pty) Ltd v Marais* 2009 ZASCA 84 para 18 and 21; *Klub Lekkerus/Liebertas v Troye Villa (Pty)* 2011 3 All SA 597 SCA; *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* 2024 ZASCA 107.

¹⁹ The verbal waiver of the no-cession clause, as oppose to a verbal agreement to suspend the enforcement of the right created in terms of the said clause, has the effect of varying the terms of the agreement, which the non-variation clause prevents from having legal effect. Similarly, the reference in the non-variation clause to the suspension of a provision or term is not sufficiently clear or wide to preclude a verbal agreement to suspend the enforcement of a right. In this regard, it is important to bear in mind that non-variation clauses are interpreted restrictively.

matter on the basis that it continued to pay the liquidators for the services purportedly rendered by High Goals. Accordingly, PRASA elected not to cancel the extended master agreement and is bound by its election. Its attempt to cancel the extended master agreement in August 2025 is therefore of no force and effect. For the said reason, the defence based on the cancellation clause must also fail.²⁰

H. THE ARBITRATION CLAUSE

[42] The defence based on the arbitration clause must also be seen in context. First, Phuhlandi is seeking an interim interdict. The arbitration clause does not preclude it from doing so. Clause 35.4 of the master agreement expressly provides that the arbitration clause does not preclude any party from obtaining interim interlocutory and other relief on an urgent basis from a court of competent jurisdiction.

[43] Second, PRASA contends that any tacit contract alleged by Phuhlandi is invalid and unenforceable, as it was concluded in contravention of section 217 of the Constitution, the applicable public procurement legislation, and PRASA's own supply chain management policies. The said issue involves the determination of a constitutional issue. Furthermore, should PRASA be successful with its defence based on invalidity, a court will have to consider the powers conferred on it by section 172(1) of the Constitution. Such powers cannot be exercised by an arbitrator. Accordingly, PRASA's reliance on the arbitration clause is inapplicable – inasmuch as it seeks to enforce an arbitration clause in circumstances where it raises a defence which cannot be decided by an arbitrator.²¹

I. INVALIDITY

²⁰ *Consol Ltd v Twee Jonge Gezellen (Pty) Ltd* 2005 (4) All SA 517 C.

²¹ *Fleet Africa (Pty) Ltd v Polokwane Local Municipality* 2023 JOL 61642 SCA at par 29. *Independent Development Trust (IDT) v Bakhi Design Studio CC and Others* [2023] ZAGPPHC 2128; *Tintswalo Lodges (Pty) Ltd v MEC for Finance, Economic Development and Tourism, Mpumalanga and Others* (2653/2017) [2020] ZAMPMBHC 46.

- [44] PRASA made the barest of allegations on the issue of invalidity. No particulars were given of the applicable procurement legislation, nor of the relevant supply chain management policies.
- [45] The issue must be considered within the specific context of the matter. Phuhlani filed a supplementary affidavit in which it made specific reference to the judgment delivered on 3 November 2023 in the matter of Sechaba Protection Services CC (Pty) Lts and Others v PRASA 2023 ZAWCHC 280 (“the Sechaba matter”), which judgment was annexed to the said affidavit.
- [46] In terms of the said judgment, supervisory orders were issued on 19 November 2019 directing PRASA to continue utilising the services of the applicants on the same terms and conditions as had previously been contracted for (referred to as **“the first order”**).²² PRASA was further ordered to report to the Court on the status of the completion and implementation of the 2019 tender and to present an adequate contingency safety plan, approved by the Railway Safety Regulator (**“the requirements”**).
- [47] PRASA unsuccessfully attempted to obtain the discharge of the said order on the basis that it was about to start an open and competitive procurement process – referred to by bid number HO/SEC/002/05/2023 - and the allegation that the safety plan had been duly approved. The Court found that there had not been compliance with either of the requirements. Instead of simply dismissing the application, the Court decided to replace the first order and, inter alia, ordered that PRASA had to file an affidavit in which it was required to state the date on which any security provider appointed in terms of the tender would be able to commence providing security services and to provide confirmation that the safety plan had been approved by the National Safety Regulator (**“the second order”**).
- [48] The second order provides that upon consideration of the affidavit the Court shall, inter alia, consider permitting PRASA to terminate the applicants’ services on 60 days’ notice or issue further orders.

²² Referred to as ‘the Hlophe order’.

- [49] Having regard to the aforesaid, it is clear that PRASA and a number of applicants, which included High Goals, were party to the Sechaba matter. In the said matter the Court considered PRASA's constitutional obligation to comply with the provisions of section 217 of the Constitution, the Public Finance Management Act²³ ("the PFM Act") and the Preferential Procurement Policy Framework Act²⁴ in the context of PRASA's further constitutional obligation to ensure that reasonable measures are taken to provide for the security of all rail commuters. The Court issued the aforesaid orders to ensure the continuity of the security services provided by the applicants until the appointment of service providers pursuant to a public tender process and confirmation of the adequacy of the safety plan.
- [50] Section 217 provides that an organ of state must contract for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
- [51] Section 51(1)(a)(iii) of the PFM Act provides that an accounting authority for a public entity must ensure and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.
- [52] One of the applicants in the Sechaba matter purported to rely on regulation 16A.6 of the National Treasury Regulations²⁵. PRASA is in fact listed as a national government business enterprise under schedule 3B of the Public Finance Management Act. Regulation 16A is limited to public entities listed in schedules 3A and 3C of the PFM Act. Accordingly, the said regulation is not applicable.

²³ Act 1 of 1999.

²⁴ Act 5 of 2000.

²⁵ Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities, GN R225 in GG27388 of 15 March 2005, as amended.

- [53] Although no particulars were provided of PRASA's procurement system, it may, as a bare minimum be accepted that it requires compliance with section 51(1)(a)(iii), which mirrors section 217 of the Constitution.
- [54] Having regard to the facts of the matter, it appears that Phuhlani procured the assignment of the extended master agreement by means of the sale agreement - without the knowledge of PRASA or any other potential supplier - and thereafter informed PRASA of its intention to enforce the agreement against it. This, in turn, gave rise a tacit contract, the pertinent feature of which is that it arose without any notice or opportunity being afforded to other potential suppliers. Accordingly, irrespective of the exact provisions of PRASA's procurement system or policies, in this instance no opportunity was given to other potential suppliers to bid or otherwise offer their services.
- [55] However, the said tacit contract was concluded within the specific context of the Sechaba matter and the first and second orders. It is clear from the said judgment that since 2011 until the date hereof PRASA has, on some unspecified basis, extended the respective contracts of all the applicants without following any public tender process. Although no definitive finding can be made on the papers, the inference – on the probabilities - is inescapable that PRASA, by its conduct in repeatedly extending the said contracts over an extended period, acted on the premise that it possessed the requisite power to do so under its procurement policy. In this context, it is instructive that PRASA did not allege or contend that the tacit contract, on which Phuhlani relies, was ultra vires its procurement policy.
- [56] While no particulars of PRASA's procurement policy have been placed before the Court, it is a matter of common occurrence that such policies vest the accounting officer or other relevant decision-maker with a discretion to depart from their strict terms in defined or exceptional circumstances.²⁶ In the circumstances, a plausible explanation for PRASA's conduct in extending the contracts of the applicants in the Sechaba matter, as well as for the conclusion of the alleged tacit agreement with Phuhlani, is that, from PRASA's

²⁶ AllPay Consolidated investment Holdings (Pty) Lts and others v Chief Executive Officer, South African Social Security Agency and others 2014 (1) SA 604 CC at par 40.

perspective, such conduct fell within the ambit of the exceptions or discretionary deviations contemplated under its procurement policy.

- [57] It is well-established that a litigant who seeks to avoid a contract on the basis of alleged illegality or unlawfulness is required to do so expressly and with particularity in its pleadings (in this case PRASA's answering papers), and bears the onus of proving the factual and legal basis for such illegality, unless it appears *ex facie* the transaction or from the evidence before a court, in which case the court may *mero motu* decide the issue.²⁷
- [58] PRASA has failed to discharge this onus. No evidence has been placed before the Court as to the content of PRASA's procurement policy. This Court cannot take judicial notice of PRASA's procurement policy. It has to be established under oath. It is insufficient to merely restate the provisions of section 217 of the Constitution and allege non-compliance therewith. This is not a matter where the absence of a procurement system is alleged,²⁸ nor one in which the system itself is challenged as falling short of the requirements of section 217. It does not appear to be in dispute that PRASA has given effect to section 217 through its procurement system. The question that arises is whether PRASA has breached its system in tacitly agreeing to the assignment of the extended master agreement. It is self-evident that the Court cannot interpret or apply PRASA's procurement policy without being furnished with the relevant provisions and supporting evidence. In the absence of such evidence, any allegation of illegality or breach is unsustainable and must fail.²⁹
- [59] In preparing this judgment the Court came across National Treasury Instruction No 8 of 2022/2023, issued in terms of section 76(4)(c) of the PFM Act,³⁰ which provides that contracts that result from public procurement

²⁷ F & I Advisors (Edms) Bpk and another v Eerste Nasionale Bank van Suidelike Afrika Bpk 1998 (4) All SA 480 SCA; Koth Property Consultants CC v Lepelle-Nkumpi Local Municipality Ltd 2006 (2) SA 25 T at par 19.

²⁸ Eastern Cape Rural Development Agency and another v Agribee Beef Fund (Pty) Ltd and others 2022 JOL 51939 SCA at par 37.

²⁹ See: Koth Property Consultants (*supra*) at par 22 thereof.

³⁰ Section 76(4)(c) of the PFM Act provides that the Treasury may make regulations or issue instructions applicable to all institutions to which the PFM Act applies concerning the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

processes are required to comply with the requirements of all supply chain management legislative prescripts (“the instruction”). The instruction provides that assignment of contracts is not allowed and is considered to be contrary to the principles derived from section 217 of the Constitution.

[60] The Court brought the said instruction to the parties’ attention after oral argument had been concluded and granted the parties an opportunity to make written submissions about the legal effect thereof.

[61] PRASA contends that the instruction has the effect of rendering the tacit assignment of the extended master agreement invalid. However, it did not deal with the fact that the instruction only came into effect on 1 September 2022, that is after the conclusion of the tacit contract of assignment on which Phuhlani relies. The instruction derives its power from section 76(4)(c) of the PFM Act and constitutes a legislative instrument. It is trite that legislation does not operate retrospectively, unless it expressly provides otherwise.

[62] The instruction, properly construed, intends to prescribe to institutions what they are required to do in respect of the issues dealt with in the instruction, which include the assignment and cession of procurement contracts. Sections 38 and 51 of the PFM Act provides that the accounting officers or authorities of departments, constitutional institutions, and public entities, listed in schedules 2 and 3 of the PFM Act, are obliged to take all necessary steps to ensure that their respective procurement systems and policies give effect to the provisions of the instruction. It follows that the instruction contemplates compliance through the respective procurement systems, which serve as the operative instruments for its implementation.

[63] In the premises, the instruction is clearly not intended to operate retrospectively. As a result, it does not have any legal effect on the validity of the tacit assignment on which PRASA relies.

J. CONCLUSION

- [64] It is important to bear in mind that Phuhlangi's rights under the extended master agreement remain precarious, being subject to PRASA's right to terminate the agreement on reasonable notice. Albeit not strictly necessary to decide, the question arises whether the second order have the effect of preventing PRASA from exercising the said right against Phuhlangi other than in accordance with the said order.
- [65] The orders granted in the Sechaba matter were intended to ensure PRASA's continued compliance with its constitutional obligation to safeguard the safety of rail commuters through the services provided by the applicants, pending PRASA's fulfilment of the two conditions imposed by the Court - namely, the confirmation of the approval of the safety plan and the appointment of security service providers pursuant to a lawful tender process. It follows that the restrictions imposed upon PRASA's right to terminate the agreements did not derive from the contractual provisions themselves, but from the overarching constitutional imperative to protect commuter safety. That said, the necessary corollary of such restrictions was to fortify the position of the applicants, in that the agreements could no longer be terminated on reasonable notice simpliciter, but only on 60 days' notice and subject to PRASA's prior compliance with the Court-imposed conditions.
- [66] Accordingly, the Court by implication did pronounce on the applicants' contractual rights and in fact augmented it. In the circumstances, the augmentation of High Goals' rights through the second order did not solely derive from the constitutional obligation at play or independently from the applicants' contractual rights. The constitutional obligation involved had the effect of providing content to the reasonableness of any notice of termination, namely that unless the conditions have been met, any purported termination would not be considered reasonable in the circumstances.³¹
- [67] In the circumstances, it appears that the tacit assignment of the extended master agreement had the effect of transferring the rights, acquired by High Goals in terms of the second order, to Phuhlangi.

³¹ *Byron v Duke Inc* (339/2001) [2002] ZASCA 58; [2002] 3 All SA 235 (A); 2002 (5) SA 483 (SCA)

- [68] Notwithstanding the aforesaid, the orders granted do not, whether expressly or by necessary implication, derogate from or diminish PRASA's right, upon the giving of reasonable notice, to terminate the suspension of the enforcement of its right to resist any purported verbal assignment of the extended master agreement. That right did not arise for adjudication in the Sechaba matter and, accordingly, remained unaffected thereby.
- [69] Having regard to the terms of the second order, a period of 60 days-notice may reasonably be regarded as sufficient. However, it appears from the notice of motion that Phuhlani considers 30 days-notice as reasonably sufficient.
- [70] Irrespective, it is clear from the position adopted by PRASA in its answering affidavit that it has given Phuhlani notice of the termination of the suspension of the enforcement of the said right. Although the said notice was given by implication, it is unequivocal and clear as daylight.
- [71] Furthermore, PRASA has not disputed that insofar as notice is concerned, Phuhlani is entitled to reasonable notice. Accordingly, the said implied notice complies with the requirements of clarity, unambiguity, and reasonableness as to time.³² Although PRASA's notice dated 29 August 2025, purporting to terminate the extended master agreement through a notice period of two/three days, was invalid for want of a reasonable notice period³³, such invalidity does not preclude PRASA from relying on another valid notice of termination of the said suspension.³⁴ In the circumstances, I am of the view that PRASA has duly notified Phuhlani of the termination of the said suspension, which means that the assignment of the extended master agreement will have no legal

³² Kragga Kamma Estates CC v Flanagan 1995 (2) SA 367 AD at 374-375.

³³ Insofar as termination of the suspension is concerned. In the case of termination upon reasonable notice, the notice also fell short on account of the non-fulfilment of the conditions imposed in terms of the second order.

³⁴ Molusi v Voges NO 2015 JDR 0864 SCA; the matter went on appeal to the Constitutional Court; however, the SCA's decision on the common law right to terminate on reasonable notice remained unaltered, although the CC did caution that the said rule of contract law does not alter the rules applicable to motions and pleadings; See: Molusi and Others v Voges N.O. and Others [2016] ZACC 6.

effect from the elapse of a reasonable period, which would be at the end of November 2025.³⁵

[72] Phuhlani had another string to its bow. It further contended that it had a legitimate expectation of being heard prior to PRASA's exercise of its right to terminate the extended master agreement by giving reasonable notice. The said issue has already been adjudicated in the Sechaba matter and is subject to a supervisory order, being the second order. The second order expressly affirms PRASA's right to terminate subject to a 60 day-notice period and compliance with the conditions imposed therein. Moreover, and in any event, the notice dated 29 August 2025 has already been found to be invalid. Accordingly, the claim to a legitimate expectation has been supplanted by the first, and thereafter, the second order.

[73] The question also arises whether PRASA possessed a legitimate expectation to be heard in respect of the decision to terminate the suspension of the enforcement of PRASA's right to resist a verbal assignment. The right to terminate the said suspension derives solely from the terms of the extended master agreement, and the strict rules of contract law. There is no evidence to suggest that PRASA, in exercising its right to terminate the suspension, was acting from a position of superior strength because of its power as an organ of state.

[74] Any termination of the extended master agreement has a bearing on PRASA's constitutional obligation to safeguard rail commuters, including the supervisory order made in the Sechaba matter.³⁶ However, the reach of both the first and second orders were limited to PRASA's right to terminate the agreements of the respective security service providers on reasonable notice. The orders did not adjudicate PRASA's right to terminate the suspension of the enforcement of its right to resist any verbal assignment of a security service agreement. To the contrary, the matter was decided on the basis that the security service

³⁵ In line with the authority that the end of a notice period must coincide with the end of the particular contract period, which in this case is the end of the first month following the elapse of a full 30 day period.

³⁶ *South African National Parks v MTO Forestry (Pty) Ltd and another* 2018 (5) SA 177 SCA at para 27 to 40.

providers would continue rendering security services on the same terms and conditions as contracted for.

- [75] Furthermore, PRASA's decision to terminate the said suspension was directed at regulating its contractual relationship with Phuhlandi, who was never a party to the Sechaba matter. Phuhlandi, not only agreed to PRASA's rights in terms of the no-cession clause, but otherwise would not have had any right at all. Its position was precarious from the start. It must be borne in mind that the terms of the master agreement emanated from the original procurement process. Phuhlandi was not a party thereto. In fact, Phuhlandi was never a party to any open and competitive procurement process. Phuhlandi only succeeded in circumventing the ordinary procurement process through a tacit assignment, which is regulated by the no-cession clause. However, it came with strings attached – PRASA was entitled to resist any verbal assignment. Accordingly, there can be no question of any duty to act fairly arising from holding Phuhlandi strictly to the terms under which it was permitted to circumvent the ordinary requirements of an open and competitive procurement process. To recognise a legitimate expectation in Phuhlandi's favour would be inconsistent with both the nature of the said right and the underlying facts and circumstances that gave rise to it.
- [76] In the result, Phuhlandi is entitled to continue rendering security services pursuant to the extended service agreement, but only until 30 November 2025. Such an order renders the remainder of the relief sought of no consequence.
- [77] Although Phuhlandi only obtained limited success, it was required to come to Court and was vindicated, in the sense that PRASA's conduct, in denying the parties' tacit contract and purporting to effect the termination of the extended service agreement, was found to unlawful. In the circumstances, the Court is of the view that it is entitled to be reimbursed for 50% of its costs.
- [78] Accordingly, the following order is issued:

- (a) The applicant is entitled to continue rendering services in terms of the month-to-month agreement concluded with PRASA in or about April 2022, on the terms and conditions contained in the master agreement, dated 3 May 2011, and attached to the founding papers under the abovementioned case number as annexure “**LN1**”, until 30 November 2025.
- (b) The respondent is ordered to pay 50% of the applicant’s costs, including the costs of two counsel, on scale C in respect of the (senior) junior counsel and on scale B in respect of junior counsel.

W ROUX
ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: Advs. Khoza and Qaba
Instructed by: Mr Maphanga

For respondent: Advs. Jacobs and Coetzee
Instructed by: Mr Horner