Annexure "PM5"

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:2015/42219

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

3 July 2017 EJ FRANCIS

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA Applicant

and

SWIFAMBO RAIL AGENCY (PTY) LTD Respondent

JUDGMENT

FRANCIS J

1. The applicant – the Passenger Rail Agency of South Africa (PRASA) brought an application against the respondent - Swifambo Rail Agency (Pty) Ltd (Swifambo) for the following relief:

   1.1 That the arbitration agreement contained in clause 36 of contract number HO/SCM/223/11/2011 (the contract), for the sale and purchase of locomotives agreement, dated 25 March 2013 be reviewed and set side; and

   1.2 To review and set aside its decision to award the contract to Swifambo,

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as well as its decision, taken on 25 March 2013, to conclude the contract with Swifambo.

1.3 In the alternative, PRASA seeks a declaratory order that the contract has lapsed and is of no force and effect as a result of a failure to satisfy the suspensive conditions within the period specified in the contract.

2. The decisions concern a tender for the purchase and supply of locomotives for use on the South African rail network.

3. At the commencement of the proceedings, I heard an application brought by Lucky Montana (Montana) who used to be the group chief executive officer (GCEO) of PRASA to be admitted as a friend of the court. That application was dismissed with costs and reasons were provided in a separate judgment.

4. The applicant's late filing of its heads of argument was condoned after I was satisfied that a proper case was made for the late filing. The applicant's application to amend its notice of motion to include a prayer for the extension of the time limits in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was also granted.

5. After judgment in the review application was reserved, Swifambo on 26 June 2017 brought an application on an urgent basis for leave to adduce further evidence which I heard on 29 June 2017. The further evidence which is what is contained in PRASA's answering affidavit marked as annexure AA1 was

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allowed since I was of the view that it would be in the interest of justice to do so. I indicated to the parties that I would decide the issue of costs of that application in this judgment.

6. The allegations in the founding affidavit of this review application relate almost entirely to conduct by or on behalf of PRASA. The founding papers suggest that there were several irregularities in the procurement process, including the procurement strategy, the preparation of the request for proposals (RFP) and the scoring of bids. Swifambo stated that it has no knowledge of those allegations and was taken completely by surprise when it received the application. It stated that it has no knowledge of the internal procurement processes followed by PRASA and could accordingly neither confirm nor deny most of the allegations in the founding papers. It was hamstrung in advancing evidence opposing the application on the merits and was therefore unable to defend the validity of the decision. It did not oppose the setting aside of the arbitration agreement.

7. The application was however opposed by Swifambo on three grounds:

7.1 The application falls to be dismissed on account of PRASA's undue and unreasonable delay in launching the application.

7.2 PRASA's excessive reliance on inadmissible hearsay evidence was fatal to its application and all hearsay evidence in the founding affidavit fell to be disregarded.

7.3 It was not appropriate, just and equitable in the circumstances to set

aside the tender with full retrospective effect since it was an innocent tenderer and would be prejudiced if the contract was set aside.

8. The irregularities that took place before and when the contract was awarded to Swifambo are undisputed save for what was raised in the application to admit evidence. I will deal with some of the irregularities when considering whether the time limits should be extended in terms of section 9 of PAJA.

9. During closing arguments respondent's counsel informed the court that there were no signed confirmatory affidavits that was referred to in the answering affidavit. Counsel is wrong since there are three signed confirmatory affidavits that were signed before a notary.

Other preliminary issues

10. Before dealing with the main issues raised in this application I deem it appropriate to deal with some other issues raised during the proceedings. The first issue was that the applicant did not make out its case in its founding affidavit insofar as it related to what is contained in the replying affidavit which was linked to the question whether PRASA has made out a proper case for an extension of the time limits in terms of section 9 of PAJA. PRASA had initially contended that the application was brought within a reasonable period. This was disputed in the answering affidavit. PRASA in its replying affidavit dealt with the issue of condonation in much more greater detail. The second issue was the allegations of fraud which so it was contended was also a

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new matter. Despite all of this the respondent filed a further affidavit dealing with what they contended were new matters.

11. I accept that the general rule is that a party must make out its case in the founding affidavit. It cannot do so in reply. This is not an absolute rule. Courts have been cautioned not to be overtly technical in such matters. The following was said about the approach to be adopted by our courts in *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at page 955 at paragraph [15]:

"In South African Milling (at 436 – 437C) the matter was also approached from a procedural point, namely that a party is not entitled to make out a case in reply and that a ratification relied upon in reply infringes this rule, this part of the ratio is strictly speaking not apposite to the present case because the issue here was decided upon a stated case which did not raise this point. It remains, however, in view of persistent difficulties in this regard, necessary to emphasise that this Court in Moosa and Cassim NNO has clearly adopted as correct refutation in Baeck & Co (at 114E – 119B) of the approach and to state that I fully subscribe to that view. The rule against new matter in reply is not absolute (cf Juta & Co Ltd and Others v De Koker and Others 1994 (3) SA 499 (T) 1994 at 511F) and should be applied with a fair measure of common sense. For instance, in the present case, the point provided no material or substantial advantage to Smith – at least, counsel could not point to any – and it simply at great cost postponed the day of possible reckoning (cf Merlin Gerin at 660I – J; National Co-op Dairies Ltd v SMITH 1996(2) SA 717 (N) at 719 E- F".

12. The following was said in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at paragraph 32:

"I am not entirely sure what is meant by the description of the application as 'totally irregular'. If it is intended to convey that the application amounted to a deviation from the Uniform Court Rules , the answer is, in my view, that, as often been said, the rules are there for the Court, and not the Court for the rules. The Court a quo obviously has a discretion to allow the affidavit. In exercising this discretion, the overriding factor that ought to have been considered was the question of prejudice. The perceived prejudice that the respondent would suffer if the application were to be upheld, is not explained.

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Apart from being deprived of the opportunity to raise technical objections, I can see no prejudice that the respondent would have suffered at all. At the time of the substantive application the respondent had already responded in its replying affidavit. The procedure which the appellant proposed would have cured the technical defects of which respondent complained, the respondent could not both complain that certain matter was objectionable and at the same time resist steps to remove the basis of the complaint. The appellant's only alternative would have been to withdraw its application, pay the wasted costs and bring it again supplemented by the new matter. This would result in a pointless waste of time and costs. For these reasons the applicant's substantive application to supplement its founding affidavit should, in my view, have succeeded."

13. The following was also said in *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA) at paragraph [16]:

"Then there is the fact that a voluminous replying affidavit containing a great deal of evidential material relevant to the issues at hand had been filed. Relying upon authorities such as Sooliman, the appellant argued that it was 'axiomatic ... that a reply is not a place to amplify the applicant's case' and that the new matter has been impermissibly raised by Lehane in reply, that it was evidential material to which the appellant had not been able to respond, and that it fell to be ignored. However, again, practical common sense must be used, and it is not without significance that many of the hearsay allegations complained of were admitted by the appellant in its answering affidavit. And although Lehane had been appointed the official assignee to Dunne's estate some 13 months before the application was launched in the court a quo, and the information set out in reply could therefore have been contained in the founding affidavits, sight must not be lost of the fact that the application was initially launched by Lehane's deputy official, Mr D Ryan, in the absence of Lehane who was abroad at the time and unable to depose to an affidavit. The detailed allegations made by Lehane speak of he, and not Ryan, having been more au fait with the facts and circumstances of the matter. Moreover, the initial application was moved as a matter of urgency, and the courts are commonly sympathetic to an applicant in those circumstances, and often allow papers to be amplified in reply as a result, subject of course to the right of a respondent to file further answering papers. Regard should also be had to the intricacy of Mr Dunne's dealings that required intensive and ongoing investigations. Furthermore, the appellant, as respondent a quo, did not seek to avail itself to the opportunity to deal with the additional matter Lehane set out in reply, and I see no reason why these allegations should therefore be ignored."

14. Auswell Mashaba (Mashaba), the chairperson of Swifambo deposed to the further affidavit. He had identified the new issues that were raised in the

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replying affidavit and stated that Swifambo would be prejudiced if it was not permitted to respond to those allegations. He stated that his affidavit was filed in answer to the new allegations in the replying affidavit. He requested leave to be granted to Swifambo to file his additional affidavit and that the granting of the affidavit would plainly be in the interests of justice and would facilitate the determination of this application fairly, on the basis of correct facts.

15. It is clear from the aforegoing that the court rules are there for the courts and not the courts for the rules. A common sense approach should be used when dealing with such matters. The true test is whether all the facts pertaining to the matter have been placed before the court. If there is any prejudice, that prejudice must be brought to the attention of the court. A party that is prejudiced should be allowed to file a further affidavit that deals with that. The respondent has filed a further affidavit which took care of any prejudice that the respondent may have suffered. It cannot complain later after they were afforded an opportunity to respond to any new matters.

Impermissible reliance on hearsay

16. It was further contended on behalf of Swifambo that the founding and replying affidavits are self-consciously based upon hearsay evidence. Further that the reliance on confidentiality is of no avail since the courts have adequate mechanisms to protect confidentiality. The only confirmatory affidavit accompanying the main affidavits are that of Mr Moonsamy; Mr Mareka both in relation to the allegedly fraudulent appointment of Mr Mthimkulu and Mr

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Stow who confirmed the events of the bid evaluation committee (BEC) meeting on 22 March 2012. Further that the various committees involved in the tender process are all identified by name: the BEC; the corporate tender and procurement committee; the finance capital investment and tender committee and the PRASA board. No indication was given about who comprised the bid adjudicating committee (BAC). Two members of the previous board were common to the present board.

17. It was further contended by Swifambo that these problems cannot be cured in reply. Nonetheless, in the replying affidavit there are confirmatory affidavits from Mr Mamabolo in relation to Montana's activities impeding the investigation by the Business Intelligence Unit. Mr Mphailane regarding his attempts to raise concerns after the tender was awarded about technical specifications. Mr Potgieter concerning the safety of the locomotives. Ms Mtlala confirming a meeting with Mr Molefe and Mr Mashaba in which the latter allegedly attempted to make the investigation go away. Mr R M Sacks concerning the financial disclosures made by Swifambo's auditors. Mr Mofi confirming the correspondence between Mr Mthimkulu and Swifambo concerning the heights of the locomotives. Mr Dingiswayo confirming the aspects of the preparations of the third addendum to the contract. Mr Ngoye confirming the allegations of bullying by Montana.

18. It was contended by the respondent that in the founding affidavit no attempt was made to bring the hearsay evidence within the ambit of the Law of

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Evidence Amendment Act 45 of 1988 (Evidence Amendment Act) and in reply it was simply asserted that the hearsay evidence should be admitted on the basis that it was in the interest of justice to do so and that submissions in that regard would be made at the hearing.

19. Mr Molefe stated in his founding affidavit that he commenced working at PRASA in August 2014 and that many of the facts set out in his affidavit are not within his personal knowledge. He stated further that he was aware of the facts because of an investigation the board had caused to be conducted into the conduct of the applicant's business prior to his involvement. He stated further that the facts have been presented to him by the investigators and are mainly derived from the documents attached as annexures. The attached documents are contemporaneous documents and form part of the applicant's records under his control. He said that he could not think of any reason to doubt the reliability of those documents. He stated further that the task was exacerbated by resignations, dismissals and a generally un-cooperative attitude from certain employees within the organisation. In some instances PRASA's records were concealed, spirited away or destroyed and it was only through the interaction and assistance of the investigators that the facts set out in his affidavit were discovered. The facts specific to this case were discovered and only revealed through the broader investigation into a number of relationships and activities that the board suspected were generally corrupt. He submitted that the unconfirmed facts were consistent with and corroborated by the documents and he believed that the facts were both true and correct.

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20. The applicant contended that the admission of the hearsay evidence is justified in terms of section 3(1) of the Evidence Amendment Act and that it was not necessary to set this out in the affidavit since it is legal in nature.

21. Hearsay evidence is generally not permitted in affidavits. Once again this is not an absolute rule and there are exceptions to it. Where a deponent stated that he is informed and verily believes certain facts on which he relies for the relief, he is required to set out in full the facts upon which he bases his grounds for belief and how he had obtained that information, the court will be inclined to accept such hearsay evidence. The basis of his knowledge and belief must be disclosed and where the general rule is sought to be avoided reasons therefor must be given. Where the source and ground for the information and belief is not stated, a court may decline to accept such evidence.

22. Section 3(1) of the Evidence Amendment Act provides as follows:

"3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence in criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) *the nature of the proceedings;*

(ii) the nature of the evidence;

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(iii) the purpose for which the evidence is tendered;

(iv) *the probative value of the evidence.*

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and;

(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interest of justice."

23. A court has a wide discretion in terms of section 3(1) of the Evidence Amendment Act to admit hearsay evidence. The legislature had enacted the provisions of section 3 to create a better and more acceptable dispensation in our law relating to the reception of hearsay evidence. The wording of section 3 makes it clear that the point of departure is that hearsay evidence is inadmissible in criminal and civil proceedings. However, because the legislature was conscious of various difficulties associated with the reception of hearsay evidence in our courts, it brought a better dispensation and created a mechanism to determine the circumstances when it would be acceptable to admit hearsay evidence.

24. The legislature also decided that the test whether or not hearsay evidence should be admitted would be whether or not in a particular case before the court that it would be in the interest of justice that such evidence is admitted. The factors that the court should take into account are those set out in section 3(1)(c)(i to vii) of the Evidence Amendment Act which includes any other

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factor which in the opinion of the court should be taken into account.

25. When the seven factors mentioned in section 3(1) of the Evidence Amendment Act are taken into account, the admission of hearsay evidence in this case is justified for the following reasons:

25.1 The nature of the evidence is reliable. The facts were mainly derived from contemporaneous documents. Copies of those contemporaneous documents which form part of PRASA's records and are under the control of Molefe were attached as annexures to the founding and replying affidavits.

25.2 There is no reason to doubt the reliability of the evidence that emerges from the documents, which are in many instances official documents and form part of PRASA's records. This is particularly so where the facts and documents were discovered by independent investigators in the course of a broader investigation into a number of relationships and activities that the board suspected were generally corrupt.

25.3 Since these are civil proceedings the courts are more reluctant to admit hearsay evidence in criminal proceedings, where the operation of the presumption of innocence applies. The lower standard of proof in civil proceedings makes it more easier to hearsay in such proceedings. Hearsay evidence will generally be more readily admitted in application proceedings than in trial proceedings. This general proposition applies more so in review proceedings where the litigant has no procedural election and must bring the review by way of

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application. It is common in tender review proceedings that the members of the public authority who feature in the record of the proceedings may not be before the court and may not depose to confirmatory affidavits. It cannot be suggested that all the information in the record relating to the decision falls to be disregarded because it is hearsay.

25.4 PRASA has provided a good reason why the evidence was not given by the particular persons or the persons who created the documents. The evidence is merely derived from contemporaneous documents and PRASA's official records. Molefe's statement under oath is entirely satisfactory and has stated that the documents form part of PRASA's official records. They were provided to him by independent investigators and the veracity of those documents can be tested by an examination of the documents that were annexed to the founding and replying affidavits.

25.5 There are additional facts justifying why individuals have not deposed to confirmatory affidavits. This is due to resignations, dismissals and a generally un-cooperative attitude from certain employees within PRASA. In some instances PRASA's records were concealed, spirited away or destroyed and it was only through the interaction and assistance of the investigators that the facts set out in this application were discovered.

25.6 Swifambo alleges that because PRASA has relied on hearsay evidence, it has been disabled from conducting any investigation of the

allegations or assessing the accuracy or otherwise of that evidence. It was therefore not possible in many cases for them to either confirm or deny the allegations in the founding affidavit. This is not correct. The documents annexed to the papers provide Swifambo with ample opportunity to investigate the reliability of the evidence and demonstrate that the documents are in some respects inaccurate, and that Swifambo has a factual basis to dispute the allegations or it does not. The lack of prejudice to Swifambo is demonstrated by its constant refrain that it has no knowledge of the internal procurement processes that PRASA followed or that it is simply unable to place in issue most of the allegations in the founding affidavit. The suggested confirmatory affidavits would not have provided Swifambo with any further means to investigate the allegations to assess the accuracy or otherwise of that evidence, and either confirm or deny the allegations in the founding affidavit.

25.7 It is clear that this application deals with subject matter that is manifestly of significant public interest.

25.8 The admission of hearsay evidence must be considered in the light of the other evidence before me which include public documents that have not been challenged and about which there can be little dispute (a report by the Public Protector, a report by the Auditor-General) and the official record of the tender decision.

25.9 Swifambo would accordingly suffer no prejudice with the admission of the hearsay evidence and any prejudice is outweighed by the public

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interest in proper justification of the decisions.

26. I am satisfied that the evidence is admissible in terms of section 3(1) of the Evidence Amendment Act.

The Undue Delay

27. PRASA had ten days prior to the hearing of the application brought an application to amend its notice of motion to include a prayer for the extension of the time limits in terms of section 9(1)(b) of PAJA. The application to amend was unopposed which I granted. What was opposed was whether a proper case had been made out for the extension of the 180-day period.

28. Section 7 of PAJA require that any proceedings for judicial review in terms of section 6(1) must be instituted without any unreasonable delay and not later than 180 days on which the person became aware of the action and the reasons. Section 9 of PAJA permits the period of 90 days to be extended on application where the interest of justice so require.

29. The applicant had initially contended that the review application was brought within a reasonable period. It had proceeded on the basis that the 180 day period referred to in PAJA commenced running from the date when it became aware of the irregularity. This is not the case. The time period starts running from the date when the decision was made. In this case the conclusion of the sale and purchase of locomotives agreement under the contract was on 25

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March 2013. This was an administrative action that can be reviewed in terms of PAJA. The 180-day timeframe for PRASA to have launched the present application, as provided for in terms of section 7(1) of PRASA, expired on 24 September 2013. The application was filed on 27 November 2015 which was 793 days late. This is a lengthy delay and good cause for such a delay must be shown. An application brought under PAJA or legality must still be brought within a reasonable period.

30. It is trite that an application for an extension of the 180 day period must be brought by way of a substantive application which can also be heard on the same day as the review application. The explanation must cover the entire duration. Whether or not the present review is in terms of the principle of legality or PAJA matters not. The delay rule applies to both types of review. In this regard see *City of Cape Town v Aurecon South Africa (Pty) Limited* [2017] ZACC 5 (28 February 2017 at paragraphs 37 – 37.

31. It was contended by Swifambo the respondent that PRASA had failed to bring a substantive application for extension at the earliest opportunity and had failed to explain the entire period of delay. The following periods of delay were not sufficiently explained or are unexplained: 25 March to August 2014 (18 months); August 2014 to 15 March 2015 (7 months); and March 2015 to 27 November 2015 (18 months). Further that it had failed to make out its case in the founding papers and not all the time periods for the delay was explained. The respondent relied on the judgment of Sutherland J in the

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unreported matter of *PRASA v Siyagena and Others* under case number 2016/7839 delivered on 3 May 2016. In that matter the court had found that the period prescribed by section 7(1) of PAJA was not calculated from the date upon which an applicant for a review became aware of an impropriety attaching to the decision sought to be reviewed, but from the date that it was aware of the decision and the reasons therefore. That court had found that the review application was not brought within the 180-day period because the relevant dates, for the purposes of section 7(1) of PAJA occurred between 2011 and 2014, and the application was launched in 2016. Since there was no application before the court as contemplated by section 9 of PAJA, the court found that it did not have the authority to entertain the review application. The review application was dismissed on that basis.

32. I have already dealt with what the court's approach should be when an applicant deals with new matters in reply. This was about the application for an extension. The respondent has filed a further affidavit that dealt with it. The *Siyangena* matter is distinguishable from the present matter. In this case, there is a substantive application that was made for an extension of the time limits. In the *Siyangena* matter it was brought on the morning when the matter was heard.

33. I am enjoined when hearing an application for an extension of the time periods to have regard to the circumstances of the case. The date when the party became aware of the irregularity would be a factor that must be taken into

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account in deciding whether to extend the time period. This will be so in cases where employees of an applicant had hidden the irregularities from the applicant and where those irregularities only came to light at a later stage. The court will also have to consider the question of prospects of success. At the end of the day the most important factor that a court will have to consider is whether it will be in the interest of justice to grant such an extension.

34. I now proceed to consider the explanation for the failure to bring the application within the prescribed 180 day period and whether a proper case has been made out for the time period to be extended.

35. The following explanation was given in paragraph 2 of the founding affidavit:

"The applicant's business is both substantial and technically complex, and it took significant effort and a considerable amount of time for the reconstituted board to familiarise itself with the intricacies of PRASA's business. The task was exacerbated by resignations, dismissals and a generally un-coperative attitude from certain employees within the organisation. In some instances, PRASA's records were concealed, spirited away or destroyed and it was only through the interaction and assistance of investigators that the facts set out in this application were discovered. The facts specific to this case were discovered and only revealed through the broader investigation into a number of relationships and activities that the board suspected were generally corrupt. Having regard to all the steps that were reasonably required prior to and in order to initiate these review proceedings, I respectfully submit that the application has been brought within a reasonable time".

36. The applicant has set out the delay in its founding and answering affidavit. I will only refer to some of the explanation which was the following:

36.1 The previous management of PRASA (some of whom are implicated in the unlawful conduct) ignored concerns and irregularities about the award of the tender and instead demonstrated a single-minded and

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devoted determination to proceed with the process that had resulted in the award of the tender to Swifambo, and to mislead the board about the nature and gravity of the irregular conduct of PRASA. PRASA's management at the time simply failed to disclose the impropriety.

36.2 The discovery of the corruption was also impeded by the tyrannical manner in which PRASA was controlled by Montana. As a result PRASA was characterised by a culture of conscious ignorance of any wrongdoing and a deliberate avoidance of controversy.

36.3 The reconstituted board faced remarkable enmity and extraordinary resistance, including attempts to obstruct the unearthing of facts relating to activities and relationships that the board suspected were corrupt or irregular. The Public Protector too was constrained to record her displeasure at the immense difficulty that her investigation team encountered in piecing together the truth as information had to be clawed out of PRASA's management. The Public Protector summarised the attempts to frustrate her investigation in the derailed report on page 20 as follows:

"(xviii) I must record that the investigation team and I had immense difficulty piecing together the truth as information had to be clawed out of PRASA management. When information was eventually provided, it came in drips and drabs and was incomplete. Despite the fact that the means used to obtain information included a subpoena issued in terms of section 7(4) of the Public Protector Act, many of the documents and information requested are still outstanding".

PRASA was accordingly compelled to employ exceptional measures in order to expose the facts that were material to the application.

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36.4 In addition, there were various resignations of relevant PRASA staff, and employees were reluctant to cooperate and, in some cases, actively frustrated the investigations.

36.5 The reconstituted board required time to understand the nature of PRASA's business, the various areas in which the business was deficient, and the investigations into PRASA by the Public Protector and the Auditor-General. PRASA, which comprises of five divisions and employs over 25 000 people, was an organisation in distress and disarray. The Public Protector was investigating approximately forty complaints or maladministration at PRASA.

36.6 Once the reasons for the impugned decisions were known to the reconstituted board, PRASA acted with due expedition, to bring this application.

36.7 Mamabolo, the assistant manager of special operations at PRASA and a member of the business intelligence unit, investigated allegations of unethical and criminal conduct within PRASA and presented Molefe with a report in July 2015.

36.8 The Auditor-General's report was presented to the reconstituted board by the audit committee on 21 July 2015. The Auditor-General's report detailed irregular and unlawful activity concerning PRASA's procurement processes.

36.9 The severity and magnitude of the problem overwhelmed the capacity of the new board. The board took the unusual step of appointing forensic investigators. PRASA's attorneys were mandated to

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commence the investigation on 5 August 2015. The investigators sourced approximately 1,2 billion documents. These needed to be stored electronically, sorted and reviewed in hard copy. Some documents had to be sourced from PRASA's employees. A number of people were not only uncooperative, but actively hampered the investigation by removing hard copies of the documents from PRASA's premises and deleting electronic copies from their computers.

37. It clear from the facts of this case that at the time when the contract was awarded to Swifambo that there was a board in existence. A board was reconstituted in 2014. It is unclear why this happened. Complaints were laid against Montana and PRASA with the Public Protector in March 2012. Certain questions were raised by some members of the board which was misled by employees of PRASA. The Public Protector's final report was only published in August 2015, three and a half years after the complaints were laid. The reconstituted board was unaware that the Public Protector had furnished a draft report dated 6 February 2015 to Montana. The investigators went through 1.2 billion documents.

38. I have already indicated that the application was not brought within a reasonable period. There are some delays that were not adequately explained. However it is clear from the explanation given that many documents were concealed, spirited or destroyed. Montana, who was implicated in the

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irregular and unlawful decision to award the tender for the locomotives to Swifambo, managed to frustrate the dissemination and communication of relevant information while he was at PRASA. Even after he had left PRASA, he managed to obstruct the distribution of relevant information through a network of associates who were collaborating with him. Employees who did not follow were victimised or unfairly dismissed.

39. The fact that some of the delays were not explained is not fatal. This is but one factor that must be taken into account in deciding whether the time period should be extended. The prospects of success are overwhelming in this case. I have already pointed that the respondent is not opposing the merits of this application. The applicant has highlighted a number of irregularities that took place. These are material irregularities that go to the heart of the issue before me. I will now deal with some of those irregularities.

The change of the bid from a lease to a purchase

40. The RFP in this case envisaged a procurement strategy by means of a lease of locomotives to PRASA by the successful bidder. There were two options. Option 1 was to provide locomotives on a 5 year renewable lease. Option 2 was to provide locomotives on a 15 year lease with an option of buying. There was no indication in the RFP that bidders were invited to consider and submit bids with an option that included an outright sale of locomotives to PRASA.

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41. In the application that I heard on 29 June 2017 to adduce further evidence about a third option that the bid was change from a lease to a purchase. I granted the application. Gcobisa Sibango (Sibango), an admitted attorney deposed to the founding affidavit and stated that she is the chief legal officer at Swifambo. She had joined Swifambo on 16 February 2015. She stated that after the matter was argued on 1 and 2 June 2017 certain investigations were conducted on this issue that Swifambo had included the option of an outright sale of the locomotives in its bid and the other bidders were not afforded the same opportunity. Swifambo had sought permission to admit as evidence the documents that were marked as annexure GS1 in its founding affidavit but consented that annexure AA1 in the answering affidavit be admitted. This was an email, briefing notes and power-points presentations that were used on 9 December 2011 at a compulsory bidder briefing when the presentation was done.

42. Sibango stated that PRASA's contention that the other bidders were not afforded an opportunity like Swifambo was to include an option of an outright sale of the locomotives was incorrect. Prasa had invited bids that included purchase options for the locomotives with which the contract is concerned and at least two other bidders (aside from Swifambo) included a purchase option in their bids. She requested this evidence to be allowed in the interest of justice so that the main application could be determined on the basis of correct facts.

43. Sibango stated further that all bidders were notified of the permissibility of the

inclusion of a purchase option and other bidders also included a purchase option in their bid submissions. PRASA's own documents bear this out. She stated that on 9 December 2011, a compulsorily Bidder Briefing was held. At the briefing, a PowerPoint presentation containing information about the bidding process was presented by PRASA to all bidders, which was attached and marked as GS1. She said that the presentation demonstrates that PRASA gave all bidders (and not just Swifambo) notice that the submission of the bids for the purchase of locomotives (as opposed to solely to the lease of locomotives) would be acceptable. This she said appeared from pages 2 and 3 of the presentation.

44. Sibango stated further that at page 2 under the heading "The RFP's Purpose" it is expressly recorded that PRASA should "request Bidders to submit Proposals for the provision of Locomotives on either sale or lease basis". At page 3, the presentation explicitly states that bidders 'will supply: PRASA with locomotives "on the basis" of "one of the following options":

44.1 A "5 year lease with Full Maintenance";

44.2 A "15 year lease" with "Full Maintenance";

44.3 A "Buy [option]" for PRASA, together with "Partial Maintenance ".

45. Sibango stated that inexplicably and improperly, PRASA failed to include this document in the Rule 53 record. This evidence was thus known to PRASA and PRASA could not be taken by surprise about its existence, nor can it be prejudiced by its inclusion. Any contention that Swifambo's inclusion of a

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purchase option demonstrates unlawful conduct, or collusion, corruption or other turpitude for which Swifambo was responsible for has no merit. If it did, then the same would have to apply to GE and Harvdap. In its founding affidavit at paragraph 24.3 at page 81, PRASA itself effectively accepted that the latter two bidders included the same options.

46. Sibango stated that in its papers and at the hearing of the main application, PRASA seized upon the aspect of Swifambo's bid and submitted that it demonstrated turpitude on Swifambo's part. It was not only self-serving for PRASA to have done so, it was also incorrect. PRASA clearly informed all bidders that a purchase option was acceptable and, what's more, it was clear that at least two other bidders acted in accordance with that information.

47. Sibango stated that she accepts that the information was also furnished to Swifambo at the time of the Bidders Briefing presentation. However, the presentation was made to bidders in 2011, and those previous staff who attended the briefing on Swifambo's behalf have since left the organisation without providing Swifambo's current staff with a complete set of documentation related to the contract. The fact that PRASA explicitly invited a purchase option from an early stage was only brought to the current staff's attention after the hearing, and even then only by happenstance.

48. Sibango stated that subsequent to the hearing of the main application, she proceeded to have a casual telephonic discussion about the hearing with a

person who had knowledge of the transaction (who has requested to remain unidentified). During such discussion, she mentioned that the absence of a purchase option in the RFP was raised sharply in argument and for the first time. The person recalled a compulsory briefing session where the RFP was effectively amended to include a third option i.e. an outright purchase option. According to that person, annexure GS1 had the effect of amending the RFP to include an outright purchase option in addition to the two options already provided therein.

49. Sibango stated that she thereafter enquired about whether any other person at Swifambo had knowledge of that. None of the current staff had such knowledge including, Mashaba the director and chairperson of Swifambo. She further instructed their IT personnel to search for the document but it could not be located. She enquired further from Montana about the amendment of the RFP by annexure GS1. Montana recollected the RFP being amended by annexure GS1 to include a purchase option. He then searched for the presentation and sent it to her.

50. The application was opposed by PRASA on several grounds. PRASA stated that the only material facts of which the deponent had personal knowledge that Montana presented her with a document that was not before the court when the main application was heard and she now wished to place that document before the Court as a new matter. PRASA denied that the admission of the document was important for a fair and just resolution of the case. The

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document sought to be placed before the court does not cure the irregularity. Swifambo was wrong to say that two other bidders aside from Swifambo included a purchase option in their bids. The only other bidder was General Electric. PRASA denied that the invitation to tender invited bids that included a purchase option. The invitation to tender is contained in the tender document which made no mention of such an option. The tender advertisement also made no mention of such an option. Any potential bidder who read the tender document or the advertisement was informed that bids were being invited on a lease basis only. The purported alteration of the invitation to tender in a closed meeting was impermissible. The decisions were tainted by numerous other irregularities. The document sought to be placed before court does not render the process regular and does not alter the fact that potential bidders who collected the tender document or read the tender advertisement were not afforded an opportunity to bid on an outright purchase. The document does state that bidders could submit bids on a sale basis. Swifambo did not mention the document or its content in its affidavits in the main application nor did Montana mention it or its contents in his application to intervene.

51. Molefe stated that he was unaware of its existence and it was not amongst the documents relating to the tender process. However in response to the application, the investigators performed an electronic search of PRASA's documents and found the document attached to an email from Brenda Malongete which was attached marked "AA1". It is not referred to in the

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briefing notes prepared for the meeting. The document appeared to have been prepared by Brenda Malongete and was obtained from Montana. Their connection to and involvement in the process was set out in the main application. The deponent does not state who attended the meeting or identified the current staff who allegedly had no knowledge of the meeting or explain why no attempt was made to ascertain what occurred at the meeting prior to the filing of the affidavits in the main application. She also did not take the court into her confidence by stating when she had the alleged telephone conversation or identified the person who had knowledge of the transaction or explained why the person has not provided an affidavit. The unidentified person does not state that the invitation to tender was amended. It was wrong to contend that the invitation to tender was amended by what purported to have occurred at the meeting. It was contended that it was inconceivable that no one at Swifambo, including Mashaba who signed the bid and the relevant documents was unaware of the reasons why Swifambo included an outright purchase in its bid and the court should infer that the Swifambo was not candid with the court.

52. There are major gaps in the version given by Sibango. She did not state who the person was that she got the information from. Whether he was an employee of PRASA or Swifambo and why he chose not to be identified. She did not state when or how she directed the enquiries to Montana. There is also no indication that Montana attended the compulsory meeting or was aware of what occurred at the meeting. He did not mention the purported amendment

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in his application to intervene or the document that he has now produced nearly a month after the matter was argued. There is simply no explanation why this did not happen yet when he was approached immediately knew about it.

53. It is clear that the said document emanates from PRASA and it is unclear why it was not disclosed during the review application. The applicant's case was that the lease agreement was converted into a sale option. This document appears to contradict that version and I would have expected it to have been disclosed whether the RFP which contained two options was changed to include a third option. If it was, this court can than exclude the basis of the irregularity. Swifambo had admitted in reply that the bid by Harvdap was for a 120 month rental lease agreement and under which ownership would be transferred to PRASA when payment in full was completed but said that in substance and effect it constituted an agreement for the outright purchase of locomotives. This is not so. It was for a lease for 120 months when ownership would be transferred when the amount was paid in full. It was not an outright option to purchase. There were therefore only one bidder and Swifambo who bidded for the purchase of the locomotives.

54. There is simply no evidence placed before me that the bid was changed to include a third option. The starting point is to reflect what the RFP said about amending the terms of the RFP. None of the persons who had effected the amendment to the RFP filed affidavits to testify how the amendment took

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place. The briefing note which is annexure AA1 indicated what had to be amended and it had nothing to do with the two options to include a third option. There is simply nothing before me that the RFP was validly changed to reflect the third option. The amendment of the RFP to have included a third option was irregular since none of the procedures that had to be followed to affect and amendment was followed.

55. Swifambo included in its bid an option to PRASA to purchase the 88 locomotives. It is clear that PRASA had changed the procurement strategy to accord with the bid submitted by Swifambo and the BACe recommended that the appointment be based on the outright purchase option. The others bidders save for General Electric were not provided an opportunity to bid for an outright purchase. The failure to provide those competing bidders with an opportunity to do so was procedurally unfair and irregular. In this regard it was held in *Metro Projects CC and Another v Klerksdorp Local Municipality and Other* 2004 (1) SA 16 (SCA) at paragraph 14 that an essential element of fairness was equal evaluation of tenders.

The Tax Clearance Certificate

56. Clause 18.8 of the RFP which was issued on 2 December 2011 which is at page 292 of the founding affidavit deals with a tax clearance certificate. It reads as follows:

"The Bidders to the RFP must provide a valid Tax Clearance Certificate obtained from the offices of the South African Revenue Services for each Bidder members. ***Failure by any of the Bidder members to submit a valid tax clearance certificate shall result in automatic disqualification of the Bidder.***

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Where the Bidder or Bidder member is not yet operating in South Africa, it must submit proof of "good standing" with the relevant taxation authority in its country of origin".

57. Swifambo dealt with this as follows at paragraphs 123 and 124 of the answering affidavit:

"I deny that Swifambo's bid did not comply with the requirements as set out in the RFP in any material respects. Vossloh is the supplier to Swifambo. The intention was for Vossloh to supply the locomotives to Swifambo for purposes either of leasing or selling to PRASA. There was accordingly no need for Vossloh to submit a tax clearance certificate when the bid was submitted. Vossloh was not a "bidder" as defined in the RFP – I was, instead, a supplier in respect of Swifambo's bid.

The SARS practice at the time of submission of the bid by Swifambo to PRASA required that a company should be trading in order to have a VAT number. Swifambo was not trading at the time, and therefore could not have been in a position to secure a VAT number. The VAT number was subsequently secured when Swifambo started trading."

58. No tax clearance certificate was submitted for Vossloh as a member of an association, party to a consortium, partner in a joint venture or subcontractor to Swifambo in terms of clauses 4.7 and 18.8 of the RFP, read with clause 1.1.1 of Form B. No proof of good standing was submitted on behalf of Vossloh from its country of origin. The tax clearance certificate submitted by Swifambo did not contain a VAT number. It therefore did not have a valid clearance certificate.

59. A similar issue arose in the matter of *Dr JS Moroka Municipality and others v Betram (Pty) Ltd and another* [2014] 1 ALL SA 545 (SCA) where the following was said at paragraph [16]:

"In these circumstances, it is clear that there was no discretion to condone a failure to comply with the prescribed minimum prerequisite of a valid and

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original tax clearance certificate. That being so, the tender submitted by the first respondent was not an "acceptable tender" as envisaged by the Procurement Act and did not pass the so-called "threshold requirement" to allow it to be considered and evaluated. Indeed, its acceptance would have been invalid and liable to be set aside – as was held by this Court in Sapela Electronics. On this basis, the appellants were perfectly entitled to disqualify the first respondent's tender as they did."

60. Clause 18.8 of the RFP is clear and obvious. It is couched in peremptory terms. A bidder who fails to provide a valid tax clearance certificate from SARS will result in an automatic disqualification of the bidder. There is no discretion to condone a bid that does not qualify with clause 18.8. Swifambo should have been automatically disqualified and should not have been allowed to take part in the bid and warded the tender.

The tailored specification and manipulated scoring

61. In terms of the procurement policy, specifications should have been designed by the Cross Functional Sourcing Committee (CFSC). Instead the specifications were prepared by Mr Mtimkhulu, who was masquerading as an engineer with a doctorate. He did not have such qualifications. The specifications ought to have been drafted to promote the broadest possible competition, to be based on relevant characteristics or performance requirements, and to avoid brand names or similar classifications.

62. Mtimkhulu adopted precisely the opposite approach to the benefit of Swifambo. In numerous instances items appeared to have been included in the specifications to ensure that Swifambo was awarded more technical points in the technical evaluation phase of the procurement process.

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63. A few examples would suffice:

63.1 The specification stipulated the number of engine cylinders at a V12. The number of cylinders is irrelevant. Vossloh's locomotive had a V12.

63.2 The bore and stroke specified was 230,19mm x 279.4mm. The bore and stroke is irrelevant. The specified bore and stroke figures were a precise match for Vossloh's locomotive.

63.3 The engine speed of 904 rpm was specified. The engine speed is irrelevant. The engine speed of 904 rpm was a precise match for Vossloh's locomotive.

63.4 The locomotive weight was specified as 88 tons. This was a precise match with Vossloh's locomotive.

63.5 A track gauge of 1065mm was specified. Vossloh's track gauge was 1067mm.

63.6 The traction effort was specified as 305KN. This was a precise match with Vossloh's locomotive.

63.7 A multi traction control with 27 pins was specified. The number of pins is irrelevant. Vossloh's locomotive had 27 pins.

63.8 A monocoque structure was specified. Monocoque structures are more difficult to service as access to components for maintenance is made more difficult. Vossloh's locomotive has a monocoque structure.

63.9 The specification repeatedly stipulated the UIC standard, which is a standard method of measurement published by the International Union of Railways and applied in Europe. In South Africa, the Association of

American Railroads standards are applied, not the UIC standard.

64. The inclusion of irrelevant considerations meant that a manufacturer with different figures would receive far fewer points in the technical evaluation than Swifambo. The inclusion of the above items materially affected the award of the tender. If those items were excluded the tender would have been awarded to another bidder: GE South African Technology.

65. The uncanny consistency between irrelevant specifications and the locomotives supplied by Vossloh caused some members of the BEC to suspect that the tender had been rigged.

66. The inference is therefore irresistible that the specifications were tailored to benefit Swifambo. Swifambo did not attempt to provide and alternative explanation. The tailoring of the specification was insufficient for Swifambo to achieve the required 70% technical compliance threshold. Further manipulation of the scoring bids by members of the BEC was required. Without that intervention Swifambo would have been disqualified. The impact of the tailoring and intervention was so marked that Swifambo was the only bidder to achieve the technical threshold of 70%.

67. It is my finding that the methodology adopted in the scoring process was irrational and or unreasonable. The items contained in the specification were weighted according to their technical importance. The very purpose of the

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weighting is to discriminate between more and less important items. The weighting is critical to the proper assessment of the bids. The scoring was not done according to the allocated weights given to each item. The failure to do so contravenes paragraph 9.9 of the SCM procurement policy which expressly states that the evaluation of bids should be in terms of the evaluation criteria and the weightings. The scoring of diesel locomotives and hybrid locomotives on the same score sheet and combining and averaging the scores resulted in an illogical evaluation.

The non-compliance with various prerequisites

68. The process failed to comply with the provisions of the Public Finance Management Act 1 of 1999 (the PFMA), the shareholders compact between PRASA and the government, PRASA's internal procurement policy and the delegation of authority. PRASA's internal procurement policy required a proper needs assessment which was not performed to determine PRASA's operational requirements prior to the tender process. This failure resulted in dramatic difference in the number of locomotives sought to be acquired.

69. The BAC indicated that approximately sixty (60) diesel-electric locomotives were required. The capital procurement committee recommended a separate tender process for twenty five diesel electric locomotives. PRASA eventually acquired twenty diesel-electric locomotives. In addition, there was uncertainty about the purpose for which the locomotives were required and particularly whether hybrid or diesel locomotives were preferred which again confirms

that there was no or an inadequate assessment of PRASA's needs as required under PRASA's procurement policy.

70. PRASA also failed to obtain approvals required under the PFMA prior to awarding the contract. In terms of section 54(2) of the PFMA (read with paragraph 1.1 of the delegation authority) PRASA's board was required to obtain the prior approval of the Minister of Transport for the acquisition of a significant asset or a large capital investment. In terms of section 54(2) of the PFMA, the Board also needed to send a written submission to National Treasury informing the Treasury of the relevant particulars relating to the acquisition of a significant asset. The PFMA required that both of these steps take place before the transaction was concluded. None of those approvals were obtained. There is also no evidence that National Treasury received written submission. The inference to be draw is that there was no such approval or written submission.

The contract materially deviated from the approved bid

71. The locomotives acquired under the contract was not evaluated by the committee responsible for the technical evaluation. A direct results of this is that *inter alia* the diesel-electronic locomotives that were required exceeded the maximum height specified.

72. The scope of negotiations after the award of a contract by an organ of state is considered in an instructive article by P Bolton in "Scope for Negotiating

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and/or Varying the Terms of Government Contracts Awarded by Way of a Tender Process" (2006) 17 STELL LR 266, whose analysis is as follows:

72.1 As a general rule, an organ of state and the preferred tenderer are prohibited from negotiating the terms of the contract after the award of the tender.

72.2 In consequence of section 217(1) of the Constitution, an organ of state and the selected contractor are not, and cannot be at, liberty to negotiate the terms of the contract to be concluded after the award of a tender, because the principles in section 217(1), in particular the principles of fairness, competitiveness and transparency, limit the scope of the negotiations. Those principles *inter alia* require organs of state to disclose the criteria that will be applied in evaluating and selecting a winning contractor, and they require organs of state to abide by the criteria specified in tender documentation.

72.3 The actual terms of the contract that is concluded must, as far as possible, conform to the criteria laid down in the tender documentation.

72.4 An organ of state may not award or conclude a contract that is materially or substantially different from the one provided in its call for tenders. The negotiations between the organ of state and the preferred tenderer for the conclusion of a contract must take place in good faith, and the terms of the contract concluded must fall within the parameters of the specifications laid down in the organ of state's call for tenders.

73. The deviation from that which was offered in Swifambo bid renders the provision of locomotives unlawful.

74. I am satisfied that although not all the delays were explained, the importance of this case as well as prospects of success makes up for that. In my view state institutions should not be discouraged from ferreting out and prosecuting corruption because of delay, particularly not where there has been obfuscation and interference by individuals within the institution. A tolerance for delay where corruption is found was recognised in *Aurecon South Africa (Pty) Ltd v The City of Cape Town* (20382/2014) [2015] ZASCA 209 (9 December 2015 (*Aurecon*) , where the Constitutional Court observed at paragraph 50 that:

"if the irregularities raised in the report had unearthed manifestations of corruption, collusion or fraud in the tender process, This Court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention".

75. In *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister II)* at paragraphs 49 – 50 the Constitutional Court held that:

"The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is that nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in particular the nature and the scope of its constitutional obligation, if any, to establish an independent anti-corruption unit. These are constitutional issues of considerable importance ...

It is, therefore in the interest of justice to grant condonation".

76. This case raises issues of fundamental public importance. This case concerns

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corruption by a public body concerning a tender that will affect the public for decades to come. This case is not merely a case about the public purse being used to acquire assets that will be used by the state or public officials. The public will make use of these locomotives for a considerable period of time and be directly affected by the benefits of harm arising from the decision to acquire them from Swifambo.

77. This case also involves issues in relation to the delay in bringing review applications, and whether and to what extent the Court should more readily condone such delay where a public body seeks to review its own decision, where the evidence before the Court points to corruption and the public body has overwhelming prospects of success.

78. This case concerns the issue of an appropriate remedy where a contract that was concluded as a result of a corrupt tender process has already been partly implemented and whether a mere declaration of unlawfulness is sufficient in order to hold the relevant decision makers accountable and to discourage public administrators from engaging in similar conduct. The importance of this deterrent role of review proceedings should be viewed through the prism set out by the Constitutional Court, that corruption if allowed to go unchecked and unpunished will pose a serious threat to our democratic state.

79. In my view to hold state institutions too strictly to the prescribed period, and thereby to shield the perpetrators, encourages the commission and

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concealment of egregious conduct of the nature found in this matter and would discourage prosecution by state institutions. It would also negatively impact on the administration of justice. There is no prejudice to the respondent if the application is heard. The consequences of refusing to hear the application and, as a result, allowing the invalid decision to stand will be borne by the public at large for many future generations. In my view the hearing of the application will advance the principle of legality and the interests of justice. This is an appropriate case where the time period to have brought the application is extended and should be condoned.

80. PRASA's case as far as the irregularities that took place before and during the tender is unanswerable since Swifambo has elected not to engage in the merits of the review. I am satisfied that a proper case has been made for the extension of the time limits to bring this application and the delay should be condoned.

81. Since I have condoned and extended the time limits within which the applicant had to bring the review application I must now decide the merits of the review application and the remedy. As stated earlier the respondent had decided not to defend the merits of the decision to conclude the contract on the grounds that the alleged invalidity arose from PRASA's own internal errors.

82. It is trite that administrative action that does not satisfy the requirements of section 33 of the Constitution or PAJA is unlawful and must be declared

invalid. The decision to award the contract was unlawful and is declared to be invalid.

JUST AND EQUITABLE REMEDY

83. I am now enjoined to consider an appropriate, effective remedy in terms of section 8 of PAJA and section 172 of the Constitution that will be just and equitable under the circumstances. Section 8 of PAJA empowers this court with a generous discretion in granting any order that is just and equitable. In doing so, a court should bear in mind that the primary focus of judicial review is the correction and reversal of unlawful administrative action.

84. Before doing so, if I take into account all the irregularities and the various steps that were taken by some employees of PRASA to hide those irregularities, this let Swifambo to gain a dishonest advantage which in this case was financial over other bidders and is tantamount to fraud. Fraud is defined as an act or course of deception, an intentional concealment, omission or perversion of truth to gain and unlawful or unfair advantage. The irregularities raised in this case have unearthed manifestation of corruption, collusion or fraud in this tender process. There is simply no explanation why Swifambo was preferred to other bidders.

85. In *Tswelopele Non-Profit Organisation and Others vs City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) at paragraph 17 it was explained as follows:

"This places intense focus on the question of remedy, for though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand and effective remedy, since (in the oft-cited words of Ackerman J in Fose v Minister of Safety and Security) 'without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced':

'Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right that has occurred, it be effectively vindicated.'"

86. The Constitutional Court made the same point in the remedial decision in the *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* 2014 (4) SA 179 (CC) at paragraphs 29. In doing so the Court relied on its decision in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 CC at paragraph 29 where it was held that:

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to pre-empt or correct or reverse an improper administrative function. ... Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration, compelled by constitutional precepts and at a broader level, to entrench the rule of law."

87. The question of what is just and equitable is a question that will always be informed by the circumstances of each case. In *Millenium Waste Management (Pty) v Chairperson of the Tender Board: Limpopo Province and Others*

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2008(2) SA 481 (SCA) the court held at paragraph as follows:

"To set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interest the administrative ...official purported to act. Those interests must be carefully weighed against those of the disappointed tenderer if an order is to be made that is just and equitable".

88. The issue of what an appropriate remedy is one of the most difficult decision that a court must make in review applications that are tainted with material irregularities and corruption like in the present matter. It is akin to sentencing in criminal proceedings. In criminal proceedings the court would have regard *inter alia* to the interest of an accused, the interest of the state, mitigating and aggravating circumstances, regard to whether there are any minimum sentence laws applicable, any remorse shown by the accused etc. There are various sentencing options that a criminal court has when deciding what an appropriate sentence would be. Similarly in review applications the court must take into account various factors. The court must look at the public interest, the nature of the irregularities that took place, any explanation for that, whether the person concerned is an innocent tenderer, what message the court will be sending out when it grants a certain remedy etc. If the respondent is an innocent tenderer it follows that this will be an important factor that the court should take into account in deciding a just and equitable remedy. A review court can either set aside the decision *ab initio* or set aside with prospective effect.

89. It was contended on behalf of the Swifambo that should this court find that the

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unlawfulness of the PRASA decision was established the court should decline to set aside the contract, or, alternatively, grant an order that sets aside the contract with prospective effect as opposed to setting PRASA's decision *ab initio*. The following facts were used in support of such a remedy:

89.1 Swifambo is an innocent tenderer;

89.2 Given *inter alia* that 25 locomotives have already been delivered, the remaining 45 locomotives are already at an intermediate stage of completion, the contract has already substantially been performed;

89.3 An order setting aside the contract *ab initio* would render Swifambo commercially insolvent which would cause PRASA itself, as one Swifambo's creditors to suffer irrecoverable losses, to the tune of R3.9 billion;

89.4 PRASA has purchased the locomotives at what independent experts have concluded are advantageous prices; received value for the money in terms of the contract; and will continue to do so in the event that a declaration of invalidity was suspended; and

89.5 A remedial order of the nature Swifambo seeks would be in the public interest.

90. PRASA disputed that the respondent was an innocent tenderer. They contended that Swifambo's innocence (or lack thereof) would be relevant when this court considers what a just and equitable remedy will be in the circumstances of this case. It is just one factor in the test about a just and equitable remedy. On the facts of the case they contended that they have

demonstrated that Swifambo was not an innocent tenderer. They had cast considerable doubt on Swifambo's claim to innocence. Any weight attached to Swifambo's innocence should be considerably be reduced when the court balances the various factors in determining a just and equitable remedy.

91. PRASA contended that Swifambo was not an innocent tenderer for the following reasons:

91.1 *Fronting*. It was contended that the contractual arrangement between Swifambo and Vossloh constitutes fronting because (i) the requirements of the definition of a fronting practice in section 1 of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEE Act) are satisfied, in particular because the arrangement undermines the objectives of the Act, (ii) the definition does not require the misleading or exploitation of the parties to the arrangement, (iii) economic empowerment means substantive empowerment, and (iv) the mere payment of money for the use of a black person's status is insufficient in the context of this matter.

91.2 Illicit payments made by Swifambo Rail Holdings to the ruling party. It was contended that the chairperson of Swifambo admitted that he had made several payments to the African National Congress and that it was common cause that one of the payments to the ruling party was made directly out of the account of Swifambo Rail Holdings.

91.3 Swifambo's trains are not fit for purposes. The locomotives fail to comply with the mandatory requirements. In particular, Swifambo

failed to comply with the vehicle structure gauge. The vehicle gauge prescribes the maximum dimensions permissible in the manufacture of rolling stock of the locomotives. The purpose of a vehicle structure is to ensure that the rolling stock fits under and through the infrastructure and can safely pass by each other on the adjacent tracks. The structure gauge prescribes a maximum height of a locomotive structure as 3.965 mm. The locomotives delivered by Swifambo are 4,140mm.

92. Swifambo denied that it was not an innocent tenderer. It denied that it was involved in any fronting. There was no direct evidence of any involvement by Swifambo in fraud and corruption linked to the award of the contract. It denied that it made an 'illicit payment" to the ruling party, and was guilty.

93. An innocent tenderer would in my view be a tenderer who was not involved in any of the irregularities that were committed when the award was granted to it. When deciding this issue I must remind myself that persons who are involved in illicit deals would always cover their tracks for obvious reasons. The court would then have to examine all the facts that were placed before it and ask itself how it came about that a specific person or organisation was awarded the tender despite all of the irregularities that took place.

94. It is unnecessary for me to make any finding whether Swifambo had made an illicit payment to the ruling party. Many organisations do make payments to political parties which they do not disclose. This is not crucial in determining

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whether Swifambo was or was not an innocent tenderer.

95. There is sufficient evidence placed before me that proves on a balance of probabilities that the arrangement between Swifambo and Vossloh constituted fronting. It is clear that Swifambo under the agreement with Vossloh was merely a token participant that received monetary compensation in exchange for the use of its B-BBEE rating. The B-BBEE points were the only aspect that Vossloh could not satisfy. Vossloh could not bid on its own. Instead it concluded an agreement with Swifambo in which its B-BBEE points were exchanged for money. Vossloh maintains complete control over the operations of the business and Swifambo's role is constrained to minor administrative activities. There is no substantive empowerment evident under the agreement between Vossloh and Swifambo. There is no transfer of skills during the agreement or after.

96. The public has a clear interest in the social and economic rights sought to be give effect to in the B-BBEE Act. At the core of B-BBEE is viable, effective participation in the economy through the ownership of productive assets and the development of advanced skills. The B-BBEE Act criminalises conduct that retards the objectives of the Act. Section 130 of the B-BBEE Act creates an offence where any person knowingly engages in a fronting practice.

97. Section 1 of B-BBEE Act defines the term "fronting practice" as follows:

"[A] transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of this

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Act or the implementation of any of the provisions of this Act, including but not limited to practices in connection with a B-BBEE initiative –

....

(d)involving the conclusion of an agreement with another enterprise in order to achieve or enhance broad-based black economic empowerment status in circumstances in which-

(i) there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers;

(ii) the maintenance of business operations is reasonably considered to be improbable , having regard to the resources available;

(iii) the terms and conditions were not negotiated at arm's length and on a far and reasonable basis."

98. It is clear from a proper analysis of the agreement between Swifambo and Vossloh amounts to fronting since the relationship meets the broader definition under the B-BBEE Act and the relationship satisfies the criteria under paragraph (d)(i) and (ii) of the B-BBEE Act. It reveals that Swifambo's obligations under the contract are mainly administrative as borne out by clause 9.2 of the contract. Swifambo is obliged to accept delivery, and procure that PRASA accepts delivery of the locomotives in accordance with the delivery schedule; to procure that PRASA transports the locomotives from Cape Town Port up to the delivery point free of charge for Vossloh and to provide Vossloh with written confirmation that PRASA, together with documentary evidence including the approval letter issued by the Department of Transport, for the approval of the transaction as contemplated in the Sale and Purchase Agreement in terms of section 54 of the PFMA, within 6 months after the signature date. In contrast Vossloh has complete control over every aspect of the contract including the appointment of the members of the steering

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committee.

99. There are various examples of the clauses in the agreement between Swifambo and Vossloh that points to what the true nature of the agreement was namely that it amounts to fronting which undermines and frustrates substantive empowerment.

100. The agreement between Swifambo and Vossloh also frustrates and undermines the implementation of the provisions of the B-BBEE Act. Section 9 of the Empowerment Act empowers the Minister through notice in the Government Gazette to issue codes of good practice in black economic empowerment that may include *inter alia* indicators to measure broad-based black economic empowerment.

101. Statement 103 entitled "The Recognition of Equity Equivalents for Multinationals", issued under section 9 of the B-BBEE Act, was introduced in February 2007, under the Codes of Good Practice on Black Economic Empowerment. The statement provides a regime for the recognition of Equity Equivalent Points where a multinational company is unable to comply with the ordinary B-BBEE. The statement provides that the Minister may approve certain Equity Equivalent Programmes and in paragraph 3.4 that such programmes may involve programmes that support Accelerated and Share Growth Initiative for South Africa; the Joint Initiative for Priority Skills; the National Skills Development Strategy. It should also provide programmes

that promote enterprise creation in respect of cooperatives that are more than 50% owned by black people; or more than 30% owned by black women; or more than 50% owned by members of black designated groups. It also provides for any other programmes that promote Socio-Economic advancement or contribute to the overall socio-development of the Republic of South Africa. Importantly, the statement provides that a foreign business needs to invest a substantial amount of money into empowerment initiatives in order to qualify for B-BBEE equivalent programmes.

102. To interpret the B-BBEE Act in a way that excludes from the definition of fronting practice a relationship such as that which exists between Swifambo and Vossloh, would permit foreign companies that do not comply with the requirements of B-BBEE Act to frustrate its implementation by evading the obligation to invest a substantial amount of money in empowerment.

103. The agreement between Vossloh and Swifambo falls squarely within the ambit of paragraph (d) of the definition, which is satisfied where an agreement is concluded in order to achieve or enhance broad-based black economic empowerment status in circumstances in which there are significant limitations, whether implicit or explicit, on the identity of suppliers, service providers, clients or customers, or the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available.

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104. There is an inherent limitation on the identity of suppliers, service providers, clients or customers under paragraph (d)(i) of the definition of fronting practice in the arrangement between Swifambo and Vossloh, where Vossloh is performing 100% of the work in a foreign jurisdiction, and Swifambo has no knowledge of or access to any of Vossloh's suppliers, service providers, clients or customers.

105. Under the contract Swifambo is obliged to return to destroy any of Vossloh's, 'confidential information', after the contract. Confidential information includes information regarding Vossloh's business activities, products, services, customers and clients, as well as its technical knowledge and trade secrets.

106. In regard to (d)(ii), but for Swifambo's B-BBEE rating, Vossloh would not have entered into the contract with Swifambo. Swifambo had absolutely nothing to offer Vossloh other than its B-BBEE status. The obtaining and maintaining of compliance with PRASA's B-BBEE policy was one of the few obligations placed on Swifambo in clause 34 of the contract which provides as follows:

"34.1 The Parties record that, in addition to [Swifambo's] general obligations regarding Black Economic Empowerment in terms of PRASA's BEE policy, [Swifambo] shall be required to attain the B-BBEE targets specified in RFP, by the dates specified in the said RFP.

34.2 [Swifambo] shall be obliged to maintain its compliance with the aforesaid B-BBEE targets in the RFP for the duration of this Agreement and the Sale and Purchase Agreement."

107. This illustrates that the maintenance of business operations is reasonable considered to be improbable given the extremely limited resources that Swifambo had available.

108. The definition of fronting practice does not require the misrepresentation of the true nature of the arrangement to the organ of state or public entity concerned and should not be interpreted in a manner that reads such an element.

109. It is trite that the public has an interest in the award of public tenders and that the tender process being free from corruption and fraud, and that public money does not land up in the pockets of corrupt officials and business people through *inter alia* fronting practices. The public also has an interest in economic empowerment, the attainment of which is retarded by such conduct. An interpretation that requires there to be misrepresentation to the organ of state or public entity concerned, would not give effect to those interests. Those interests are given effect to by an interpretation that recognises that fronting practises also exists where organs of state and public entities or individuals within their ranks conspire or collude in such conduct.

110. This was recognised in *Esorfranki Pipelines (Pty) Ltd and Another v Mopani District Municipality and Others* [2014] 2 All SA 493 (SCA) where fronting was described as a 'fraud on those who are meant to be the beneficiaries of legislative measures put in place to enhance the objective of economic

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empowerment'. The practice of fronting would constitute a fraud on the public where organs of state and public entities or individuals within their ranks conspire and collude to award tenders to a front under the disguise of economic empowerment.

111. A fronting practice may be found where organs of state and public entities or individuals within their ranks are complicit in the arrangement and in the absence of a misrepresentation to them.

112. The true relationship between Swifambo and Vossloh was obfuscated in the bid. It had indicated that it would rely on the experience and technical capabilities of Vossloh. However at the time the bid was submitted Vossloh was not a co-bidder as defined in the RFP and there was no legal relationship between Swifambo and Vossloh whatsoever. There was no indication that Swifambo would be able to perform. There are portions of the bid which mention the establishment of a joint venture with Swifambo Rail Holdings and/or its subsidiaries, and Vossloh as well as other entities. Swifambo only concluded a contract on 4 July 2013 which was 16 months after the bid was submitted. The tender documents expressly required that the joint venture must already have been in place when they submitted their bid.

113. In other parts of the bid Swifambo indicated that there would be no joint venture arrangement. Instead Vossloh would be a subcontractor doing 100% of the work or its supply partner or a supplier.

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114. Exploitation is not a requirement. The definition only requires an arrangement that undermines or frustrates, the achievement of the objectives of the B-BBEE Act or the implementation of its provisions. The relationship that exists between Swifambo and Vossloh amounts to exploitation of the intended beneficiaries, being black people as defined in the B-BBEE Act.

115. Swifambo's contention that the present case is not a scenario wherein a third party is using a black individual to gain an opportunity to the black individual's prejudice and is not consistent with the provisions of the B-BBEE Act. The contractual arrangement between Swifambo and Vossloh amounts to a fronting practice and is a criminal offence under the B-BBEE Act. Swifambo's involvement in a fronting act also justifies the setting aside of the contract.

116. It is clear from the replying affidavit and the further affidavit filed by both Molefe and Mashaba that Molefe was informed by Mamabolo that Mashaba wanted to meet him. Mamabolo and an unknown person met Mashaba who told Mamabolo that he was worried that his involvement in the Swifambo tender would negatively affect his other businesses. Mashaba suspected that people were investigating him and he wanted the investigation to stop. He wanted Mamabolo to arrange a meeting with Molefe to discuss those issues. Mashaba explained to Mamabolo that he had initially been approached by a Makhensa Mabunda (Mabunda) who convinced him to get involved with a tender to supply locomotives to PRASA. Mabunda told Mashaba that he was

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friends with Montana who was working at PRASA. The requested meeting took place on 31 August 2015 between Molefe, Mamabolo, Mashilla Mtlala and Mashaba. Mashaba once again explained that he had been approached by Mabunda who had asked him to participate in a tender to supply PRASA with locomotives. Mashaba said that before being approached by Mabunda he had no previous business relationship with Mabunda. (This according to Molefe indicated that both Mashaba and Mabunda had no any experiences in supplying locomotives). Mashaba told them that he knew that the Swifambo tender was under investigation and did not want his association with the tender to negatively affect his other businesses. He wanted an assurance from Molefe that his businesses would not be affected by the investigation. Molefe explained to him that he could not give him any assurance or indemnify him in any way. Mashaba did not deny all of this except to deny that Mabundla told him that he was friends with Montana. He also denied that he had no experience in supplying locomotives. He said that he had 3 years experience in the rail industry at that time. Swifambo's goal was to become a whole owned leading black industrialist company in the rail sector.

117. I have raised the above to deal with the notion that Swifambo was an innocent tenderer. This was a strange submission to make when all the facts are taken into account. He clearly was not and had said that he was initially approached by Mabunda who convinced him to get involved with a tender to supply locomotives to PRASA. He had intended to become an industrialist. He was aware of the investigation and did not want his association with the tender

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to negatively affect his other business. He wanted an assurance that his other businesses would not be affected by the investigation. This does not support his contention that he was an innocent tenderer. He also did not deny that he had told Mamabolo that he wanted the investigation to stop. There was no need for the investigation to stop if he was innocent. The inference to be drawn from what I have stated above is that Swifambo had no interest in the bid but was prompted to do so by Mabunda who was Montana's friend.

118. It is clear from the facts of this case that Swifambo was shown not to be an innocent tenderer. The tender that was put out was for the lease of locomotives and not the sale of them. The respondent knew this but had despite this knowledge bid for the sale of locomotives. In doing so, it brought this harm upon itself. They obviously benefitted from the award of the tender. They should not have been given the tender in the first place. There were so many irregularities that took place in the award of the tender that the inescapable conclusion is that they were not innocent.

119. Swifambo submitted that the locomotives were fit for purpose. It did so with reference to reports issued by Transnet and the Railway Safety Regulator, as well as a report compiled by an expert, which demonstrated that the locomotives delivered to PRASA were fit for purpose for which they were designed. PRASA on the other hand contended that the trains were not fit for the purpose. It also relies on various expert reports to disprove the fitness of the trains for its purpose.

120. I do not deem it necessary to resolve this issue on paper since it is clear that there is a material dispute of fact. I am sitting as a review court and am required to determine whether there were any irregularities committed when the tender was awarded. If the goods that were received does not meet the specifications that is a separate cause of action.

121. There were other issues raised about the additional payment made by PRASA to Swifambo that is approximately R335 million and over invoicing. I do not have to decide these issues in a review application. These might be issues that will have to be dealt with in another forum and it will be inappropriate for me to make any pronouncement on it.

122. It is clear from the facts placed before me that there is still an approximately one billion rands of public funds that has not been paid to Swifambo under the contract. This is a crucial factor in favour of setting aside the contract. The investment of those funds in a detrimental appointment to the exclusive benefit of Swifambo cannot be justified in the public interest. Swifambo simply has no right to those benefits. Swifambo has only delivered 13 locomotives out of the revised total of 70 locomotives which would be delivered to PRASA which is a crucial consideration in favour of setting aside the award.

123. I accept that Swifambo will suffer some financial hardship if the tender is set aside. They simply brought this upon themselves when they had no right to

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have been awarded the tender in the first place and they cannot benefit from an unlawful tender. I do not deem it appropriate to consider what alternative remedy that Swifambo has.

124. It is clear that Swifambo was disqualified from the onset and this relates to the issue of the Tax Clearance Certificate. They simply did not have one and should never have been allowed to bid. This was overlooked by the BAC.

125. Corruption is a cancer that is slowing eating at the fabric of our society. If it is left unchecked it will devour our entire society. Chemotherapy is needed to curb it. The chemotherapy in this instance is an effective remedy that will nip the cancer in its bud. The remedy that the respondent is proposing will be making a mockery against the fight against unlawful tenders. It will send out a message that it pays to be involved in unlawful tenders and crime does pay. This is not the society that we fought for and should live in. There is simply no reason why the respondent should benefit from an unlawful award that was peppered with so many irregularities.

126. In considering the question of remedial correction, the Constitutional Court in *Allpay Remedy* judgment at paragraph 32 emphasised that in the context of public procurement matters generally, priority should be given to the public good.

127. The primary reason that Swifambo provides for not setting aside the decision

is the financial prejudice it will suffer if the tender is set aside retrospectively. It submitted that by the time that the application was launched it expenses in terms of the contract had exceeded R2.5 billion.

128. Any prejudice to Swifambo must be viewed in the context of several keys facts: Swifambo is a start up, it has virtually no employees, business, customers and suppliers, and is a wholly-owned subsidiary of Swifambo Rail Holdings. Any prejudice to Swifambo, and particularly Swifambo Rail Holdings who devised the scheme is immaterial in comparison to the prejudice to the public interest. The public interest and not the successful tender's is the guiding interest when a court is determining the appropriate remedy.

129. In determining an appropriate remedy, I should be mindful of the purposes of public procurement legislation and the constitutional imperatives of section 217. The defects in the award of the bid in the present case are egregious and allowing the respondent to continue with the contract would serve no remedial function and cannot therefore constitute 'just and equitable relief', within the meaning of that requirement in section 172 of the Constitution.

130. Harm has been done in this case to the principle that corruption should not be allowed to triumph. Harm will be done to the laudable objectives of our hard fought freedom if I was not to set aside the award. Harm will be done to all the hardworking and honest people of our land who refrains from staining themselves with corruption. Harm will been done were I to allow an

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unlawful tender to remain intact. Harm will be done to the whistle blowers who were able to blow a whistle to members of the reconstituted board. Harm will be done if the benefactors of the tender were allowed to reap the benefits of their spoils. Harm will be done to the administration of justice if this award is not set aside from the onset. Corruption will triumph if this court does not set aside the tender.

131. The only just remedy is to set the contract with retrospective effect.

132. It becomes unnecessary to consider the alternative relief.

133. Both parties agreed that this application warranted the employment of three counsel. I agree.

134. In the circumstances I make the following order:

134.1 The time period within which the applicant had to institute these proceeding in terms of section 7(1) of PAJA is extended to 27 November 2015.

134.2 The arbitration agreement contained in clause 36 of contract number HO/SCM/223/11/2011 (the contract), for the sale and purchase of locomotives agreement, dated 25 March 2013 is reviewed and set side.

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134.3 PRASA's decision to award the contract to Swifambo, as well as its decision, taken on 25 March 2013, to conclude the contract with Swifambo is reviewed and set aside.

134.4 The respondent is to pay the costs of the application which costs include the employment of three counsel.

134.5 The respondent is to pay the opposed reserved costs of the application that was brought for further evidence.

FRANCIS J
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION

FOR APPLICANT	:	A SUBEL SC WITH Q LEECH SC AND P NGCONGO & S SCOTT INSTRUCTED BY WERKMANS ATTORNEYS
FOR RESPONDENT	:	G MARCUS SC WITH N FERREIRA AND M STUBBS INSTRUCTED BY EDWARD NATHAN SONNENBERGS
DATE OF HEARING	:	1 AND 2 JUNE 2017
DATE OF JUDGMENT	:	3 JULY 2017

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Annexure "PM6"

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1030/2017

In the matter between:

SWIFAMBO RAIL LEASING (PTY) LIMITED **APPELLANT**

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA **RESPONDENT**

Neutral citation: *Swifambo Rail Leasing v PRASA* (1030/2017) [2018] ZASCA 167 (30 November 2018)

Coram: Lewis, Ponnan, Zondi, Makgoka and Schippers JJA

Heard: 1 November 2018

Delivered: 30 November 2018

Summary: An award of a tender vitiated by irregularities, corruption and 'fronting' within the meaning of the Broad-Based Black Economic Empowerment Act 53 of 2003 set aside: delay in instituting review proceedings reasonable in the circumstances, and condonation would be granted if it was unreasonable.

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ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Francis J sitting as court of first instance):

The appeal is dismissed with the costs of two counsel.

JUDGMENT

Lewis JA (Ponnan, Zondi, Magkoka and Schippers concurring)

[1] The Passenger Rail Agency of South Africa (PRASA), the respondent, until 2014, was effectively controlled by Mr Lucky Montana, the Group Chief Executive Officer of PRASA. He and some of his officials approved the award of a tender for the supply of various train locomotives to a recently incorporated company, Swifambo Rail Leasing (Pty) Ltd (Swifambo), the appellant. The award was vitiated by a number of material irregularities, primarily the dishonest and corrupt conduct of officials of PRASA in advertising the Request for Proposals in respect of the supply of locomotives and in awarding the contract. Swifambo has neither challenged nor contradicted PRASA's evidence that the tender was procured through corruption. But it insisted that it was an innocent tenderer, and that the contract between it and PRASA ought nonetheless to remain in existence and that the parties should be permitted to continue performing their respective obligations.

[2] On discovering the fraudulent conduct of Mr Montana and others, a newly reconstituted board of control of PRASA applied to the Gauteng Local Division of the High Court to have the contract declared invalid and for an order setting it aside. I shall refer to that court as the high court for the sake of convenience. Francis J granted the orders sought. The appeal before us is with his leave. The chief defences raised by Swifambo in the high court were that PRASA brought the application some three years

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after the contract was concluded and was thus precluded from seeking relief because of its unreasonable delay; that Swifambo was an innocent tenderer, which had no knowledge of PRASA's dishonesty; and that it was not equitable to set aside the contract in the circumstances. Francis J rejected all these defences. On appeal, Swifambo persists in them. In the high court, PRASA also sought an order setting aside an arbitration agreement in the contract. That order was not contested in the high court and it is not an issue in this appeal.

Background

[3] PRASA is an organ of state, funded by National Treasury. It is mandated to provide rail services throughout South Africa. On 25 March 2013, and pursuant to a tender process, PRASA decided to conclude a contract with Swifambo for the purchase of locomotives. Prior to that, in July 2009, PRASA had published a request for expressions of interest in the supply of locomotives for the haulage of passenger trains on various national routes as it had a shortfall of some 85 locomotives needed for various purposes. Following that, in May 2011, a Spanish company, Vossloh España S A U (Vossloh), inspected PRASA's fleet, and made recommendations as to what PRASA needed in the short, medium and long terms.

[4] In July 2011, the then Executive Manager: Engineering Services of PRASA, Mr D Mtimkulu, sent a memorandum to Montana about PRASA's needs. He recorded that PRASA's fleet was outdated and that this impacted on the reliability of the services PRASA was supposed to provide. He estimated that it would cost R5 billion over a period of six years, and recommended that Montana and the Board of PRASA, approve the sourcing of 100 locomotives.

[5] PRASA published a request for proposals late in November 2011, having decided to purchase some 88 locomotives. The number actually needed was not clear at the time when the application to the high court was made, nor was it clear whether diesel, electric or hybrid locomotives were needed. Accordingly, no proper assessment of actual needs was in fact made by PRASA. And the normal financial procedures required by PRASA's procurement policy were not followed. It appeared that PRASA had not obtained the approval of National Treasury, required in terms of s 54(2) of the Public Finance Management Act 1 of 1999.

[6] Nonetheless, on 9 December 2011, PRASA held a compulsory briefing session for potential bidders. Swifambo was not listed as one of the companies in attendance, but its holding company, Swifambo Rail Holdings (Pty) Ltd, was present. Swifambo sought to adduce evidence that at the briefing, the presentation made by PRASA indicated that it was willing to consider the purchase of locomotives as well as their hiring. I shall return to this issue.

[7] The specifications for the locomotives to be supplied were drawn by Mtimkulu. He had no expertise in the subject, but had been appointed to a position at PRASA by Montana in 2010, and had a meteoric rise through the ranks, with a meteoric salary hike to match it. Mtimkulu claimed to have diplomas in engineering and later a doctorate. In fact he had no qualification at all. The specifications contravened various requirements of the procurement policy. But they matched those of Vossloh locomotives manufactured in Spain. Francis J in the high court found that the specifications had been tailored by Mtimkulu to ensure that the entity importing the locomotives from Vossloh would be awarded the bid.

[8] Swifambo does not deny that Mtimkulu behaved dishonestly but maintains that Swifambo was not aware of this, an issue to which I shall return. When the board of PRASA was reconstituted in 2014, Mtimkulu's fraud came to light. Disciplinary proceedings against him were initiated in 2015 but he resigned before any hearing could be held and he seemed to have disappeared. Montana, who had been party to Mtimkulu's conduct, also resigned in March 2015. When the application was instituted by the new board, investigations into Mtimkulu's and Montana's fraud were ongoing.

[9] After the briefing session in December 2011, Swifambo Holdings (Pty) Ltd, on 7 February 2012, acquired a company known as Mafori Finance Vrydheid (Pty) Ltd (Mafori Finance), the name of which was later changed (on 5 May 2012) to Swifambo Rail Leasing (Pty) Ltd, the appellant. Mafori Finance submitted a bid for the award of the tender under the name 'Swifambo Rail Leasing' on 27 February 2012, some 20 days after that company had been acquired for the purpose. There were five other bidders.

[10] Swifambo's bid did not comply with the requirements of the request for proposals in a number of material respects. First, bidders had to supply tax clearance certificates. The certificate submitted by Swifambo did not have a VAT number. And although Swifambo indicated that the locomotives would all be manufactured and supplied by Vossloh, it did not submit any tax clearance certificate for Vossloh, which was required as Vossloh was regarded, according to the bid, as a subcontractor. Although it operated outside South Africa, and was not registered as a taxpayer, Vossloh had to supply a certificate of good standing regarding tax from the authority where it was liable for tax.

[11] Second, no broad based black employment equity (BBBEE) plan for procurement of goods and services for the duration of the contract was submitted, as was required by the request for proposals. Third, the bid did not comply with the local content requirement as the locomotives were to be designed and manufactured in Spain. Fourth, there was no evidence in the bid itself that supported Swifambo's assertion that it and its shareholders had previous experience in the rail industry: the request for proposals required that the bidder had to be technically and financially qualified to provide the locomotives that PRASA needed.

[12] In the fifth place, Swifambo did not demonstrate in the bid that it had previous experience in the supply of locomotives (it could hardly have done so since it came into existence only a few days before the bid was submitted) nor did it show the capacity to manage a project of the size put out to tender. The five reference letters supplied, in accordance with the request for proposals, all related to Vossloh's operations in Europe. Moreover, Swifambo indicated in the bid that it would rely entirely on Vossloh to fulfill its obligations, but Vossloh was not a co-bidder, and at the time of the bid, had no contractual relationship with Swifambo.

[13] Despite material non-compliance with the request for proposals (which was not disputed by Swifambo) the Bid Evaluation Committee of PRASA, which first met on 27 March 2012, recommended to the Bid Adjudication Committee that the bid be awarded to Swifambo. And at a meeting held on 24 July 2012, the Board of PRASA approved Swifambo as the preferred bidder for the procurement of dual electric diesel locomotives. The contract between PRASA and Swifambo was concluded on

25 March 2013. Only after that, on 4 July 2013, was a contract for the supply of locomotives concluded between Swifambo and Vossloh.

[14] As I have said, Swifambo does not deny the irregularities in the bidding process. It takes issue, however, with the allegation of 'fronting' made by PRASA; with the nearly three year period between the decision to award the bid by PRASA and the bringing of the application; and with the order of the high court setting aside the contract. It complains also that PRASA has relied on hearsay evidence in its founding and replying affidavits; that much of PRASA's evidence as to fraud and fronting is to be found only in its reply to Swifambo's answering affidavit (despite the fact that Swifambo was afforded the opportunity to respond to that); and it denies that it was the only bidder to offer to sell locomotives to PRASA, alleging that at least two of the bidders also included a purchase option in their bids.

[15] In the founding affidavit of PRASA, deposed to by Mr Popo Molefe, the new chairman of the reconstituted board, in addition to raising the irregularities in Swifambo's bid, said that PRASA considered the award to have been vitiated not only by the irregularities to which I have already alluded, and which are not disputed, but by other factors. These included a change in the procurement strategy for a lease to an outright purchase; the 'appearance' of a fronting relationship between Swifambo and Vossloh which, as a Spanish entity, did not have BBBEE credentials; the apparent preference afforded to Swifambo throughout the tender process, in particular in that the specifications were 'tailored to suit the products supplied by Swifambo'; and that the diesel-electric locomotives were not evaluated by a technical committee, as a result of which those that were acquired from Vossloh exceeded the maximum height suitable for South African railway lines.

[16] Francis J in the high court found for PRASA on all these issues and concluded that he should entertain the application to have the contract set aside despite the unreasonable delay in the institution of proceedings. He also found that the hearsay evidence was admissible under s 3(1) of the Law of Evidence Amendment Act 45 of 1988.

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[17] Swifambo on appeal contends that the findings were incorrectly made for a number of reasons. It complains that they are based on hearsay evidence and on inferences from facts that have not been proved. It denies that it was guilty of the practice of fronting, and asserts that PRASA had not made out a case for fronting in the founding affidavit. It complains that the entire judgment of the high court was informed by the finding that Swifambo was not an innocent tenderer. Swifambo also argues that Francis J had made findings of fact that were misdirected. And it contends that the delay in bringing the application was unreasonable and should not be condoned. I shall deal with these arguments in turn. Since the finding on fronting colours the issues of delay and the remedy granted, I shall deal with the issues of fronting and delay last.

Hearsay evidence

[18] The founding affidavit deposed to by Molefe started thus:

'I commenced my involvement with the applicant [PRASA] as part of an entirely reconstituted board of control on 1 August 2014 and accordingly many of the facts set out herein are not within my personal knowledge. I am nevertheless aware of the facts . . . from an investigation the board has caused to be conducted into the conduct of the applicant's business prior to my involvement. The applicant's business is both substantial and technically complex, and it took significant effort and a considerable amount of time for the reconstituted board to familiarize itself with the intricacies of PRASA's business. The task was exacerbated by resignations, dismissals and a generally un-cooperative attitude from certain employees within the organisation. In some instances PRASA's records were concealed, spirited away or destroyed and it was only through the interaction and assistance of the investigators that the facts set out in the affidavit were discovered. The facts specific to this case were discovered and only revealed through the broader investigation into a number of relationships and activities the board suspected were generally corrupt. Having regard to all the steps that were reasonably required prior to and in order to initiate these review proceedings, I respectfully submit that this application has been brought within a reasonable time.

The facts have been presented to me by the investigators and are mainly derived from documents attached as annexures. The attached documents are contemporaneous documents and form part of the applicant's records under my control. I cannot think of any reason to doubt the reliability of the documents.

. . .

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I have obtained confirmatory affidavits [from employees of PRASA] only where I am confident that the employees concerned will not be intimidated and the integrity of the investigation will be maintained.'

[19] Swifambo's chief complaint appears to be that allegations of fraud and corruption should not be made lightly, and should be based on hard facts, or amount to the 'clearest evidence' or 'clear and satisfactory evidence'. It argues that no such evidence was tendered by PRASA. Molefe's conclusion, in the replying affidavit, that there were 'irregular and corrupt practices at PRASA', is criticized on the basis that there is no direct evidence supporting it. However, Swifambo in its heads of argument on appeal gives no detail as to what evidence it objected to. Moreover, it did not take issue with the conclusion itself, professing ignorance as to the practices within PRASA. Swifambo did not contest the merits of the application, and did not generally dispute the factual allegations made by Molefe. Nor did Swifambo dispute the contents, or the reliability, of the documents attached to the affidavits deposed to by Molefe. And as Francis J held, confirmatory affidavits were provided in respect of the replying affidavit. Thus while hearsay evidence is generally not permitted in affidavits, where there is no reason to doubt the reliability of the allegations made, they are uncontested, and the deponent says he believes them to be true, they will be admissible.

[20] Section 3(1) of the Law of Evidence Amendment Act provides that hearsay evidence is inadmissible unless the court, having regard to the nature of the proceedings; the nature of the evidence tendered; its probative value; the reason why the evidence is not given by the person upon whose credibility it depends; any prejudice to the party who objects to its admissibility; and any other factor which, in the opinion of the court, should be taken into account, is of the view that the evidence should be admitted in the interests of justice. As Francis J held, the evidence in the documents supporting both the founding and replying affidavits was not alleged to be unreliable and the facts and documents were discovered by independent investigators in the course of their broader investigation into corruption within PRASA. The reasons why direct evidence could not be given were explained by Molefe in the passages quoted above: some employees of PRASA had resigned, others were uncooperative, records were concealed, and in so far as possible documentary evidence was adduced. Swifambo had the opportunity to examine all the evidence and to respond

to it. But since it did not dispute that there was corruption, claiming ignorance, it was not in any way prejudiced by the admission of the evidence. The application was manifestly in the public interest. And it was in the interests of justice to admit the evidence adduced by PRASA. Swifambo did not take issue with any of the allegations of PRASA's corruption. Francis J thus correctly admitted the evidence.

The purchase option

[21] Francis J found that Swifambo was the only bidder to offer the sale of locomotives to PRASA, rather than leases for which the other bidders tendered. Swifambo argues that the finding was incorrect. The request for proposals anticipated that the successful bidder would let locomotives to PRASA. The high court regarded this as an indication of corruption. However, Swifambo argues on appeal that the finding was due to the failure of the court to have regard to an affidavit, which it applied to admit, by an attorney who alleged that at the compulsory bidder briefing, potential bidders had been advised that a sale of locomotives would be considered.

[22] As PRASA points out, however, Swifambo amended its application so as to ask only for a document that was attached to the affidavit to be admitted. That document does not indicate that the request for proposals was amended in any way. The fact that one other bidder also tendered a sale option does not change the fact that the request for proposals does not expressly refer to the purchase of locomotives and was not amended. In the circumstances, Francis J correctly concluded that Swifambo was at an advantage in the tender process since other bidders were not given an opportunity to bid to sell locomotives to PRASA. There was no misdirection of fact in this regard.

The tailoring of the specification

[23] I have already referred to the fact that the specifications for the locomotives to be acquired were drawn by Mtimkulu who was not qualified to do so. The procurement policy of PRASA required that specifications be drawn by a cross-functional sourcing committee. The specifications would, in the ordinary course, take into account exactly what would function on South African railway lines. Instead, Mtimkulu made provision for the Vossloh locomotives, tailoring the requirements to what Vossloh was

manufacturing in Europe. This process ensured that Swifambo would score the highest points in the technical evaluation.

[24] The high court set out in detail the specifications that matched the Vossloh locomotives. Swifambo does not, on appeal, dispute any of the facts. It argues merely that the high court drew the 'most adverse inference' from the undisputed facts. There is, however, no other inference to be drawn. Many of the features of the Vossloh locomotives were of no relevance to the needs of PRASA, yet they were required in the specifications. Swifambo argues, however, that these features were public and disclosed by PRASA in its request for expressions of interest. Moreover, other bidders could match some of the specifications. That is beside the point. Swifambo argues that a more benign explanation of the uncanny resemblance between the specifications and the Vossloh locomotives can be given. But it does not suggest what that might be. The high court correctly concluded that the specifications had been tailor-made for the benefit of Vossloh, and thus Swifambo. It correctly held that this was a factor that leads to the conclusion that the tender process was corrupt.

Fronting

[25] PRASA alleged that Swifambo was a 'front' for Vossloh, who would not have been able to bid itself because it was not based in South Africa and did not meet the requirements of the procurement policy nor the request for proposals that necessitated that it be Broad-Based Black Employment Equity (BBBEE) compliant. Swifambo, on the other hand, had a level 4 BBBEE rating.

[26] Swifambo argues that it was not knowingly a party to 'fronting'. A fronting practice is defined in the Broad-Based Black Economic Empowerment Act 53 of 2003 as a transaction, arrangement or other act or conduct that undermines the achievement of the objectives of the Act. Section 1(c) refers to the 'conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of broad-based black economic empowerment compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person'. Any person who knowingly engages in a transaction that undermines the BBBEE Act would be guilty of an offence under s 13O of the Act.

[27] Swifambo attacks the finding of the high court that it was guilty of fronting on various bases. It argues that, since fronting is a criminal offence, PRASA should have shown beyond reasonable doubt that Swifambo was knowingly a party to a fronting transaction. This argument loses sight of the nature of the proceedings: it is not a criminal prosecution, but an application to set aside a transaction vitiated by serious irregularities. It also argues that the allegation of fronting is made only obliquely in the founding affidavit, where Molefe stated that there was an 'appearance of fronting', since Vossloh was the real bidder hiding behind a company controlled by black persons. However, the allegation is borne out by the chronology of events leading to the making of the bid, and of the events after the tender was awarded. I have already alluded to these events.

[28] I emphasize that a shelf company, Mafori Finance, was acquired by Swifambo Holdings (Pty) Ltd 20 days before the bid was made. Its name was changed to Swifambo after the bid was submitted. Before then, in May 2011, Vossloh had done a needs assessment in respect of PRASA locomotives, and made recommendations as to its short, medium and long term requirements. Vossloh was not eligible to bid. It did not have any BBBEE rating. If it were to supply locomotives to PRASA it had to become part of a BBBEE compliant enterprise. Vossloh's status was far from clear: in the bid it was described as a subcontractor, but it was supplying all the locomotives via Swifambo – the main obligation of Swifambo under the contract with PRASA. The contract between Swifambo and Vossloh was concluded only on 4 July 2013, more than a year after the bid was submitted. In terms of that contract, Swifambo's only obligation was to accept delivery of locomotives, and to procure their handing over to PRASA. It played no other role.

[29] Counsel for Swifambo submitted that that is the essence of any BBBEE transaction. The entity with the skills and assets contracts with a black owned entity which is BBBEE compliant. The argument ignores the purpose of the BBBEE Act, which is to transfer capital and skills to black people. Swifambo personnel played no real role in so far as PRASA was concerned, and so there was no skills transfer and no change of asset holding. Vossloh had complete control over every aspect of the contract between Swifambo and PRASA, including the appointment of members of the steering committee overseeing the acquisition and commissioning of locomotives.

Swifambo's real role was undoubtedly to enable Vossloh to become the real bidder for the tender. In *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21; [2014] 2 All SA 493 (SCA) (para 26) this court described fronting as a 'fraud on those who are meant to be the beneficiaries of legislative measures put in place to enhance the objective of economic empowerment'.

[30] Accordingly, the high court did not err in finding that Swifambo was a party to a fronting practice, and was not an innocent tenderer. This, apart from other factors that I will discuss, clearly colours the nature of the remedy to which PRASA is entitled.

Delay

[31] Francis J in the high court found that the nearly three year delay in bringing the application was unreasonable, but that given the public interest in state owned entities not being corrupt, and the enormous cost to the country incurred through the tender process, the period for bringing the application should be extended and the delay condoned. The parties had assumed, as had the high court, that the application was brought by PRASA under the Promotion of Access to Administrative Justice Act 2 of 2000 (PAJA). That Act provides that applications must be brought within 180 days of the decision under review (s 7(1)), but that an applicant may apply for an extension of that period and condonation under s 9 if the interests of justice require it.

[32] In *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2018] ZACC 40; 2018 (2) SA 23 (CC) the Constitutional Court held that where the State or an organ of state seeks to review its own decision, the PAJA is not applicable. Instead, any application for review that it may bring would have to be based on the principle of legality, and at common law such an application must be brought within a reasonable period – without unreasonable delay. Swifambo argues that the period between the making of the decision to award the bid to it and the date when the application was brought, more than two years, was unreasonable. Moreover, complains Swifambo, PRASA did not apply for an extension of time in the application initially, and Molefe did not explain the reasons for the delay in the founding affidavit. PRASA did, however, apply to amend its notice of motion before the hearing was held in the high court, and Swifambo did not object to the amendment. It did take issue with the assertion that the delay was not unreasonable in the circumstances.

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[33] In particular, Swifambo argues that three periods are not accounted for in PRASA's explanation set out in the replying affidavit. Francis J accepted that the three periods were not explained but found that in all the circumstances the apparent delay was to be condoned.

[34] I have already set out Molefe's explanation for bringing the application only in November 2015. He pointed out that the entire board of PRASA was reconstituted in August 2014, more than two years after the tender was awarded. It had taken time for the new board to familiarize itself with the complexity of the PRASA business operation. And about 40 complaints of maladministration at PRASA had been made to the then Public Protector. She had spent some two years in attempting to investigate the complaints. The Auditor General had also been tasked with investigating illegal expenditure by PRASA, and PRASA needed to examine his report. Montana, who had controlled PRASA and its staff, was obstructive, and attempted to cover up his role in various corrupt transactions, including the award of the tender to Swifambo. He resigned only in March 2015, and left before providing any response to the Public Protector's report entitled 'Derailed'. The Public Protector had experienced similar obstruction in her investigation, and so had released her report only in August 2015. In it she said:

'I must record that the investigation team and I had immense difficulty piecing together the truth as information had to be clawed out of PRASA management. When information was eventually provided, it came in dribs and drabs and was incomplete. Despite the fact that the means used to obtain information included a subpoena issued in terms of s 7(4) of the Public Protector Act, many of the documents and information requested are still outstanding.'

[35] Furthermore, Montana misled the new board as to the nature of the complaint made to the Public Protector, saying it was a trivial matter. And then, despite several requests by Molefe to Montana to provide a response, he had not done so before he left PRASA. Molefe said, in his replying affidavit:

'Mr Montana held sway over PRASA through the active assistance of his associates and the intimidation of those who would not do his bidding. PRASA employees who did not bend to his will were victimized, suspended or dismissed.'

[36] The board considered legal advice and 'launched this application as soon as it was in a position to do so. It did so notwithstanding the time consuming preparation

that was required in order to launch the application.' In all the circumstances, said Molefe, PRASA launched the application within a reasonable time after the reasons for the decision became known to the new board.' Molefe pointed out too that senior employees who attempted to deal with irregularities at PRASA were dismissed by Montana. These included the general manager: group legal services and the group executive manager: risk, legal and compliance. And while the investigation was in progress, Montana instructed certain employees to delete electronic documents. Swifambo does not challenge the finding of the high court that Montana, who was implicated in the irregular and unlawful activities, prevented the dissemination of information to investigators even after he had left PRASA. The board was thus kept ignorant of the full extent of the wrongdoing at PRASA including the wrongful award of the tender to Swifambo.

[37] Swifambo argues on appeal that that does not matter. That the facts came to light only a few months before the application was launched is irrelevant, it asserts. Delay runs from the date of the decision (in July 2012) and not from the time when the board became aware of the unlawfulness of the decision, the full extent of which was appreciated only in late 2015. It relies in this regard on *Cape Town City v Aurecon SA (Pty) Ltd* [2017] ZACC 5; 2017 (4) SA 223 (CC), which confirmed the decision of this court in *Aurecon South Africa (Pty) Ltd v City of Cape Town* [2015] ZASCA 209; 2016 (2) SA 199 (SCA). In *Aurecon* (SCA) this court said that if the period of delay started only when the entity wronged became aware of the wrong, this would 'automatically entitle every aggrieved applicant to an unqualified right to institute judicial review only upon gaining knowledge that a decision (and its underlying reasons), of which he or she had been aware all along, was tainted by irregularity, whenever that might be. This result is untenable as it disregards the potential prejudice to [the tenderer] and the public interest in the finality of administrative decisions and the exercise of administrative functions' (para 6). This statement was approved by the Constitutional Court (para 42) on appeal to it.

[38] In that case the City had awarded a tender and discovered much later that there might have been an irregularity in the award. It sought to have it set aside once it became aware of the irregularity. This court held that the application for review was brought out of time but nonetheless determined that there was nothing irregular in the

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process. The Constitutional Court held that the delay was unreasonable in the circumstances, refused condonation, and did not consider whether the award had been irregular.

[39] This case is totally distinguishable from *Aurecon.* The PRASA board once reconstituted did not ascertain the irregularity in the award of the bid to Swifambo for all the reasons stated until August 2015 and launched the application for review in November of that year. It acted as expeditiously as possible. On the assumption that there was indeed delay at common law (for just under three years), it applied for condonation. In my view, there was no unreasonable delay in all the circumstances. However, it is useful to consider whether condonation should have been granted by the high court, given the lengthy period between the award of the contract and the institution of review proceedings.

Condonation

[40] The overriding consideration in condoning delay is the interests of justice. In *Aurecon SCA* this court said (para17) that in determining whether condonation should be granted, the relevant factors that require consideration are the nature of the relief sought; the extent and cause of the delay; its effect on the administration of justice; the reasonableness of the explanation for the delay; the importance of the issues raised and the prospects of success on review. The Constitutional Court endorsed this statement.

[41] There is undoubtedly a public interest in entertaining the application for review. At least R2 billion of taxpayers' money has been spent in pursuit of a fraudulent and corrupt tender. The explanation for the delay, if such there is, is clear and plausible. It is in the interests of PRASA and the general public that the award of the contract to PRASA be reviewed. And in *Aurecon CC* the court said that if the irregularities raised had 'unearthed manifestations of corruption, collusion or fraud in the tender, this court might look less askance in condoning the delay. The interests of clean governance would require judicial intervention' (para 50).

[42] In this matter, both PRASA and Swifambo were not innocent. The award of the tender to Swifambo was corrupt. And there is no reason to interfere with the exercise

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of the high court's discretion to grant condonation. It was in the interests of justice and in the public interest.

Equitable remedy

[43] The high court, in the exercise of its discretion, ordered that the contract between PRASA and Swifambo be set aside. Is there any reason to interfere with its decision? Swifambo argues that there is. The contract has been part performed, and the parties can continue to perform, it contends. PRASA argues, on the other hand, that if the contract were to stand, good money would be thrown after bad. While Swifambo contends that Vossloh is ready to deliver more locomotives, Vossloh is silent. There has been no confirmation by Vossloh by affidavit or otherwise that it is in a position to deliver locomotives that are fit for purpose.

[44] The locomotives already delivered to PRASA (some 13 in all) are not fit for purpose. They cannot be, and are not, used. Swifambo insists that they are in use because they have clocked up (between them) some 71 000 kms. That is not correct. They have been tested on railway lines in the country, and have been found to be unsafe.

[45] A Transnet engineering report dated 23 September 2015, for example, states that:

'The side clearance and height of the AFRO4000 locomotive [supplied by Vossloh] exceeds that of the Transnet gauge for diesel locomotives and the locomotive can therefore not be declared compliant . . .

In addition, the height of the AFRO4003 exceeds the Vosloh dimensional drawing . . . Minor modifications could be considered to reduce the height in the silencer area . . . as well as to rectify items which result in side clearance infringements.'

[46] A report of the Railway Safety Regulator, dated November 2015, stated that the AFRO4000 series of locomotives is designed and manufactured to a height above that of the rail head. It thus exceeded the vehicle structure gauge height required for diesel locomotives. On the other hand, a report commissioned by Swifambo stated that the locomotives supplied complied with the specifications of the contract. That is hardly surprising since the specifications were drawn by Mtimkulu to match those of the Vossloh locomotives.

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[47] The continued performance of the contract would serve no useful purpose. It might benefit Vossloh and Swifambo, but it would be to the detriment of the public and to the detriment of PRASA. While it is true that PRASA's current locomotives are old and must be replaced, it assists no one to spend public money on new locomotives that are not fit for purpose. Swifambo contends that PRASA will have to start the tender process again, which will be costly and will take time. But as PRASA argues, that is unavoidable, and preferable to spending a further R1 billion on locomotives that cannot safely be used on South African railway lines.

[48] Apart from the fact that no purpose would be served in continuing with the performance of the contract, the high court was correct in saying that it would be harmful to allow a contract, concluded in a corrupt process, to stand. I see no reason to interfere with the discretion exercised by Francis J.

[49] Accordingly the appeal is dismissed with the costs of two counsel.

C H Lewis
Judge of Appeal

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APPEARANCES

For Appellant:	D Mpofu SC (with him N Rajab-Budlender, M Stubbs and M Nxumalo) Instructed by: Edward Nathan Sonnenbergs, Johannesburg Honey Attorneys, Bloemfontein
For Respondent:	A Subel SC (with him QG Leech SC) (Heads also prepared by A Dipa and S Scott) Instructed by: Werksmans Attorneys, Johannesburg Michael du Plessis Attorneys, Bloemfontein

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Annexure "PM9"

SS2-JUDG-083

"PM9"

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO

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

(3) REVISED

2017-04-10 — I Malan

DATE — SIGNATURE

CASE NUMBER: 17748/17

DATE: 10 April 2017

POPO SIMON MOLEFE	First Applicant
ZODWA PENELOPE MANASE	Second Applicant
MASHILA JEMINA MATLALA	Third Applicant
WILLIAM SOLOMON STEENKAMP	Fourth Applicant
XOLILE GEORGE	Fifth Applicant
CLEMENT MANYUNGWANA	Sixth Applicant

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THE MINISTER OF TRANSPORT	First Respondent
PASSANGER RAIL AGENCY OF SOUTH AFRICA	Second Respondent
CAROL ROSKRUGE-CELE	Third Respondent
NONDUDUZO SAMUKELISWE KHESWA	Fourth Respondent
NAZIR ALI	Fifth Respondent
RONNY MKHWANAZI	Sixth Respondent
TIYANI RIKHOTSO	Seventh Respondent
NATALIE SKEEPERS	Eighth Respondent
THE MINISTER OF TRANSPORT	Ninth Respondent
CONSTANCE MALEHO	Tenth Respondent

JUDGMENT

MABUSE J:

[1] To set the scene this matter concerns the decision taken on 8 March 2017 by the Minister of Transport ("the Minister") to dissolve the Board of Control ("the Board") of Passenger Rail Agency of South Africa ("PRASA") by removing the applicants from the said Board. It is

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submitted by the applicants that while the Minister has the power to remove the directors from the Board, such power is a public power which must be exercised at the very least, in a lawful and rational manner and in accordance with the prescripts of administrative justice. The applicants contend that this obligation arises automatically *ex lege* and that the Minister is not entitled to remove the directors of the Board of PRASA in an unlawful, irrational, unreasonable or procedurally unfair manner with far reaching consequences for the individuals involved, PRASA and the public.

[2] On the other hand while the Minister admits that in removing a director of the Board she is obliged to act in a lawful and rational manner, she contends, however, that the decision to remove the applicants is of an executive nature and, furthermore, denies that the decision to remove the applicants constitutes an administrative decision.

[3] Accordingly, it is required of this Court to decide whether the decision to remove the applicants from the Board constitutes an administrative or executive action. Secondly, it is required of this Court to decide whether in dissolving the PRASA Board or in removing the applicants from the Board of PRASA, the Minister acted lawfully and rationally. It is of supreme importance to point out that the issue to be decided in this matter is not so much whether the Minister had valid grounds to dissolve the Board of PRASA as it is whether she acted rationally and lawfully when she did so.

[4] The applicants are all former directors of the Board of PRASA. The directors who were removed by the decision of the Minister are the first, second, third, fourth, sixth and seventh applicants. For purposes of brevity these applicants may be referred to as "the removed directors". Although there are ten respondents in this matter the battle raging on in this application involves the applicants on the one side and the first respondent on the other side. The second to tenth respondents have not filed any papers in this matter. In the circumstances I will assume that they are all prepared to accept the outcome of this application. Although the target of this application is the decision of the Minister taken on 8 March 2017 the ultimate decision of this Court may have implications for the second to the tenth respondents.

[5] In this application the applicants seek the following order:

"1. that this application be treated as an urgent application and in so far as may be necessary where the forms prescribed by the Rules of this Court be dispensed with;

2. reviewing; alternatively declaring unlawful, and setting aside the notices of removal of director issued by the first respondent in respect of each of the applicants on or about 8 March 2017;

3. *removing; alternatively, declaring unlawful, and setting aside the decision(s) by the first respondent to remove each of the applicants from the Board of Control of the second respondent on or about 8 March 2017;*

4. *to the extent necessary, ordering the reinstatement of the first to seventh applicants as directors of the second respondent, with effect from 8 March 2017 alternatively the date of this order;*

5. *to the extent necessary, reviewing; alternatively: declaring unlawful, and setting aside the appointment of any directors appointed, in substitution of the applicants, to the Board on or after 8 March 2017;*

6. *in the alternative to 2-5 above, ordering that, pending the determination of the review referred to in Part B below:*

   6.1 *the notice of removal and the decisions to remove are suspended with effect from 8 March 2017 and have no practical or legal effect;*

   6.2 *to the extent necessary, the first to seventh applicants are reinstated as directors of the second respondent with effect from 8 March 2017, alternatively, the date of this order;*

   6.3 *to the extent necessary, the appointment of any directors, in substitution of the applicants, to the Board on or after 8 March 2017 is reviewed; alternatively declared unlawful, and set aside, alternatively, suspended;*

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6.4 interdicting and preventing the first respondent from appointing any directors to the Board in substitution of the applicants;

7. ordering any respondent who opposes Part A relief to pay the costs of Part A of this application on a scale as between attorney and own client, including the costs of two counsel jointly and severally with any other respondent who does opposes, the one paying the other to be absolved;

8. ordering further and alternative relief."

THE BACKGROUND

[6] On 8 March 2017 the Minister decided to remove the relevant directors as well as the third and fourth respondents from the Board. She sent notices to each of the relevant directors as well as the third and fourth respondents, unilaterally terminating their directorship of PRASA with immediate effect. The notice to the first applicant reads as follows:

"Dr. Popo Molefe

Chairperson

Passenger Rail Agency of South Africa

Private Bag X101

Braamfontein

2017

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Dear Dr. Molefe

NOTICE OF REMOVAL AS DIRECTOR

In accordance with s 24(1) of the Legal Succession to the South African Transport Services Act, Act 9 of 1989, the Minister of Transport as the Minister designated as the shareholding Minister, hereby gives you notice that you are hereby removed as a director of the Company with effect from date of this notice.

Yours faithfully

Ms. Dipuo Peters, MP

Minister of Transport

Date 08/03/2017."

[7] The contents of the notices to the other directors are similar to the one that was sent to the first applicant. The Minister's decision to dismiss these directors and former directors was also intimated in a letter sent by the Minister on 8 March 2017 to the Acting Company Secretary of PRASA. The said letter reads as follows:

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"Mr. Tumi Mohube

Acting Company Secretary

Private Bag X101

Braamfontein

2017

Members of the Board of Directors Passenger Rail Agency of South Africa (PRASA)

NOTICE OF REMOVAL OF DIRECTORS

In accordance with section 24(1) of the Legal Succession to the South African Transport Services Act, Act 9 of 1989, the Minister of Transport as the Minister designated as the Shareholding Minister, hereby gives the Company and the board of directors of the Company notice that P Molefe, WS Steenkamp, TB Phitsane, ZP Manase, CR Cele, MJ Matlala, N Kheswa and C Manyungwana are hereby removed by the Minister as directors of the Company with effect from the date of this notice.

Please note that the written notice has been sent to each of the abovementioned directors regarding their removal.

Yours Faithfully

Ms. Dipuo Peters, MP

Minister of Transport

Date: 08/03/2017."

[8] By the said decision the Minister thus dissolved the entire Board and purported to "remove" two former directors of PRASA, the third and fourth respondents, who had, many months before her decision, resigned from the Board. No similar notice was sent to the fifth applicant, the reason being that the fifth applicant had been seconded to PRASA by the South African Local Government Association ("SALGA") and for that reason the Minister had no powers to remove him. Consequently the Board became a one member board constituted only by the fifth applicant. The applicants contend that there is no basis in law or fact for the Minister's actions.

[9] Each of the relevant directors has a right to remain in that position, so it is contended by the applicants, in the absence of any circumstances on the basis of which the Minister could lawfully terminate their membership of the Board. The Minister has, however, terminated each of the applicants' mandates, except the fifth applicant, to act as director without reason or warning thereby severely affecting the relevant directors' rights and interests. This application is therefore brought by each of the relevant directors in his or her personal capacity. It is also brought by the fifth respondent in his capacity as a director of PRASA for the time being in the exercise of his fiduciary duties to PRASA.

[10] PRASA was established in terms of s 22(1) of the Legal Succession Act To The South African Transport Service Act No. 9 of 1989 ("the Legal Succession Act"). Under that Act, PRASA

was tasked with providing commuter rail services within, to and from South Africa as well as Long Haul Passenger Rail and Bus Services. In carrying out its business and projects, PRASA is obliged to *"have due regard to key governmental social, economic and transport policy objectives"*. PRASA's powers are set out under s 23(4) of the Legal Succession Act and include the power "*generally, to do anything or to perform any other acts ... that may assist the co-operation in achieving its objects*".

[11] PRASA is a State owned entity. It receives substantial amount of public funding. It is listed as a National Government Business Enterprise under Schedule 3 of the Public Finance Manual Act, 1999 ("PFMA"). Moreover s 23(1)(a) of the Legal Succession Act states that the main objects of PRASA is *"to ensure that, at the request of the Department of Transport, rail commuter services are provided within and to and from public in the public interest."* PRASA is thus obliged and does in fact provide rail commuter services to millions of people in South Africa.

[12] The public interest in PRASA and the constitution of the Board and the need for proper corporate governance are underscored by the investigations carried out by the office of the Public Protector and the report of the Auditor General in 2015 who each uncovered irregular expenditure at PRASA. Following these findings and in terms of its obligations and the Public

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Finance Management Act No. 1 of 1999 as amended by Act No. 29 of 1999 ("the PFMA"), the relevant directors conducted an internal investigation in PRASA.

[13] The directors were appointed in August 2014. Each of them was appointed for a fixed period by the Minister until 31 July 2017 in the case of every director. The seventh applicant, though, was appointed until 12 April 2018. Shortly after the appointment of the relevant directors in August 2014 previous irregularities and misconduct within PRASA were uncovered. On 31 July 2015 the Auditor General made certain discoveries of irregular and unauthorised expenditure against PRASA. He later reported approximately of R550 million in irregular expenditure for the 2014/2015 financial year and approximately R14 billion for the period 2015/2016 year. On 24 August 2015 the Public Protector issued a report containing a series of damning indictments against PRASA for conduct between 2008 and 2015. In this report the Public Protector pointed out numerous instances of cooperate governance failures and suspected corruption. On the basis of her discoveries the Public Protector then instructed the National Treasury to investigate every PRASA contract above R10 million. Each relevant director therefore joined PRASA at the time when there already was maladministration and financial mismanagement at PRASA and which affairs were in serious disarray and required investigations and oversight.

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[14] Following the aforementioned findings by both the Public Protector and the Auditor General and in accordance with the terms of their obligations under PFMA the relevant directors conducted an internal investigation in PRASA. So far the said investigation uncovered the true extent of fruitless and wasteful and irregular expenditure at PRASA totalling at least approximately R14 billion. The removed directors contend that the Minister's action in removing them from the Board of PRASA interferes with the ongoing investigations at PRASA and may be an effort to frustrate the successful outcome of these investigations. They contend furthermore that their removal clearly threatened the constitutional principle of legality, the operations in PRASA, the values of transparency and openness and the continued viability and finalisation of the PRASA investigation. The removal of the directors also erodes the institutional memory and intimate knowledge of these investigations and cases against individuals and companies involved. The Board has taken several steps pursuant to these findings in the discharge of its duties to act in PRASA's best interest and its assets. The Minister denies, though, that the relevant directors conducted the required internal investigations of PRASA. She contends that their investigations were selective. She contends furthermore that the directors were in fact content in concealing some of the irregular expenditure that they themselves committed until exposed by the Auditor General. She denies that her actions interfere with the ongoing activities at PRASA. She states that it is the applicants who have over a period overseen the corruption in PRASA and frustrated the efforts of one Mr. Collins Letsoalo ("Letsoalo") to turn around the fortunes of PRASA.

According to her Letsoalo has uncovered more corruption in the short space of time that he was at PRASA than the applicants who have been sitting on the rot for more than two years without any meaningful intervention. She accused the Board of having appointed Werksmans Attorneys to conduct crime investigations into the irregular expenditure of R127 million which had not been budgeted for. According to her there is a clear contravention of the PFMA.

THE APPOINTMENT OF MR. COLLINS LETSOALO AS ACTING GROUP CHIEF EXECUTIVE OFFICER

[15] Up until March 2015 when he resigned from his position, one Mr. Lucky Montana was the Group Chief Executive Officer ("GCEO") of PRASA. He only left PRASA in July 2015. During that same month the Board appointed a certain Nkosina Khena to act in that portfolio. Thereafter the Board embarked on a robust recruitment drive to hire a permanent GCEO. In February 2016 it submitted a list of preferred candidates to the Minister for that position. Despite repeated requests the Minister refused for many months and for inexplicable reasons to engage with the Board on this burning issue of the appointment of the GCEO. The Board believed that the appointment of a GCEO would go a long way towards stabilising the organisation and improving its performance. The Board needed someone who would introduce strategy that would give direction to PRASA and someone who would allow lower level managers to perform their roles and who would make decision that were capable of moving, or designed to move, PRASA towards its objectives.

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[16] On or about 29 June 2016 the first applicant was informed that the Minister wished to meet with him. At their meeting the Minister indicated to him that she did not believe that PRASA was sufficiently stable to allow for the appointment of a permanent GCEO. She told him furthermore that she would be seconding her nominee to PRASA to be the acting GCEO. Although initially reluctant to reveal the identity of that person she had in mind, which is denied by the Minister, it was to be Letsoalo, the Chief Financial and Deputy Director General ("DDG") in the Department of Transport ("DoT"). The Minister had indicated that, as part of Letsoalo's mandate, he was to assist in stabilising PRASA and drafting a general plan. The Minister denies that she was reluctant initially. She contends that she disclosed the identity of Letsoalo to the first applicant. She trusted the ability of Letsoalo as a proven corruption buster and his knowledge of the PFMA and corporate governance, including the duties and responsibilities of non-executive directors with regard to daily management of an organisation. The applicants did not, in this regard, have the same level of knowledge as Letsoalo. The Board was of opinion that PRASA needed the appointment of a permanent GCEO to lead PRASA's executive team. They were baffled as to how a temporary deployee from the DoT could create any stability within PRASA. They contend that the Minister does not have any statutory authority unilaterally to dictate the appointment of the GCEO to the Board. Under s 24(1) the Board is vested with the power to manage the affairs of PRASA

including the appointment of the GCEO. Section 24(1) of the Legal Succession Act states as follows:

"The affairs of the corporation shall be managed by a Board of Control and of not more than eleven members, including the Chairman who shall be appointed and dismissed by the Minister."

[17] The Legal Succession Act, however, does not expressly regulate the appointment and makeup or removal of the Board. As part of its shareholders' agreement the Board appoints a GCEO in consultation with the Minister.

[18] On 30 June 2016 the Board agreed reluctantly to appoint Letsoalo. It, however, requested a meeting with the Minister to obtain clarity on the terms and conditions of his secondment especially as the Board did not know how long he was going to be seconded to PRASA. A meeting was set up with the Minister on 5 July 2016 but unfortunately the Minister cancelled the meeting at the last moment and never rescheduled another one. The Minister does not deny these allegations. On 7 July 2016 the Minister approved the Acting Director General of the DoT's request to second Letsoalo to PRASA as an Acting GCEO ("AGCEO"). Although the applicants state that it was expressly stated that this request was subject to approval by National Treasury and that the Minister did not obtain such approval, the Minister states that the Department contend that it was no longer necessary for National Treasury to give its

approval. In a letter dated 7 July 2016 the Minister addressed a letter of secondment to Letsoalo in which she advised him that such secondment was from 1 July 2016 until further notice. It was further stated that Letsoalo's rank, salary, seniority, date and service benefits would remain unchanged. On the same date the Minister had sent a letter to the first applicant in which she indicated that the all-inclusive human resource costs of Letsoalo would be borne by the DoT but would in turn be claimed from PRASA on a monthly basis. At that particular time Letsoalo's salary was a gross sum of R1,358,868.00 per annum. The first applicant, in his capacity as Chairman of the Board and acting in terms of s 24(1) of the Legal Succesion Act, then concluded an appointment agreement with Letsoalo. The said agreement provided expressly, inter alia, that PRASA would terminate his employment at any time with or without cause and with or without advance notice. With regard to the contention by the applicants that under section 24(1) the Board is vested with the powers to administer the affairs of PRASA, including appointing the GCEO, the Minister states that the letter that she wrote on 7 July 2016 was in line with section 15(3) of the Public Services Act 1994 which provides, inter alia, that the executive authority of a department may second an employee of a department to another department, any other Organ of State or any Government or any other body on the prescribed conditions and such other conditions as agreed upon by the Executive Authority and the relevant functionary of the body concerned. Such appointment, according to the Minister, did not deprive Letsoalo of any applicable benefits in the position in which he was to act at PRASA. According to her PRASA offered Letsoalo benefits fitting of his position

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because it would have been anomalous for Letsoalo to continue earning an amount of R1,358,868.00 per annum when his immediate subordinates at PRASA were earning salaries of more than R4 million. The Minister contends that the Board has deliberately misinterpreted her letter and have created a frenzy around this issue and alleged that Letsoalo had increased his salary by 350%.

[19] According to the first applicant Letsoalo appeared to accept that, as acting GCEO, he was accountable to the Board. He indicated that he wanted to assist the Board in its investigations into corruption and irregular expenditure with PRASA and the Minister purportedly identified him as a suitable candidate to do so.

[20] The applicants complain that far from pursuing the mission for which he had been seconded to PRASA, which was to improve PRASA's core service and to deliver a turnaround strategy, Letsoalo seemingly embarked on his personal crusade to restructure PRASA and to enrich himself. His secondment to PRASA was, as will be demonstrated hereunder, not without teething problems. It is contended by the applicants that in the period during which he was seconded to PRASA he ignored instructions and requests from the Board of Control.

20.1 he refused meetings and, for some inexplicable reasons, believed that the Board was indebted to him. He defied delegated authority;

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20.2 from August 2016 he engaged with Mr. Khumalo, PRASA's previous Acting Executive Human Capital Management and PRASA's Mr. Nkomo and sought to secure payment to himself or what the previous GCEO, Mr. Montana, had been earning. Mr. Montana was earning R5.9 million per annum. When Mr. Khumalo refused Letsoalo unilaterally terminated Mr. Khumalo's appointment. Letsoalo's termination of the appointment of Mr. Khumalo was never raised for discussion with the Board nor was it approved by the Board as would be required under statutes and the shareholders' agreement;

20.3 having terminated Mr. Khumalo's appointment, he then unilaterally appointed a certain Ms Pearl Munthali ("Munthali") to the position of the Acting Group Executive Human Capital Management. This same Munthali, it is so testified by the applicants, had previously been removed from this very position by the Board on 30 September 2015. The reason for removing her was that she did not have the appreciation of the Human Capital policies she was supposed to implement or a sufficient grasp of corporate governance principles. The Board was not informed of and never approved this appointment contrary to the requirements of statutes and shareholders conduct;

20.4 On 26 October 2016 Munthali addressed a letter to the Acting Director General of the DoT and Mr. Mokonyama in which she stated that the Board had *"agreed to compensate Letsoalo at a rate applicable to the position being R5,986,140.07"*, that PRASA would bear the difference between this new salary and the salary paid by the DoT and that PRASA would backdate the salary to the date of appointment of GCEO;

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20.5 the Board had never approved that this salary be paid to Letsoalo; that PRASA would be paying any secondment allowance or bear any additional salary costs itself or that there would be any backdating. According to the Board, at most Letsoalo would be entitled to an additional secondment allowance of 12% on top of his DoT package in terms of PRASA policies. His unilateral and meteoric increase of remuneration, however, far exceeded this amount to an over 350% increase in his salary so the Board contended. As a result of the unlawful increase Letsoalo was paid R1.3 million by PRASA before the Board became aware of this machinations of February 2017;

20.6 Letsoalo further unilaterally seconded two additional individuals to PRASA, Ms. Prudience Manyasha and Ms. Sikelelwa Maqaqa and afforded them significant pay packages to be borne by PRASA. The Board was not informed of and did not approve of any aspect of the secondment.

[21] The Minister has not responded to the full text of paragraph 57 of the founding affidavit. Of paramount importance though is that she has pointed out that in their complaint that Letsoalo's unilateral and meteoric increase in his remuneration amounted to 350%, the applicants have failed, for no apparent reason, to deal specifically with paragraph 3 of 'PM7'. 'PM7' is a document in which Letsoalo was appointed as the AGCEO by the Board of PRASA. It was signed by Dr. P S Molefe, the first applicant herein. It sets out the terms and

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conditions under which PRASA employed Letsoalo as AGCEO of PRASA. The said paragraph 3 states that:

"During the term of service as Acting Group CEO, PRASA will pay you at the annualised salary rate applicable to this position and in accordance with applicable remuneration policy, payable at such time at the company's normal payroll during the 27th day of every month. You will be eligible to receive all the benefits applicable to the position and to PRASA's Senior Officers. The details related to your compensation and benefits will be discussed and shared with you by the Group Executive responsible for the Human Capital Portfolio."

Accordingly, it is as clear as crystal from the correspondence that the total costs to the company package for the GCEO at the time was standing at R5,986,140.07 per annum. And this package, read with paragraph 3 of Annexure 'PM7' signed by the first applicant himself leaves no doubt as to what package was Letsoalo entitled to. Paragraph 5 of this letter makes it clear that it constituted an agreement between the parties and it was nowhere stated that it was subject to further approvals.

[22] Letsoalo, so the Court was told, was earning or was supposed to earn a salary of R1,358,868.00 per annum, while he occupied, though in an acting capacity, the position of the GCEO of PRASA. While he occupied that position in a permanent capacity, Mr. Montana earned R5,986,140.07 per annum. It boggles one's mind that the Board seemed to have some difficulty with Letsoalo earning the same salary or the salary of the GCEO, the same

amount that Mr. Montana earned per annum or put otherwise, the salary that a GCEO was entitled to. If 350% that the applicants complained about was the percentage that would have brought the level of Letsoalo's salary to that of its GCEO and if it was agreed, there is no merit therefore, in the allegations that it was unilateral. It would appear that it was justified. It is not correct, in my view, that the increase was unlawful or that it had not been agreed by the parties in the appointment document. In my view the perpetuation of the myth that Letsoalo wanted to increase his salary by 350% per annum is unfounded and unfair to him. The truth is that, based on the information before the Court, Letsoalo was entitled to the same package that was agreed upon in his appointment package or the same package that was enjoyed by Lucky Montana.

[23] Following such teething problems that it perceived were caused by Letsoalo, the Board enlisted the services of a top law firm to provide it with legal opinion. For three reasons, firstly, the teething problems accompanying Letsoalo's secondment to PRASA, secondly, the legal opinion and advice from the relevant top law firm and, thirdly and lastly, the contents of a letter dated 3 March 2017 that the Board had written to the Minister, the Board took a unanimous decision on 24 February 2017 to terminate Letsoalo's appointment at PRASA.

[24] On Sunday 26 February 2017, the Sunday Times carried a report in the front page article which stated that "MR. FIX-IT UPS HIS OWN PAY BY 350%." Letsoalo had planned to hold a

press conference at the offices of PRASA the following day in the afternoon. The first applicant issued instructions to him that such a press conference should not proceed. He instructed Letsoalo to tell him of any press conference. Instead Letsoalo refused to hearken these instructions and indicated to the first applicant that he, the first applicant, should, on the contrary, call him. Letsoalo proceeded to hold a press conference albeit at a different venue.

[25] The Minister was concerned about the aforementioned Sunday Times article and the public spat between the Board and Letsoalo. So on 27 February 2017 she wrote the following letter to the first applicant:

"MEDIA REPORTS ON ALLEGED PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA) ACTING GROUP CEO SALARY INCREASE

I am hereby writing to the Chairperson with reference to the media reports of the past weekend on the abovementioned, and in particular the Sunday Times article of 26 February titled "MR. FIX-IT UPS HIS OWN PAY BY 350%".

Mr. Letsoalo's secondment to PRASA with effect from 1 July 2016 was done in accordance with the Public Services Act of 1994, read in conjunction with the Public Service Regulations of 2001, which provides for a secondment of an employee. Mr. Letsoalo's rank, salary and seniority at the Department, including service benefits remain unchanged during his acting period, but the acting allowance is however a matter to be decided by PRASA and Mr. Letsoalo.

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The allegations as contained in these reports are of great concern to the Department and it remains of critical importance that they are responded to in a conscious and rational manner.

I therefore instruct the Board to duly investigate the matter and report back to my office by Friday 3 March 2016 to ensure that timeous and appropriate action is taken.

Yours faithfully

Ms. Dipuo Peters, MP

Minister of Transport

Date: 27/02/2017."

[26] On 27 February 2017 Mr. Letsoalo was formally notified in writing by the Board that:

"2. The Board of PRASA has, however, resolved to terminate your secondment. Accordingly please report for duty at the Department of Transport as from Monday 27 February 2017."

As a consequence of the said termination of the secondment Mr. Letsoalo was advised to

"Kindly return the property of PRASA including but not in total: vehicles, computer, cell phone and any strategic documents that is in your possession, as well as intellectual property of PRASA."

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[27] On 1 March 2017 two important incidents took place. Firstly, the Minister wrote the following letter to Letsoalo:

"Dear Mr. Letsoalo

WITHDRAWAL OF SECONDMENT AS ACTING GROUP CHIEF EXECUTIVE OFFICER: PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

The evenly numbered letter dated 7 July 2016 regarding your secondment to PRASA with effect from 1 July 2016, refers.

Please be informed that your secondment as Acting Group Chief Executive Officer (GCEO) of PRASA is hereby withdrawn with immediate effect.

I wish to take this opportunity to thank you for making yourself available for the secondment.

Kind regards

Ms. Dipuo Peters, NP

Minister of Transport

Date: 01/03/2017."

The second incident was that the Minister wrote another letter to the first applicant. The said letter stated as follows:

"Dear Mr. Molefe

THE TERMINATION OF THE SECONDMENT OF THE ACTING GROUP CEO, MR LETSOALO RELATING TO HIS REMUNERATION AND THE SUBSEQUENT NEGATIVE MEDIA ATTENTION

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The above matter refers.

I have witnessed with great concern the continuous negative publicity in the media and other related platforms about PRASA, which undermines good corporate governance and the image of the organisation. This current impasse and undesirable actions by both the Board and the Acting Group CEO is bringing the name of the Company into disrepute, and warrants my urgent and decisive intervention.

To that extent, I am obliged to request as I hereby do, to furnish me with reasons why I should not intervene and/or take appropriate actions to restore good governance and stability of the organisation. It is also of critical importance that to furnish me with the root cause for the public spat, and equally to provide reasons for disregarding the instruction in my letter of 27 February 2017.

I therefore call upon you to within 5 working days of this letter, provide me with a report justifying your actions, as it is evident that these issues are playing themselves in the public discourse and require urgent attention.

I believe during the period we will all rise above our personal issues and place the interest of the organisation and the country at heart.

Yours faithfully

Ms. Dipuo Peters, MP

Minister of Transport

Date: 01/03/2017."

[28] The Minister, on her side, contends that the purpose of this letter dated 1 March 2017 was an attempt to grant the Board an opportunity to make representations before she could take any action. She states furthermore that the letter complies, or substantially does so, with the *audi alterim partem* principle.

[29] On 8 March 2017 the Minister removed the directors as well as the third and fourth respondents from the Board of Control of PRASA by way of Notices of Removal referred to in paragraph 8 supra.

[30] On the evening of 12 March 2017 the applicants' legal representatives became aware that the Minister had planned to hold a press conference at 10h30 on 13 March 2017 on the developments at PRASA. At 21h24 on the same date the applicants sent an email to the Minister and the DoT in which they warned the Minister that in the light of the current proceedings any action by her to appoint any interim Board would be *mala fide*, would unlawfully pre-empt the judgment of the court order and would under such circumstances constitute constructive contempt of court. The Minister and the Department were furthermore warned to desist from appointing an interim Board. No response was received from either the Minister or the DoT. On 13 March 2017 the Minister proceeded with a press conference during which she announced the immediate appointment of the members of the new Board.

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At 16h43 the applicants sent a letter of objection to the appointment of the new Board to the Minister.

[31] As a consequence of the dichotomous views with regard to the characterisation of the Minister's action, it is only apposite at this stage to pause and determine whether the Minister's decision to remove the directors from the board constituted an executive or administrative action. Considering that the application is brought under PAJA, the classification is crucial as it will enable this Court to establish whether the principles of PAJA apply to the Minister's decision, if it is an administrative action or the principles of legality apply to it, if it is an executive action.

[32] The Minister derives the power to appoint and dismiss the Board from s 24 of the Legal Succession Act. The said section states that:

"Board of Control –

(1) The affairs of the corporation shall be managed by a Board of Control ... who shall be appointed and dismissed by the Minister."

Accordingly the Minister's appointment and dismissal of the members of the Board constitutes administrative action as it involves the implementation of national legislation. The Minister derives the power to act, neither from the Constitution nor from any provision of the Constitution but from a statute of Parliament. Accordingly the power of the Minister to remove

the directors of the Board is located in the abovementioned s 24. In The Minister of Defence v Modau 2014(5) SA 69 CC at p. 82 paragraph 31 C-D ("Modau") the Court stated that:

"This Court has held that the implementation of legislation by a senior member of executive ordinarily constitutes administrative action."

In making the said statement the Court confirmed what it stated in Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another vs Ed-U-College (PE)(Section 21) Inc. 2001 (2) SA 1 CC at paragraph 18 p.12 where it had the following to say:

"In President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA 1 CC this Court held that, in order to determine whether a particular act constitutes administrative action, the focus of the enquiry should be the nature of the power exercised, not the identity of the actor (my own underlining). The Court noted that senior elected members of the executive (such as the President), Cabinet Ministers in the National sphere and members of the executive councils in the provincial sphere, exercise different functions according to the Constitution. For example, they implement legislation, they develop and implement policy and they prepare and initiate legislation. At times the exercise of their functions will involve administrative action and at other times it will not. In particular, the Court held that when such a senior member of the Executive is engaged upon implementation of legislation, that will ordinarily constitute administrative action. However, senior members of the Executive also have constitutional responsibilities to develop a policy

and initial legislation and the performance of this task will generally not constitute administrative action."

The Court continued as follows at p. 143:

"Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of the power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purpose of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."

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[33] Mr. Labuschagne argued that the power to dismiss the Board is more of an executive than an administrative action in that it was incidental to the power to make transport policy; that it is a high level power and the Minister is afforded broad discretion in exercising it. What, according to him, constitutes good cause for removing Board members under s 24(1) is a matter for the Minister to form a view on, depending on the government policy. It would therefore, according to him, constitute the performance of an executive function in terms of s 85(2)(e) of the Constitution. It provides that:

"The President exercises executive authority, together with the other Members of the Cabinet, by –

(e) performing any other executive function provided for in the Constitution or in National Legislation."

[34] Other than administrative implementation of national legislation which is referred to in s 85(2)(a) of the Constitution, on this aspect Mr Labuschagne relies on the case of Modau, paragraphs [41] to [57] where the Court in paragraph 47 stated as follows:

"[47] In the light of the aforegoing and for the reasons that follow, I am of the view that the Minister's decision is executive rather than administrative in nature. First, the minister's s 8(c) power is adjunct to her power to formulate defence policy. In terms of this power, the Minister formulates policy on, among others, the acquisition and maintenance of 'a navigation system' and 'arms, ammunition, vehicles, aircraft, vessels, uniforms, stores

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and other equipment.' Of course this is policy in the broad sense: overarching and direction-giving, with the minutiae of individual procurement decisions left to Armscor.

[48] As is apparent from the scheme of the Armscor Act, the minister does not provide direction through interventions in individual projects or by prescribing particular procurement policies. Rather, she discharges a political responsibility to ensure that the department's procurement agency meets statutory obligations by appointing and dismissing leaders who have the 'knowledge and experience which ... should enable them to obtain the objectives of the Corporation.' The minister must have in mind the department's policy aims when selecting board members, including the chairperson and the deputy chairperson. She must select people who are capable of carrying out those aims and who share the department's policy vision. Similarly the Minister arrests the failure to follow proper policy by terminating the directorships of people who have not assisted Armscor to discharge the statutory functions. The formulation of defence procurement policy and the appointment and dismissal of people who would supervise the implementation of that policy are thus closely linked. While the appointment and dismissal of board members are not the formulation of policy as such it is the means by which the minister gives direction in the vital area of military procurement, and is therefore an adjunct to her executive policy-formulation function.

(51) For these reasons, I am persuaded that the impugned decisions are not subject to review under PAJA. Because s 8(c) of the Armscor Act is an adjunct to the minister's

power to make defence policy, and thus more closely related to the formulation of policy than its application, the decision to terminate the services of the board members amounts to the performance of an executive function in terms of section 85(2)(e) of the Constitution rather than the implementation of national legislation in terms of section 85(2)(a)."

[35] In his heads of argument, Mr Labuschagne had stated that in deciding whether a decision was executive rather than administrative, the Court should have regard to the following guidelines:

35.1 a power most closely related to a formulating policy is likely to be executive, while a power most closely related to applying policy is likely to be administrative;

35.2 pointers in making a determination were:

35.2.1 the source of the power;

35.2.2 constraints imposed to its exercise; and

35.2.3 whether it was appropriate to subject its exercise to the more vigorous standard of administrative law review.

[36] According to him, the Minister of Transport is an organ of state subject to Constitutional imperatives in s 195 of the Constitution, to ensure the promotion of constitutional values and principles as set out in s 195(1), which include the efficient and economic effective use of

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resources. The Minister's exercise of her powers to dismiss Board members must, as a matter of law, be rational. He developed his argument and stated that, however, it would not be appropriate to subject the Minister's powers of dismissal to the more vigorous standards of administrative law review.

[37] The fundamental difference between the Modau case and the current case is that in the Modau case the Constitutional Court found that the Minister's powers were predicated on the provisions of the Constitution whereas in the current case the Minister's powers are anchored in statutory enactment. Her power to appoint and dismiss the Board of PRASA is sourced from the legislation and not from the Constitution. In removing the directors of the Board the Minister was wielding her statutory power which was conferred on her by the provisions of s 24 of the Legal Succession Act. She was not involved in the development of a new policy. I have accordingly reached a conclusion that the Minister's decisions are liable to be reviewed under the broad grounds provided for in PAJA. It will be recalled that in his argument Mr Labuschagne submitted that in deciding whether a decision was executive rather than administrative, the court should have regard to, inter alia, the source of the power, in other words, was it the Constitution or, if not so, was it statute?

[38] Mr Unterhalter, the applicants' counsel, argued that even if PAJA was not applicable to the Minister's decision, then such a decision constitutes the exercise of public power and is

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therefore amenable to the principle of legality. This principle requires that the decisions be rationally connected to the purpose for which they were taken. Such decisions should not be arbitrary or capricious or ultra vires the Minister's powers. They should not unjustifiably limit the Constitutional rights. The Minister answered that in such circumstances as the instant matter where she has to take all decisions, she merely has to act in a lawful and rational manner.

[39] The principle of legality also requires fairness to be observed before the decision was taken. The process by which an executive decision is taken and the resultant decision must be rational. The case of Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (15) SA 391 CC serves as good guidance in this respect. It concerns the powers of the President of this country to grant pardons under s 84(2)(j) of the Constitution to people who claimed that they had been convicted of offences which they had committed with a political motive. The question for consideration by the Constitutional Court was whether the President was required, prior to the exercise of the power to grant pardon to this group of convicted persons, to afford the victims of these offences a hearing. In paragraphs [49] and [50] respectively the Court expressed itself as follows:

"(49) It is by no means axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of section 82(2)(j), we held that although

there is no right to be pardoned, an applicant seeking pardon has a right to have this application "considered and decided upon rationality, in good faith, (and) in accordance with the principle of legality." It follows therefore that the exercise of the power to grant pattern must be rationally related to the purpose sought to be achieved by the exercise of it.

(50) All this flow from the supremacy of the Constitution. The President derives the power to grant pardon from the Constitution and that instrument proclaims its own supremacy and defines the limits of the powers it grants. To pass the constitutional muster, therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution."

See also in this regard **The Democratic Alliance v President of the Republic of South Africa and Others 2013(1) SA 248 CC paragraph [34]** where the Court stated:

"(34) It follows that both the process by which the decision is made and the decision itself must be rational. Albutt is authority for the same proposition. The means there were found not to be rationally related to the purpose because the procedure by which the decision was taken did not provide an opportunity for victims or their family members to be heard."

[40] Accordingly, the Minister's process of removing the concerned directors could only have been rational if the Minister had, before taking that decision, afforded the concerned directors an opportunity to be heard before their removal. Both our common law and the rule of law require a hearing to precede the undertaking of any drastic steps against the individual.

[41] It is an unalienable principle of our law that preceded even both the Constitution and PAJA that everyone is entitled to present his or her case. This is called the *audi alterim partem* rule. It extends even to the powers that the Minister exercises in terms of the Constitution. In their book South African Legal System And Its Background the authors, HR Hahlo and Ellison Kahn, stated the following at p.62 about this principle of *audi alterim partem* rule:

"In an old English case Biblical authority to this effect is given: Even God himself did not pass a sentence on Adam, before he was called upon to make his defence. Adam ("says God") where art thou? Hast thou not eaten of the tree, whereof I commanded thee thou shouldst not eat."

[42] The Minister denied the concerned directors a fair hearing. By thus denying them a fair hearing and deciding to remove them from their positions as directors without first having given them any hearing, the Minister exercised her powers arbitrarily or in a greatly unreasonable manner. A denial of a fair hearing was clearly designed to cause these

concerned directors substantial prejudice. The general rule is that where the Minister, entrusted with such powers as envisaged in s 24(1) of the Legal Succession Act, is seized with information that seeks her to make a decision, the person whose rights or claims may be adversely affected by such a decision, is entitled to a hearing. It is one of the fundamental requisites of a fair hearing that she should give such a person an opportunity of meeting such point. The Minister was obliged, in my view, to disclose to the concerned directors the substance of any prejudicial information in her possession and, having done so, afford these concerned directors a fair opportunity to controvert it. I am fortified in this regard by paragraph [101] at p. 104 of the case of Modau where Jafta J confirmed the principle of *audi alterim partem* in the following manner:

"Although the main judgment agrees that the respondents were entitled to a pre-decision hearing ..."

and also paragraph [83] of the same case of Modau where the Court had the following to say:

"[83] However, whether the principle of legality, or some other principle in this case, required the Minister to act in a procedurally fair manner does not, in the light of the applicability of the Companies Act, need to be decided here. It suffices to know that our law has a long tradition – which was endorsed by this Court in Mohammed – of strongly entrenching audi alterim partem ("hear the other party") which contains particular force when prejudicial allegations are levelled against an individual. And it is for this reason

that dismissal from service has been recognised as a decision that attacks the requirements of procedural fairness."

[43] Interestingly enough, the Minister was aware of the *audi alterim partem*, and that it would be for her procedurally remiss in the manner in which she took a decision to remove the directors from their positions. She contends that she complied with the principles of national justice. She answers that:

"I specifically requested both the Board and Mr. Letsoalo to furnish me with submissions why I should intervene. After carefully considering their submissions, I arrived at my decision to remove the Board."

I will revert to this statement later in the judgment in order to establish the contents of the letter in which the Minister requested submissions. I will contrast that letter with what Mr. Labuschagne informed the Court about the basic complaints that the Minister had against the Board.

[44] Suffice to mention that the Minister's decisions, even if they were of an executive nature as she claims, and that they may not be procedurally reviewed under PAJA,, they were subject to review under the principle of legality, for lawfulness, rationality, bad faith and lack of procedural fairness.

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[45] Referring the Court to the evidence, Mr. Labuschagne submitted that there was good cause for the removal of the concerned directors. He argued that even before the appointment of Letsoalo PRASA had virtually collapsed under the erstwhile Board. As early as 9 September 2015 the erstwhile Board was implored by the Minister to move with speed in the implementation of the Public Protector's findings. Notwithstanding such a request from the Minister by June 2016 the performance of PRASA had in fact deteriorated alarmingly under the watch of the erstwhile Board. In her letter dated 17 March 2016, the Minister expressed her concern as *"the Board has failed to turn tide as the pace of irregular, fruitless and wasteful expenditure are increasingly relentless"*. In the letter dated 14 June 2016 the Minister wrote as follows:

"It is evident from PRASA's declining performance that the BOC has not been able to turn around the performance of PRASA. In fact it is declining. I have persistently directed the BOC as the accounting officer to take responsibility for the affairs of PRASA, conduct detail analysis of his performance and to make vital interventions."

The continuous performance and executions cannot be tolerated any longer, there needs to be consequences for poor performance. Government is expecting improved performance from all Entities, especially those that are providing services directly to the public and receiving the majority of its funds from the national fiscus."

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[46] Mr. Labuschagne also pointed out that what the Minister did was not only the Minister that had persistently raised her concerns. Parliament through its Portfolio Committee on Transport had equally been concerned about the poor performance of the ex-board and its failure to address the irregularities in the Auditor General's report. In addition a vote of no confidence in the Board and a suggestion of the dissolution of the Board were also raised in that Committee. In support of this contention he argued that in fact when the decision of the Minister was read to the Portfolio Committee on 8 March 2017 it gave its full support to the Minister's decision. On this basis he contends that this Court should be slow to disturb the decision that was carefully made and has the support of Parliament.

[47] According to him, on 31 August 2016 the Portfolio Committee continued to question PRASA on the repeated findings by the Auditor General. The ex-Board was also questioned about the irregular expenditure in the amount of R93 million, now standing at R127 million at the time paid to Werksmans Attorneys, a matter persistently raised by Letsoalo.

[48] The purpose of the secondment of Letsoalo to PRASA was to help turn around the infirmity at PRASA. This was done because he was known to have had a track record of clearing up corruption and irregular expenditure. He is reported to have devised a turn-around strategy for PRASA in an attempt to set up systems and controls that were lacking at PRASA.

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[49] When Letsoalo was removed by the Board after the media frenzy, the Minister called for submissions from both the Board and Letsoalo why she should not intervene. It is contended that the submissions that the Minister obtained demonstrate that the allegations that Letsoalo had increased his salary by 350% could not be true. This is because, in the first place, his letter of appointment signed by the first applicant himself expressly stated in paragraph 3 that he was to be paid at the annualised salary applicable to the position of the Group CEO. This amount was therefore an objectively determinable one and was not subject to further Board approval. Paragraph 3 concludes by stating that:

"the details related to your compensation and benefits will be discussed and shared with you by Group Executive responsible for Human Capital Portfolio."

It was argued by Mr. Labuschagne that nowhere did the said paragraph state that it was subject to the Board's approval. The 12% allowance relied upon by the ex-Board did not apply to Letsoalo. I have stated somewhere above that this matter is not about whether the Minister had valid reasons to dissolve the Board but whether or not in dissolving the board she acted rationally or lawfully or in a procedurally fair manner.

[50] The Minister did not initially provide reasons for her decision to remove the relevant directors from office either at the time of their removal or in response to the applicants' request for reasons on 9 March 2017. This is the argument by Mr. Unterhalter. The fact that initially no reasons were provided and that still no reasons were provided when they were requested for

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on 9 March 2017 created the presumption that the decision by the Minister was irrational. In this respect he relied on **National Lottering Board v South Afican Education and Environment Project 2012 (4) SA 504 (SCA)** where it was stated by the Court at par. [27] that:

"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the Courts have said that such a decision would ordinarily be void and cannot be validated by different reasons afterwards – even if they show that original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but they are rather an expose facto realisation of a bad decision."

[51] For the first time the Minister purported, at a press conference that she held on 13 March 2017, to justify her decision to remove the relevant directors. She did that to the media instead of to the concerned directors. She stated that the Board *"was found wanting relating to amongst others the declining performance, lack of good governance, lack of financial prudence and ever deteriorating public confidence due to spats of infighting."* In her answering affidavit she set out two fundamental reasons for her decision. Firstly, she claims that the trigger for the relevant directors' removal was their decision to terminate Letsoalo's secondment to PRASA. She states that the Board was removed because *"the Board acted in unison in frustrating the actions of Mr. Letsoalo and ultimately removing him."* Furthermore

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she claimed that *"she substantially complied"* with the procedural fairness obligations in respect of this complaint because she wrote to the Board on 1 March 2017 and asked it to explain its public spat with Letsoalo and to furnish reasons why she should not intervene in order to restore good governance within PRASA. Secondly, the Minister claimed that she had wide-ranging concerns about the board's management of PRASA. She considered it to have been involved in corruption and in irregular expenditure since its appointment. Quite clearly nowhere does she state that she afforded the relevant directors an opportunity to be heard on these issues before she took the decision to remove them from office.

[52] A submission advanced by Mr. Unterhalter is that the Minister was not entitled to formulate reasons after the fact in an attempt to justify her decision. He relied, in this respect, on the case of National Lottery Board and South African Education Environment Project 2012 (4) SA 504 SCA where the SCA upheld the High Court's finding that it was impermissible for an administrator to rely on reasons put up for the first time in its answering affidavit.

[53] Her decision to remove the relevant directors from their position in the board must be assessed against reasons that motivated her at the relevant time she took the decision. Counsel for the applicants submitted that the clear trigger for the decision was the board's dismissal of Letsoalo. That dismissal did not provide independently any sufficient basis for the removal of the relevant directors. That must be so because the Minister herself decided

to remove Letsoalo a few days after the Board had taken that decision, and by doing so she validated the decision of the Board to remove Letsoalo.

[54] The argument advanced by Mr. Unterhalter was that even if the Minister had been motivated by both sets of reasons, her decision remained liable to be reviewed on the following grounds:

54.1 firstly, that it was procedurally unfair. According to the Minister she removed the relevant directors because she considered them to have engaged in long-standing irregular payments and, potentially, misconduct. But surprisingly she did not raise the alleged irregular spending on the part of the board with them or afford them an opportunity to respond and address her concerns. Procedural fairness requires that they be provided with such information and a chance to respond to it. See in this regard Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 304 A at 234 H-I which was recently endorsed by this Court in The Minister of Agriculture Fisheries and Forestry v Public Protector, case number 21830/2014 the unreported judgment which was handed down on 13 March 2017;

54.2 the Minister also failed to afford the relevant directors an opportunity to be heard in order to explain their decision to remove Letsoalo. In her letter dated 27 February 2017 she alerted the board to her concerns around the public spat with Letsoalo but failed to warn it that she was considering their removal pursuant thereto. For that reason alone her letter did not constitute sufficient notice of the steps that she was contemplating.

Furthermore, the board addressed the Minister on its reasons for terminating Letsoalo's secondment and so did Letsoalo. The Minister appears to have preferred Letsoalo's versions of events but did not revert to the board or notify it of Letsoalo's allegations against it before she did so. This is a further breach of the requirements of procedural fairness.

[55] Secondly, the Minister's decision can be challenged on the basis of irrationality. The Minister's explanation of her conduct quite clearly is internally inconsistent and irrational. She terminated on the one hand Letsoalo's secondment to PRASA thereby tacitly confirming that there were sound grounds for such termination. I already have pointed out in paragraph 54 that by doing so the Minister validated the action of the board to terminate Letsoalo's secondment appointment at PRASA. She accepted Letsoalo's version, on the other hand, of the dispute that unfolded between him and the Board. She then used the dispute as the springboard to remove the relevant directors from office. Those two decisions cannot be married with each other. They demonstrate that the decision to remove the Board was irrational. She claims she was forced to remove the board once Letsoalo was no longer in office because the board would otherwise be able to operate unchecked. This is a suggestion that the Minister was happy to allow the board that was potentially guilty of misconduct or mismanagement to remain in the office for as long as it was supervised by Letsoalo or consider their removal to be imperative once he was gone. It was submitted that that claim is

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irrational and unsustainable. It is to be remembered that at all times the board, and not Letsoalo, managed the affairs of PRASA. It is of crucial importance to point out that the Board was never answerable to Letsoalo and that Letsoalo could not have prevented misconduct if the Board was indeed engaged in such. If the Minister, honestly and genuinely believed that there were grounds to remove the concerned directors before 27 February 2017 then she was obliged to act on that belief at that particular time. The Minister could not simply bury her head in the sand and turn a blind eye to potential evil doing on the part of the board. The fact that the Minister took no steps to discipline the board before 8 March 2017 is indicative of the fact that there were in fact no grounds to do so and that the alleged misconduct was raised simply after the fact in an attempt to justify her unlawful conduct. Accordingly, her decision was irrational.

[56] Thirdly, and lastly, the Minister's decision to remove the concerned directors was so unreasonable and disproportionate as to be arbitrary and irrational. The board took a decision to terminate Letsoalo after it had sought and obtained legal advice. The decision to terminate Letsoalo's appointment was thus plainly reasonable given the fact that it had a discretion to terminate his appointment at will. The Minister should therefore have accepted that the Board's decision to terminate his secondment rather than disciplining it for it. Her decision was accordingly unreasonable on that basis alone. The decision, however, is rendered wholly disproportionate by the fact that the Minister appears to have given no

consideration to the serious and prejudicial impact of the wholesale removal of the Board on PRASA's interest. Mr. Unterhalter submitted that it was arbitrarily and irrational for the Minister to take the extreme step of removing the board for its good faith's removal of Letsoalo when the effect of the decision was so deleterious to PRASA's interest and those of the public. Finally, he submitted that the decision was subject to be reviewed and set aside on each of the grounds set out above whether the review is brought under PAJA or on the basis of legality.

THE DECISION TO APPOINT THE NEW BOARD MEMBERS

[57] At the time the Minister appointed the new members of the Board of Control of PRASA, she was aware of this application. The Minister had been warned in an email of 12 March 2017 from the removed director's legal representatives that the relevant directors had instituted the urgent proceedings on 11 March 2017. It is contended that in appointing the new members of the Board, the Minister clearly and deliberately ignored the urgent proceedings and the relief sought by the applicants. Furthermore she ignored the fact that such urgent proceedings were subject to considerations by the Court. The Minister ignored the letters dated 9 and 10 March 2017 respectively sent to her by the removed directors' legal representatives and, finally, ignored the email sent on behalf of the removed directors dated 12 March 2017.

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[58] It was submitted by counsel for the applicants on the basis of the aforegoing allegations that the Minister's conduct was clearly unlawful and amounted to pre-emption of the urgent proceedings and constructive contempt of court.

[59] Finally, it was submitted, furthermore, that if the removal of the concerned directors was invalid then the decision to appoint the new members in their place was equally invalid. In this respect counsel for the applicants relied on the case of **Seale v Van Rooyen N.O. and Others Provincial Government, North West Province v Van Rooyen N.O. and others 2008 (4) SA 43 at page 50 C-D** where the Court had the following to say"

"I think it is clear from Oudekraal, and it must, in my view, follow that if the first act is set aside, a second act that depends for its validity on the first act must be invalid at the legal foundation for its performance was non-existent."

Cora Hoexter on page 509 of her book "Administrative Law of South Africa, 2nd Edition" commented on the Oudekraal judgment and had the following to say:

"In other words, as Oudekraal itself makes clear, the factual existence of an act is capable of supporting subsequent acts only as long as the first act is not set aside. In this instance a decision to grant a servitude had indeed been set aside and the subsequent registration of the servitude was therefore of no force and effect."

I have therefore come to the conclusion that the decision of the Minister to appoint new members of the Board of directors before the conclusion of the current prosecution was invalid.

[60] I have reached a conclusion that the applicants, or should I say the removed directors, have proved that they have a clear right to challenge the decision taken by the Minister and furthermore to have the decision reviewed and set aside or to obtain an order suspending the operation of the notices of removal. The removed directors have a right to the proper exercise of statutory powers by the Minister, who exercises public power and whose decision in this regard is subject to administrative justice. Secondly, it is in the public interest that the affairs of PRASA be properly regulated by an independent Board of Control independently of any interference from the government. Thirdly, and finally, it is of paramount importance that corruption in PRASA be exposed and prevented. The public has an interest to fight the deep rooted corruption in the country because it compromises the democratic ethos, the institutions of democracy and gnaws at the rule of law. Accordingly, the applicants therefore have a clear right.

[61] A tug-of-war relating to whether or not this matter was urgent developed between the parties. The parties agreed that the said issue should not be made a separate subject of argument but that it should be argued with the merits of the matter. This was in order to prevent the Court

from being bogged down on a side issue before it could deal with the merits of the application. The move was intended to save time and to expedite the proceedings. In this tug-of-war the removed directors had, much to the chagrin of the Minister, contended that the application was urgent and also asked for an order accordingly. The Minister though disputed urgency of the matter.

[62] What were then the reasons for the removed directors to contend that their matter was urgent? In this regard the removed directors cited continuity in the governance of PRASA. They contended that continuity employment of PRASA was critical not only in the light of the projects that PRASA was pursuing but furthermore in the light of the investigations of corruption and maladministration which was continuing. Consequently, the summary removal of the directors of PRASA would denude it of any intimate knowledge about such investigation. Civil proceedings which had been set down for hearing in the coming months would also be weakened. The second reason that they gave was that they were suffering substantially and potentially irreparable personal harm, both in terms of their public and commercial reputation. In the eyes of the undiscerning public, their removal was ignominious. They were perceived to have misconducted themselves in running the affairs of PRASA. If the decision was left unchallenged, they would be regarded as having mismanaged the affairs of PRASA and ran it into the ground.

[63] Fourthly, they could not let the decision of the Minister go on unchallenged unless they be regarded as having acquiesced in it. They had to act with lightning speed to bring the application and to set the record straight. Fifthly, time was not on their side. It is common course between the parties that ordinarily they were left with three months or less to the end of the tenure of their office. Sixthly, the Minister herself has conceded that the matter was urgent.

[64] The Minister contended that judging from the time frame set by the appellants the matter was not urgent. They pointed out that already on 10 March 2017 the appellants' attorneys had indicated in a letter that they were aware that the Minister was actively engaged in trying to install a new PRASA Board. Accordingly, they were aware that the Minister was on the point of appointing a new Board. Then they contend that a new Board had already been instituted.

[65] The fact that the Minister had already appointed a new Board, as they contend, made the matter, in my view, extremely urgent. The Minister was not prepared to wait for her decision to be challenged so that there could be certainty. This shows that she herself thought that the matter was urgent and that a new Board had to be installed in order to attend to the governance of PRASA. The applicants had to take steps to challenge the appointment of the new Board, firstly, because the Minister proceeded with the appointment of the new Board despite the fact that it had been indicated to her that her decision would be challenged and,

secondly, before the new Board could take root. In conclusion I agree, and I find, that the matter was urgent.

[66] Finally, I now turn to whether or not the Court should grant an interim or final relief. This point was not so much vigorously pursued by the parties during the argument. In the circumstances and also due to the fact that this matter was argued as if it was an application for a final relief, the Court will accept that the parties envisaged that on the facts before the Court the final order could be granted. Moreover it will be financially cumbersome and costly to expect the parties to come back to Court to reargue the points that they fully ventilated during their argument in this urgent application. Then interim relief will be otiose considering the fact that a period of three months which represent the last of the three months of the tenure of office of the removed directors would have expired by the time the matter comes back to Court for argument on Part B of the application. I am satisfied that all the relevant issues were properly and extensively ventilated and that, in the circumstances, there is nothing that prevents the Court from granting a final relief in this matter. The application, in my view, satisfies the requirements for a final relief.

[67] Accordingly, the application is granted and the following order is made:

1. This application is hereby treated as an urgent application and the forms prescribed by the Rules of this Court are hereby dispensed with.

2. The Notices of Removal issued by the First Respondent on 8 March 2017 in respect of each of the Applicants, except the Fifth Applicant, are hereby reviewed and set aside:

3. The decision of the First Respondent made on 8 March 2017 in terms of which the First Respondent removed each of the Applicants, except the Fifth Applicant, from the Board of Control of the Second Respondent is hereby reviewed and accordingly set aside.

4. It is hereby ordered that the First, Second, Third, Fourth, Sixth and the Seventh Applicants be and are hereby reinstated as the directors of the Second Respondent with effect from 8 March 2017.

5. The appointment of any directors to the Board of Control of the Second Respondent on or after 8 March 2017 in substitution of the Applicants is hereby reviewed and set aside, with effect from 13 March 2017.

6. The First Respondent is hereby ordered to pay the costs of this application.

P.M. MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants:	*Adv. D Unterhalter (SC)*
	Adv IA Goodman
Instructed by:	*Webber Wentzel Attorneys*
Counsel for the respondents:	*Adv. EC Labuschagne (SC)*
	Adv. J Motepe (SC)
Instructed by:	*The State Attorney*
Date Heard:	*17 March 2017*
Date of Judgment:	*10 April 2017*

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Annexure "PM15"

HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 36337/2017

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED. ✓
DATE 04/05/2018
SIGNATURE

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA	Applicant
ORGANISATION UNDOING TAX ABUSE	Intervening Party
and	
DIRECTORATE FOR PRIOPRITY CRIMES INVESTIGATION	First Respondent
NATIONAL PROSECUTING AUTHORITY	Second Respondent

JUDGMENT

DAVIS, J

Introduction

[1] In this matter four interlocutory applications came before me in the Third Court on 30 April 2018. As the various interlocutory applications are being applied for by different parties, it will avoid confusion to refer to the parties as in the main application.

[2] The Applicant in the main application is the Passenger Rail Agency of South Africa (PRASA). The First Respondent in the main application is the Directorate for Priority Crimes Investigation (DPCI) and the Second Respondent is the National Prosecution Agency (the NPA). The Organization Undoing Tax Abuse (OUTA) is the intervening party. The NPA abides the decision of the court and did not participate in the interlocutory applications.

[3] The four interlocutory applications are the following:

3.1 The Rule 7 Proceedings launched by the DPCI;

3.2 The condonation application launched by the DPCI;

3.3 The counter-application by PRASA;

3.4 The intervention application by OUTA.

[4] The procedural history

The procedural history of the interlocutory applications are (briefly) the following:

4.1 On 29 May 2017 PRASA launched the main application;

4.2 On 5 June 2017 the DPCI lodged its notice of opposition;

4.3 On 21 June 2017 the State attorney on behalf of the DPCI requested an extension of time for the delivery of the DPCI's answering affidavit, which time would expire on 27 June 2017;

4.4 On 22 June 2017 PRASA's attorneys granted such extension to 14 July 2017;

4.5 On 12 July 2017 the DPCI lodged a Rule 7 notice, disputing the authority of the then Chairperson of PRASA and its Board of Control, Dr Molefe, to have launched the main application;

4.6 On 13 July 2017 PRASA's attorney claimed that the Rule 7 notice was out of time and therefore irregular, the 10 days period after service of the main application having expired on 12 June 2017. Simultaneously a power of attorney from PRASA's Group CEO and Group Executive: Legal, Risk and compliance (also referred to as "Head of Legal") was sent to the State Attorney.

4.7 Leaving further correspondence between the parties aside for the moment, a notice in terms of Rule 30 was delivered by PRASA on 26 July 2017 claiming the irregularity of the Rule 7 notice;

4.8 On 2 August 2017 PRASA's attorneys sent an affidavit deposed to by Dr Molefe on 26 July 2017, being prior to the expiry of his term of office on 31 July2017, to the State Attorney. This affidavit makes reference to a resolution taken by the PRASA Board of Control to institute, inter alia, the present proceedings. The resolution was taken at a special board meeting on 21 September 2015. This affidavit was subsequently served on the State Attorney

on 7 August 2017 together with confirmatory affidavits thereto by four other board members;

4.9 Despite the above and, intent on pursuing the disputed authority raised in its Rule 7 notice, the DPCI lodged a substantive (but conditional) application in terms of Rule 27 (3) of the Uniform Rules (referred to as the condonation application);

4.10 PRASA opposed the condonation application. In its opposition it again annexed the affidavit of Dr Molele and other board members and, reliant thereon and on the contents of the opposing affidavit by its "Head of Legal", claimed certain relief in a counter application, notably the setting aside of the DPCI's Rule 7 notice alternatively a declaratory order that the PRASA main application was duly authorised;

4.11 The DPCI did not answer or reply to the abovementioned PRASA affidavit and its counter-application.

4.12 In the meantime, OUTA has delivered an application for leave to intervene on 31 July 2017 which application was opposed by the DPCI on the basis that the PRASA main application was fatally defective due to lack of authority and that leave to intervene should not be granted in respect of a defective application. OUTA has delivered a replying affidavit to the DPCI's answering affidavit;

4.13 The papers in the main application are, as yet, incomplete in that the DPCI has not yet delivered its answering affidavit which ostensibly, on the correspondence, has been ready since the previously extended date for filing of 14 July 2017;

4.14 OUTA has indicated that its founding affidavit is ready for delivery immediately upon being granted leave to appeal.

[5] I consider it inimical to the interests of justice that, where matters of public interest are concerned, organs of state indulge in costly squabbles of interlocutory and somewhat technical nature rather than engage with the merits of the matter in an expeditious, responsible and transparent manner.

[6] Context

The context of the relief claimed in the main application, to my mind, adequately illustrates this point:

6.1 PRASA has in recent years sought to investigate numerous incidents of alleged corruption, other criminal conduct and irregularities relating to various tenders, including the two mentioned in the main application, namely the "Swifambo and Siyangena tenders". Fruitless, wasteful or irregular expenditure of between R 9 billion and R 14 billion are alleged in this regard.

6.2 Some of the irregular and unlawful activities were set out in a report by the Auditor General in the Draft Management Report of 31 March 2015 and others were highlighted in a report by the previous Public Protector entitled "Derailed".

6.3 The magnitude and severity of the "problems" uncovered were such that it overwhelmed PRASA's Board of Control. It therefore took the step of engaging forensic investigators lead by PRASA's attorneys Werksmans to assist in unearthing the relevant information. Werksmans were mandated to commence their investigations on 5 August 2015. The investigations bore

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substantial fruit in respect of, inter alia, the two tenders referred to in paragraph 6.1 above which had been prioritized by PRASA.

6.4 On 21 September 2017 and at a special board meeting of the PRASA Board of Control a resolution was taken which had been detailed in the affidavit of Dr Molefe in paragraph 8 thereof as follows:

"8 *On that day, the Board resolved that:*

8.1 PRASA launch any application proceedings and institute any action proceedings that PRASA may be duly advised (by Werksmans) to launch or institute, and which proceedings are deemed to be the appropriate remedial actions to any findings that may arise from the investigation.

8.2 PRASA defend any application proceedings and action proceedings that may be launched or instituted by any third parties as a result of remedial steps taken by PRASA to deal with any findings by Werksmans during the course of the investigation.

8.3 That POPO SIMON MOLEFE be and is hereby authorised to take all steps and do all things necessary with regards to the proceedings referred to in paragraph 1 and 2 above including the signing of all documents and deposing to affidavits in regard thereto, and insofar as he has done so before the

adoption of these resolutions, such action/ s be and is / are hereby ratified.

8.4 *That Werksman Attorneys of 155-5th Street, Sandown, Sandton be appointed as PRASA's attorneys in regard to the proceedings referred to in paragraphs 1 and 2 above".*

6.5 The resolution followed on complaints filed with the South African Police Services (the SAPS) regarding the 37 complaints initially made to the Public Protector, including complaints of criminal conduct regarding the award of the two mentioned tenders and conduct surrounding their execution.

6.6 From an early stage, the SAPS referred the complaints to the DPCI for investigation as these complaints fell within its constitutional and statutory mandate. The founding affidavit is replete with complaints regarding the dilatory and alleged lackadaisical and unorganized fashion in which the investigation has been handled since.

6.7 The relief claimed in the main application is the following:

(a) Declarations that the DPCI has failed reasonably to conduct and / or continue to finality the PRASA / Siyangena and Swifambo investigations;

(b) A declaration that the DPCI has failed reasonably to conduct and co-ordinate the investigations co-operatively with the NPA to enable the effective utilization of asset protection

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procedures provided for in the Prevention of Organised Crime Act 121 of 1998;

(c) An order directing the DPCI to take such steps as are necessary to finalise its investigations in respect of the related complaints by taking inter alia the steps set out in prayers 5.1 to 5.5 of the notice of motion;

(d) An order directing the DPCI to finalise its investigations within 30 days or such other time as may be determined by the Court or directing the Head of the DPCI to request the NPA to lead the investigations in terms of section 28(2) of the National Prosecution Authority Act 32 of 1998;

(e) Various relief aimed at preserving the confidentiality of certain evidence before the Court and to ensure that a financial analysis conducted in respect of the Swifambo matter be placed before the Court under an appropriate confidentiality regime;

(f) An order directing the DPCI to supply the NPA with the financial analysis.

6.8 It is in this context that the DPCI's attack in terms of Rule 7 must be considered.

[7] Uniform Rule 7

The relevant portions of Uniform Rule 7 provide as follows:

"Power of Attorney

... the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, where after such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application ...

(4)Every power of attorney filed by an attorney shall be signed by or on behalf of the party giving it, and shall otherwise be duly executed according to law; provided that were a power of attorney is signed on behalf of the party giving it, proof of authority to sign on behalf of such party shall be produced to the registrar who shall note that fact on the said power ..."

[8] Authority to Act

8.1 It is clear from the wording of the rule that it is primarily designed to ascertain whether the attorney acting for a party has the necessary mandate or power of attorney to represent the specific party or client.

8.2 Based on the wide wording of Rule 7(1), it is also often used to dispute the authority of anyone alleging that the proceedings have been authorised by a party, particularly in the instance of corporate or other legal entities.

8.3 The best evidence that proceedings have been authorised by a corporate entity is customarily the production of a resolution of the board of such an entity to this effect, introduced by an official of the entity. It is usual and desirable for such a resolution, if it exists, to be annexed and proven by the founding affidavits in motion

proceedings but such method of proof is not essential in every case. In each case, the court must decide whether sufficient evidence has been placed before it to warrant the conclusion that it is indeed the applicant that is litigating and not some unauthorized person purportedly acting on its behalf. Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk 1957 (2) SA 347 (C) quoted with approval in Poolquip Industries (Pty) Ltd v Griffin 1978 (4) 357 (WLD) with reference to a string of similar judgments at 386 F-H.

8.4 One should also be mindful of the fact that "*the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit*". Rather "*it is the institution of the proceedings and the prosecution thereof which must be authorised*". Ganes and Another v Telecom Namibia Ltd 2004 (3) SA 615 (SCA). Once the proceedings have been authorised on behalf of a party, it is unnecessary that a witness should additionally be authorised. Eskom v Soweto City Council 1992 (2) SA 703 (W).

8.5 It is a question of fact whether the evidence tendered on the issue of authority is sufficient to establish whether it is in fact the applicant litigating.

8.6 "*The manner in which the authority is challenged is also relevant to the kind of evidence that would be required to satisfy a court as to the existence of authority*" : Tzaneen Local Transitional Council v Louw et Uxor 1996 (2) SA 860 (T) at 863B-C and Tattersall and Another v Nedcor Bank Ltd 1995 (3) SA 222 (A) at 228F – 229D.

[9] I am of the view that the issue of whether the present proceedings are in fact those of PRASA and whether they have been duly launched is of far greater importance than the issues of whether the Rule 7 notice was delivered in time and, if not, whether "good cause" has been established for the granting of condonation and, if not, whether the notice should be set aside as an irregular step or not. Determination of the issue of authority would also be dispositive of these other questions, including that of intervention of OUTA.

[10] The Rule 7 notice

10.1 The "manner" in which PRASA's authority was challenged has been formulated as follows in the DPCI's notice in terms of Rule 7:

"*The deponent to the founding affidavit, Dr Popo Simon Molefe, does not allege that he has been authorised by the Board of PRASA, the applicant herein, to launch this application.*

The applicant is a juristic person, a state owned entity with legal personality established in terms of section 22(1) of the Legal Succession to the South African Transport Services Act No 9 of 1989 and it has a Board of Control in which authority to manage PRASA vests.

As a result, the Board's resolution authorizing the launching of this application is a sine qua non for the launching of the application.

The absence of the Board's resolution is fatal to this application.

Wherefore the First Respondent hereby calls upon the applicant to produce a Board resolution which authorises the deponent to the

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founding affidavit to launch this application and to depose to an affidavit on behalf of the applicant ..."

10.2 The consequences to be achieved by this notice has been stated on behalf of the DPCI in heads of argument filed on its behalf to be that "*should this application (the Rule 7 attack) be granted, there will be no prejudice to PRASA as at this stage a new Board has been appointed and they can go back and rectify this irregularity and bring back the case and all their rights will remain intact*".

10.3 The aforesaid submission was premised on the fact, as stated by the State Attorney in his affidavit delivered in support of the DPCI's application for condonation, that "*... it was also raised by client in that consultation [of 10 July 2017] that it has learned through the media that the PRASA Board did not quorate (sic) at the time when Dr Molefe deposed to the founding affidavit and launching (sic) the application. Senior counsel undertook to consider the issue. It was on the strength of this revelation and failure by Dr Molefe to allege in the founding affidavit that he was duly authorised which strengthened the suspicion that indeed Dr Molefe did not have authority to institute the application. The Rule 7 notice was delivered on this basis*".

10.4 So far the grounds for disputing the authority of the PRASA proceedings and the manner in which it has been raised.

[11] Evaluation

11.1 To start off with, the attack on the alleged lack of authority to depose to an affidavit is unfounded and misplaced and has determinatively been dealt with by the Supreme Court of Appeal in

Gane's case mentioned in paragraph 8.4 above. No such authority to depose is necessary. Insofar as it may have been, it has in any event been granted by the Board.

11.2 The allegation that a Board of Control resolution is a sine qua non for the launching of legal proceedings is also factually incorrect. The PRASA Board of Control has, as it is empowered to do in terms of section 24 (5) of its enabling statute mentioned in the Rule 7 notice, delegated the authority to institute proceedings to an employee. In the affidavit delivered by PRASA in support of its counter-application and in opposition to the DPCI's condonation application, its Group Executive: Legal, Risk and Compliance (also known as Head of Legal) produced such a "delegations document" which clearly indicate that the power to institute legal proceedings and to appoint attorneys and counsel to act on behalf of PRASA has been delegated to the said deponent as the responsible person and that the accountability responsibility has been delegated to the Group CEO.

11.3 In response to the Rule 7 notice, PRASA's attorney have forwarded a power of attorney signed by the Head of Legal and the Group CEO of PRASA, reading as follows:

"... in our respective capacities as Acting Group Chief Executive Officer and Group Executive: Legal, Risk and Compliance of the Passenger Rail Agency of South Africa ("PRASA") and as the accountable and responsible person authorised to (a) institute legal proceedings on behalf of PRASA and (b) appoint attorneys and counsel to act on behalf of PRASA as prescribed in PRASA's

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Delegation of Authority (a copy of which is attached) hereby certify that, in our aforesaid capacities, we have duly:

1. *Authorised the institution of the above proceedings and*

2. *Nominated, constituted and appointed Werksmans ... to act for PRASA, to launch and prosecute the proceedings ...*

To the extent necessary we hereby ratify, allow and confirm any and all actions already taken by virtue of this Power of Attorney".

11.4 As already indicated, all though this Power of Attorney was furnished to the state attorney on 14 July 2017, the DPCI was not satisfied with it and proceeded with its dispute of authority, alleging that the power of attorney was "fatally defective" as it was "inconceivable" that subordinate employees can authorise their employer to institute legal proceedings. No attack was however made on the delegation referred to above itself nor on its validity. A proper power of attorney to institute proceedings was therefore furnished by the duly delegated PRASA employee. It follows that this attack is without foundation.

11.5 In addition to the above, PRASA furnished the State Attorney with a copy of the Affidavit of Dr Molefe referred to in paragraph 6.4 above on 2 August 2017 and separately served and filed the affidavit together with the confirmation affidavits of four other Board members on 7 August 2017.

11.6 In the DPCI's application for condonation launched the next day, 8 August 2017, not a word was said about Dr Molefe's affidavit nor

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about the resolution of 21 September 2015. Still not a word was said by the DPCI about this after the delivery of the affidavit opposing its condonation application and supporting PRASA's counter application, to which the affidavit of Dr Molefe and that of the other Board members were again attached. In addition, it was common cause during argument of the matter that at 21 September 2015 the PRASA Board of Control was quorate.

11.7 Counsel for the DPCI, although conceding that PRASA's Board retained the power to authorise the institution of legal proceedings itself despite the delegation of similar power to its Head of Legal, attacked the Board resolution relied on by Dr Molefe, not on the basis that it had not been properly minuted, but on the basis that it and the Power of Attorney referred to in paragraph 11.3 above are mutually exclusive and mutually destructive.

11.8 I cannot agree. Clearly the Board Resolution is blanket in nature, particularly viewed in the context in which it was taken as set out in paragraph 6 above. The exercise of the delegated power reflected in the Power of Attorney was additional and incidental thereto but relating to these specific proceedings. The two powers and the exercise thereof are clearly complimentary to and not destructive of each other.

11.9 In view of the uncontested evidence of Dr Molefe, not only has it been established to the satisfaction of the court that the present proceedings are indeed those of PRASA and have been duly authorised, but that the prosecution of the attack on this authority appears to be so without foundation that it was unreasonable.

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11.10 Insofar as it may not yet be apparent, I find that the present proceedings have been duly authorised by PRASA.

11.11 In view of the above finding, I need not make any separate finding in respect of the condonation application or the Rule 30 proceedings except insofar as costs are concerned. It also follows that, once the issue of PRASA's authority is disposed of, there is no further bar or hurdle, insofar as there may have been, for the delivery of the DPCI's answering affidavit in the main application.

[12] OUTA's intervention

OUTA submitted, both in the affidavit filed in support of its intervention and in argument, that it was entitled to join in the main application as it seeks the same relief as PRASA and on the same facts and for substantially the same reasons. It further claimed to act in the public interest and that its joinder would be manifestly convenient and in the public interest. PRASA did not object to this proposed intervention and the only opposition proffered by the DPCI was that mentioned in paragraph 4.12 above. It conceded that, should the issue of authority be decided in PRASA's favour, as it now had, that it would not object to OUTA's joinder. With reliance on, inter alia, Shapiro v SA Recording Rights Association Ltd (Galeta intervening) 2008 (4) SA 145 (W), I am satisfied that OUTA has made out a sufficient case to warrant its intervention in the main application. It has also indicated that, should leave to intervene be granted, it is in a position to deliver its founding affidavit as co-applicant immediately and, as the grounds relied therein are substantially the same as those relied on by PRASA, lastmentioned of which the DPCI (and the NPA) had been aware of for almost a year, it should not present the respondents with any difficulty in delivering their answering affidavits thereto promptly.

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[13] The hearing of the main application

I have been advised by the parties that the review application in respect of the review of one of the tenders forming the subject matter of the main application has been set down for hearing in the Third Court in this Division at the end of June 2018. PRASA would have preferred to have the main application heard simultaneously therewith but the permutations pertaining to this and the exchange of further papers subsequent to the filing of the answering affidavit by the DPCI will have to be taken up by the parties with the Deputy Judge President, with whom they had already had meetings in this regard. Suffice it to say that in the counter application an order for delivery of the answering affidavit in the main application by the DPCI within five days was claimed. There was no objection raised to this proposed time period.

[14] Costs

14.1 As indicated earlier in this judgment, it is to be deplored that organs of state engage in interlocutory skirmishes with each other whilst the main battle is raging around them and they, by their conduct delay any meaningful engagement therein.

14.2 The delay caused by the dispute of one organ of state of the authority by another organ of state for a mandamus to have criminal investigations expedited or concluded has exceeded nine months if calculated from the delivery of the Rule 7 notice and only slightly shorter if calculated from the day of the furnishing of the affidavit of Dr Molefe wherein the Board of Control resolution to initiate proceeding had been detailed. These delays could have been avoided and the manner in which the authority had been challenged was, as already indicated, inappropriate.

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14.3 Not only did this delay prejudice progress in the finality if the investigation or at least the consideration of the public interest issues raised in the main application but huge additional costs were incurred.

14.4 The DPCI alleged that it would suffer prejudice if the main application is not dismissed due to a lack of authority but demonstrated no such prejudice. Surprisingly it further argued that "*the only possible prejudice (which is denied) [that PRASA would suffer] should the relief be granted, is the delay in the adjudication of the claim*". This, to my mind, constitute an irresponsible and wasteful type of litigation by an organ of State.

14.5 In addition, the prosecution of the challenge to PRASA's authority is in my view and in the circumstances of this matter and its context, unreasonable to the extent that it warrants a punitive costs order. The same applies to the opposition to OUTA's application for intervention.

14.6 Both PRASA and the DPCI had agreed or conceded that whatever costs order be made, the costs of three counsel would be warranted.

[15] Order

1. Paragraph 2 of the counter-application by PRASA is granted to the effect that:

1.1 It is declared that the main application is duly authorised;

1.2 The DPCI is directed to deliver its answering affidavit to the main application, if any, within five days from date of this order.

2. OUTA is granted leave to intervene in the main application as co-applicant and is directed to deliver its founding affidavit forthwith.
3. OUTA's costs of its application for intervention shall be costs in the main application.
4. The DPCI is ordered to pay OUTA's costs occasioned by the opposition to OUTA's application for intervention.
5. The DPCI is ordered to pay PRASA's costs of the interlocutory applications, including the costs of the condonation application and PRASA's counter application, on the scale as between attorney and client, including the costs of three counsel where employed.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 30 April 2018

Judgment delivered: 4 May 2018

APPEARANCES:

For the Applicant:	Adv. R HuttonSC (with Ms S Cowen and Ms N Kakaza)
Attorney for Applicant:	Werksmans Attorneys, Pretoria
For the Intervening party:	Adv Q G Leech SC (with Ms A Dipa)
Attorney for Applicant:	Alet Uys Attorneys, Pretoria
For the First Respondent:	Adv W Mokhari SC (with Mr MH Mhambi and Ms CT Lithole)
Attorney for Respondent:	State Attorney, Pretoria