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

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

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;

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

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:

"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

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.

[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.

[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

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;

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;

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

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.

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."

[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

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.

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."

[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

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

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

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.

[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."

[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.

[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

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

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

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.

[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*