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28 February 2018 date

Passenger Rail Agency of South Africa

PRASA House
1040 Burnett Street
Hatfield, Pretoria

Attention: Chairperson: Adv. TAN Makhubele SC
Per email: tanmakhubele@me.com / lzide@prasa.com

Dear Chairperson

ADVICE ON THE CONSTITUTION OF THE INTERIM BOARD AND THE APPOINTMENT OF THE CHAIRPERSON

1. INTRODUCTION

1.1. We refer to the meetings held between (amongst others) yourself and ourselves on Thursday, 22 February 2018 and Saturday, 24 February 2018 (the "**Briefing Meetings**"). At the Briefing Meetings, you asked us to consider and provide the current Board of Control of the Passenger Rail Agency of South Africa ("**PRASA**") (the "**Interim Board**") with our advice on the specific questions set out in paragraph 3 of this memorandum.

1.2. We set out hereunder our preliminary advice in response to the questions from the Interim Board.

1.3. In preparing our advice, we have had regard to certain facts giving rise to the questions from the Interim Board (our understanding of such facts being set out in paragraph 2 below), as well as relevant provisions from the following statutes:

1.3.1. the Constitution of the Republic of South Africa, 1996 ("**Constitution**");

1.3.2. the Legal Succession to the South African Transport Services Act No. 9 of 1989 (the "**Legal Succession Act**");

1.3.3. the Public Finance Management Act No. 1 of 1999 (the "**PFMA**");[1]

1.3.4. the Judicial Service Commission Act No. 9 of 1994 (the "**JSC Act**");

[1] PRASA is a public entity as contemplated in the PFMA and is bound to the provisions applicable to national government business enterprises, by virtue of being listed as such at Schedule 3B to the PFMA.

1.3.5. the Judges' Remuneration and Conditions of Employment Act No. 47 of 2001 (the **Judges' Remuneration Act**"); and

1.3.6. the Code of Judicial Conduct published as GNR. 865 of 18 October 2012 (the "**Code of Judicial Conduct**"), in terms of the Judges' Remuneration Act.

1.4. In order to avoid prolixity, we have referred to the relevant provisions of the statutes referred to in paragraph 1.3 above and have refrained (except in limited instances) from repeating entire sections of the aforementioned statutes.

2. MATERIAL BACKGROUND FACTS

Our understanding of the factual matrix giving rise to the questions we have been asked to address, based on discussions with the Interim Board at the Briefing Meetings and the documentation provided to us by the Interim Board, is as follows -

2.1. in March 2017, the then Minister of Transport (the "**Minister**") dissolved the then Board of Control (the "**Board**") of PRASA by removing the Board members in terms of section 24(1) of the Legal Succession Act;

2.2. the Minister's decision to remove the Board was successfully challenged in court and the Board members were reinstated, but their terms of office lapsed on 31 July 2017;

2.3. on 5 October 2017, the Judicial Service Commission (the "**JSC**") formally recommended Advocate TAN Makhubele SC (hereinafter the "**Chairperson**") for appointment as a judge in the High Court of South Africa, Gauteng Division, Pretoria (the "**High Court**");

2.4. on 19 October 2017, it was announced by the then Minister of Communications that the Minister had appointed four members to the Interim Board, with then Advocate TAN Makhubele SC as its Chairperson, "until further notice".[2] We understand that the appointment was preceded by a process of advertisement in the national newspapers, and that the aforesaid appointees had applied to be considered as members of the Interim Board. We also understand that the appointments made by the Minister on 19 October did not include a representative from the Department of Finance (National Treasury), and that such representative was only appointed to the Interim Board on 5 February 2018;

2.5. on the same day, 19 October 2017, the clerk to the Judge President of the High Court sent an email to the Chairperson amongst others, enclosing a "directive" from the Judge President for her attention;

[2] The announcement states that the four persons appointed to the Interim Board on 19 October 2017 were the Chairperson, Dr Natalie Skeepers, Professor John Maluleke and Magdalene Reddy.

2.6. on 20 October 2017, the Chairperson sent an email to Judge President Mlambo accepting her placement to the High Court and indicating that she wished to discuss with the Judge President the matter of the starting date of her appointment;

2.7. on 23 October 2017 the Judge President responded by email, in which he requested the Chairperson to indicate her view on the starting date via email as he was very busy that week;

2.8. on 2 November 2017, it was announced in the media that the Chairperson had been appointed by then President of the Republic of South Africa, President Jacob Zuma (the "**President**") as a judge of the High Court, with effect from 1 January 2018;

2.9. the Chairperson confirmed her appointment as a judge in the High Court, in her report to the Parliamentary Portfolio Committee on Transport ("**PCOT**") on 24 November 2017;

2.10. on 28 November 2017, a representative of the Office of the Chief Justice emailed the Chairperson various forms for completion by her for purposes of "appointment implementation on the PERSAL system", stating that her appointment cannot be finalised without the information and documentation referred to in the email;

2.11. on 4 December 2017, the Chairperson emailed the Judge President indicating that "*I think it will be in the best interest of the Bench if I start in April 2018*";

2.12. on 6 December 2017, the Judge President responded by confirming that notwithstanding the Chairperson's preference for a later starting date, the President had already done the appointment with effect from 1 January 2018, and that the Judge President was waiting for the "*appointment letters and certificates*";

2.13. on 15 December 2017, the Chairperson emailed the Director-General of the Department of Water Affairs and Sanitation confirming her appointment to the High Court and stating that she had made arrangements to start on 1 April 2018 and that she would submit a formal letter of resignation from her position as chairperson of the Water Tribunal with effect from 30 March 2018;[3]

2.14. on 29 January 2018, the Registrar of Judges' Registrable Interests confirmed in an email that after sending the Chairperson a reminder to complete the disclosure forms by 31 January 2018 (based on an assumed commencement date of 1 January 2018), the Registrar had "*since been informed*" that the Chairperson's commencement date has been moved to April 2018 and that her disclosures would be due then and not at the end of January 2018. It is however not indicated in such correspondence who had informed the Registrar of Judges' Registrable Interests of the decision to defer the Chairperson's commencement date;

[3] The Water Tribunal (of which the Chairperson is a member and the chair) is not a court as contemplated in the Constitution, and its members are not judges as contemplated in the Constitution even though they are appointed on the recommendation of the JSC. Therefore the Chairperson's role as member (and chairperson) of the Water Tribunal is not at issue in this memorandum.

2.15. on 29 January 2018, the Judge President addressed a letter to #Unite Behind confirming that he had already forwarded a letter to the Minister of Justice and Constitutional Development to request the President to "*revoke the appointment of Madam Justice Makhubele from the 01st January 2018*", and to request that her appointment be with effect from 01st April 2018. His letter also states that the Chairperson had not at that date taken the oath nor been paid any salary as a judge; and

2.16. as at the date of this memorandum, the Chairperson remains the Chairperson of the Interim Board.

3. SPECIFIC QUESTIONS FOR ENSAFRICA TO CONSIDER

At the Briefing Meetings the Interim Board informed us of the events referred to in paragraph 2 above, directed us to the further documents and correspondences we received subsequently detailing the aforesaid events and, in that context, asked for our opinion and advice in relation to the following specific questions: -

3.1. whether the Minister's appointment of the Chairperson is legally sound, having regard to her position as nominee to the bench at the time of her appointment ("**Question One**)";

3.2. whether the Chairperson is currently a judge ("**Question Two**"); and

3.3. whether the Interim Board was otherwise lawfully constituted by the Minister (**Question Three**).

4. QUESTION ONE: LAWFULNESS OF THE APPOINTMENT OF THE CHAIRPERSON

In order to assess whether the Minister's appointment of the Chairperson was lawful in the circumstances described at paragraph 2 above, it is necessary to first determine what Advocate TAN Makhubele SC's status was at the time of her appointment as Chairperson, relative to the office of judge of the High Court.

4.1. Was Advocate TAN Makhubele SC a judge at the time of her appointment as Chairperson of PRASA?

4.1.1. The power to appoint and remove judicial officers is provided for in the Constitution. With regard to the appointment of judges, section 174(6) of the Constitution states that "*[t]he President must appoint the judges of all other courts on the advice of the Judicial Service Commission.*"[4] The general consensus regarding the meaning of this provision is that it *obligates* the President to appoint as judges, all persons recommended for appointment as judges by the JSC.

[4] The reference to "other courts" is a reference to courts other than the Constitutional Court.

4.1.2. During the period following a recommendation by the JSC for appointment as a judge, and prior to their actual appointment by the President, the persons recommended by the JSC for appointment as judges do not hold office as a judge, even if their final appointment is inevitable by virtue of section 174(6). **Thus, at the date of her appointment to the Interim Board, the Chairperson was not a judge**.

4.2. **Was the Minister's appointment of the Chairperson legally sound**

4.2.1. As stated above, at the date of her appointment to the Interim Board, the Chairperson had been recommended by the JSC but was not yet appointed as a judge. The relevant question from a PRASA perspective is whether the appointment by the Minister of the Chairperson, at a time when she had been recommended by the JSC and her appointment as a judge was inevitable (as reasoned above), was legally sound.

4.2.2. The manner in which the Minister's power to appoint the members of the Board of Control must be exercised, is not constrained by other provisions of the Legal Succession Act. (Matters relating to composition of the Interim Board are dealt with separately in paragraph 6 below). However, the Minister's conduct must be consistent with the Constitution and any other generally applicable legal rules or principles.

4.2.3. If the appointment constitutes "administrative action" as contemplated in section 33 of the Constitution and as given further effect in the Promotion of Administrative Justice Act No. 3 of 2000 ("**PAJA**"), then the appointment must be lawful, reasonable and procedurally fair. If it is not administrative action it must, at the very least, conform to the principle of legality (which is derived from the rule of law, entrenched in section 1 of the Constitution). In addition, the appointment must not violate any other constitutional principle, prohibition or requirement – such as the separation of powers (as complained of by #Unite Behind).

4.2.4. On the question of whether the Minister's appointment of the Chairperson constitutes administrative action or not, it is difficult to give a definitive view. South African courts have held, *inter alia,* that –

4.2.4.1. the decision not to appoint an applicant as a municipal manager in terms of section 67 of the Local Government: Municipal Systems Act 32 of 2000 is administrative action;[5]

[5] *Mlokoti v Amathole District Municipality* 2009 (6) SA 354 (E) at 377D-E.

4.2.4.2. the decision not to appoint an applicant as a magistrate in terms of section 10 of the Magistrates' Act 90 of 1993 is administrative action;[6]

4.2.4.3. the decision to appoint an applicant as the principal of a high school in terms of section 6(3)*(f)* of the Employment of Educators Act 76 of 1998 is administrative action;[7]

4.2.4.4. the removal of members of the board of directors of Armscor in terms of section 8(c) of the Armaments Corporation of South Africa Ltd Act 51 of 2003 is not administrative action;[8] and

4.2.4.5. the removal of directors of PetroSA by the board of its holding company, CEF, is administrative action.[9]

4.2.5. Based on the above decisions, it is strongly arguable that a decision not to appoint a particular applicant, and a decision to remove a member of the Board of Control, would be considered to be administrative action. Whether a decision to appoint a person to the Interim Board – where the individual concerned benefits from the appointment, and the only possible "adverse effect" (if at all) is on the rights of the public – is less clear.

4.2.6. As indicated above, if the appointment is administrative action, it must be lawful, reasonable and procedurally fair.

4.2.6.1. The Legal Succession Act prescribes no particular procedure, and in our view as long as the positions were publicly advertised and nominations or applications considered, the requirements of procedural fairness would likely have been met.

4.2.6.2. According to the Constitutional Court, factors relevant to determining whether a decision is reasonable or not would include: (a) the nature of the decision; (b) the identity and expertise of the decision-maker; (c) the range of factors relevant to the decision; (d) the reasons given for the decision; (e) the nature of the competing interests involved; and (f) the impact of the decision on the lives and well-being of those affected.[10] Reasonableness has been characterised as going beyond merely a requirement of rationality.[11] Rationality means that a decision must be supported by the information before the

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[6] *Wessels v Minister of Justice and Constitutional Development* 2010 (1) SA 128 (GNP).
[7] *Head, Western Cape Education Department v Governing Body, Point High School* 2008 (5) SA 18 (SCA).
[8] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC). The Constitutional Court's view that the removal decision was executive rather than administrative action was closely tied to the policy-laden nature of defence-related decision-making.
[9] *Steenkamp and Another v Central Energy Fund SOC Ltd and Others* 2018 (1) SA 311 (WCC).
[10] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 45.
[11] Head, Western Cape Education Department v Governing Body, Point High School 2008 (5) SA 18 (SCA) para 16.

administrator, as well as by the reasons given for it. It must be objectively capable of furthering the purpose for which the power was given, and for which the decision was purportedly taken.[12]

4.2.6.3. The requirement of "lawfulness" in administrative action means, in essence, that administrative decisions must be duly authorised by law and that any statutory requirements or pre-conditions that attach to the exercise of power must be complied with.[13] No power or function may be exercised beyond that conferred by law.[14] The logical concomitant of this rule is that an action performed without lawful authority is illegal or *ultra vires* – that is to say, beyond the powers of the administrator.

4.2.7. When the Minister appointed the Chairperson to the Interim Board, he –

4.2.7.1. did so on the basis that she would form part of an "interim" board for a period of three to six months;[15] and

4.2.7.2. presumably knew that Advocate TAN Makhubele SC was already the chairperson of the Water Tribunal, and that she had been a judicial nominee since 5 October 2017, and would necessarily be appointed as a judge within a reasonable time.

4.2.8. Two questions arise in this regard – both of which, in our view, are relevant whether or not the decision to appoint is administrative action or not.[16] Those questions are: (a) whether it was lawful for the Minister to appoint an "interim" board; and (b) whether it was rational to appoint as Chairperson, an individual who had been recommended for appointment as a judge.

4.2.9. It seems from public statements at the time that in deeming the appointment to be "interim", the Minister was paying heed to the Cabinet's view that while work needed to happen at PRASA, his submission on the proposed appointees had been inadequate for purposes of justifying "full" appointment. We note that the statutory authority to appoint lies with the Minister and not with or subject to the approval of the Cabinet – thus any reasons for appointment would have to be

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[12] *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at paragraph 21.
[13] Subsections 6(2)(f)(i) and 6(2)(i) of PAJA, respectively.
[14] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC). Underpinning this doctrine is the understanding that the rule of law holds that individuals should be entitled to rely on governmental decisions, and to be able to plan their lives around such decisions.
[15] The official announcement of the appointment was made by the then Minister of Communications, who stated that the Cabinet has approved the appointment of an interim board for PRASA. She said as follows: "The process of appointing the board is not yet complete. The transport minister wanted to ensure there is an interim board so work can happen. He has three to six months and then he is expected to bring a submission to Cabinet for a full appointment."
[16] The principle of legality, which would apply if the appointment decision is not administrative action, has been described as being 'strikingly similar' to the PAJA requirements applicable to administrative action – especially in this case where issues relating to proportionality and procedural fairness are not directly relevant.

justified by the Minister, and he could not disclaim the reasons stated by Cabinet and rely solely on the fact of having followed an instruction given by Cabinet. One of the grounds of review of administrative action under PAJA is that the action was taken "because of the unauthorised or unwarranted dictates of another person or body".[17]

4.2.10. On the first question of the "interim" appointment, we note that neither the Legal Succession Act nor any other legislation binding the Minister provides for a maximum or minimum term for appointees to the Board of Control. It is thus implied that the Minister has the authority to set the term of office of appointees to the Board of Control. While we understand that their letters of appointment confirm their appointment for an indefinite period, the Cabinet announcement of their appointment refers to a three to six month period. **Our view is that the Minister has the power to determine the terms of office of members of the Board of Control, and therefore the mere fact of an "interim" board does not render the appointments unlawful.** Whether there was a legitimate purpose served by the intended short-term appointments is difficult to discern, without further information. If it turns out that there was an improper motive behind the short-term appointments or that the rationale for the appointments is not legitimate, the decision to appoint could be set aside by a court on the basis of legal invalidity (unlawfulness or unreasonableness).

4.2.11. **On the question of whether it was rational for the Minister to appoint the Chairperson knowing she was destined to be appointed as a judge, it is again difficult to give a view without knowing what information was before the Minister when he made the appointment decision, and without knowing what were the reasons for the short-term nature of the appointment, and what legitimate purpose would be served by a short-term appointment.** Taking the facts at face value, we believe there is some risk (albeit minimal) that a court could consider the appointment of the Chairperson, in the circumstances, to be irrational and therefore legally invalid if it was to be challenged.

4.2.12. As stated above, in addition to the Minister's decision having to be rational (and in the case of administrative action, also comply with the other requirements of PAJA), it must be consistent with other applicable constitutional principles. #Unite Behind has in recent correspondence to various Government and judicial officials complained that the Chairperson's dual role as a judge of the High Court and as the Chairperson is inconsistent with the constitutional principle of separation of powers. As a member of the Interim Board, the Chairperson carries out functions in the executive domain and is accountable to the Minister of

[17] Section 6(2)(e)(iv) of PAJA.

Transport, as well as Parliament and the Auditor-General. Arguably, these functions are incompatible with judicial office.

4.2.13. The leading case on the concept of separation of powers (in the context of judicial and executive appointments) is *S.A. Association of Personal Injury Lawyers v Heath and Others*[18], in which the Constitutional Court, addressing the principle of the separation of powers, stated at paragraph 46:

> *"Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions, which are not appropriate to the central mission of the judiciary. Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive's power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order."*[19]

4.2.14. In our view, the situation described above is not immediately comparable with the circumstances which are the subject matter of this memorandum. **Although the role of Chairperson is generally inconsistent with judicial office, the appointment of a judicial nominee on a short-term basis to a parastatal board, prior to her commencing active service as a judge and with a view to her discontinuing her PRASA-related functions before commencing active service on the judiciary, is unlikely in our view to be considered a breach of the separation of powers principle.** Of course, if such appointment as Chairperson had been made after the Chairperson's appointment by then President Zuma as a judge, our conclusion (on this matter as well as on rationality) could well be different, as that kind of decision would come much closer to violating the intended separation. And, we would note, the longer the Chairperson remains a member of the Interim Board, without tendering her resignation and winding up her PRASA-related affairs, the greater the risk of a successful constitutional challenge based on the Minister's failure to terminate the Chairperson's position so as to avoid the possibility of violating the separation of powers principle.

5. QUESTION TWO: IS THE CHAIRPERSON CURRENTLY A JUDGE

5.1. Once a judge has been appointed as such in accordance with section 174(6) of the Constitution, he or she remains a judge until removed or discharged. With regard to the removal of judges, section 177 of the Constitution provides that a judge may be removed from office only if: (a) the JSC finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for that judge to be

[18] 2001 (1) SA 883.
[19] See also *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C).

removed, by a resolution adopted with a supporting vote of at least two-thirds of its members. Section 177 goes on to state that the President must remove a judge from office upon adoption of a resolution by the National Assembly calling for that judge to be removed.

5.2. With regard to terms of office, section 176(2) of the Constitution provides that "other judges hold office until they are discharged from office in terms of an Act of Parliament."[20] The discharge of judges of the high courts is regulated by the Judges' Remuneration Act.[21]

5.3. Section 174(8) of the Constitution provides that "before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution".

5.4. The term "judicial officer" is not defined in the Constitution, but is used to cover not only judges of superior courts but also magistrates and members of other institutions similar to courts. "Judge" is defined in section 1 of the Judges' Remuneration Act as follows:

"judge" means any person holding the office of –

(a) Judge President or Deputy Judge President of the Supreme Court of Appeal;

(b) judge of the Supreme Court of Appeal;

(c) Judge President or Deputy Judge President of any High Court; or

(d) *judge of any High Court".*

5.5. "Judge" is also defined in section 7 of the JSC Act, for purposes of Chapter 2 of that Act, as follows:

> *"judge" means any Constitutional Court judge or judge referred to in section 1 of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), which includes a judge who has been discharged from active service in terms of that Act, as well as any person holding the office of judge in a court of similar status to a High Court, as contemplated in section 166 of the Constitution, and, except for the purposes of section 11, includes any Constitutional Court judge or judge performing judicial duties in an acting capacity".*

5.6. The JSC Act makes a distinction, for certain purposes, between a judge, and a judge "in active service". The term "active service" is defined in the Judges' Remuneration Act in relevant part as follows: '**"active service"** means any *service performed* as a Constitutional Court judge or judge in a permanent capacity, irrespective of whether or not such service was performed prior to or after the date of commencement of this Act…'. (Our emphasis.) In terms of section 11(1) of the JSC Act, a judge performing active service –

5.6.1. may not hold or perform any other office of profit; and

[20] The reference to "other judges" is a reference to judges other than Constitutional Court judges.
[21] See section 3.

5.6.2. may not receive in respect of any service any fees, emoluments or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge...".

5.7. Similarly (although without reference to active service), section 2(6) of the Judges' Remuneration Act provides that, "No Constitutional Court judge or judge may, without the consent of the Minister [of Justice and Constitutional Development], accept, hold or perform any other office of profit or receive in respect of any service any fees, emoluments or other remuneration apart from his or her salary and any amount which may be payable to him or her in his or her capacity as such a Constitutional Court judge or judge."[22]

5.8. Section 12 of the JSC Act provides for a Code of Conduct to be prepared, and in terms of section 12(5), the "Code shall serve as the prevailing standard of judicial conduct, which judges must adhere to..." Thus while the prohibition on other sources of remuneration provided for in section 11 of the JSC Act is stated as applying only to judges in acting service, the Code of Conduct provided for in section 12 applies (to the extent stated therein) to judges generally. In the Code of Conduct itself, there are some provisions which regulate the conduct of judges in active service, and others which bind all judges. Section 2 of the Code of Conduct states as follows with regard to its application:

> *"(1) This Code applies to every judge referred to in section 7 (1) (g) of the Act who is performing active service and, unless the context indicates otherwise, also to-*
>
> *(a) a judge released from active service and who is liable to be called upon to perform judicial duties; and*
>
> *(b) an acting judge.*
>
> *(2) A judge not on active service is bound by this Code insofar as applicable."*

5.9. Our understanding is that the Chairperson has not yet taken her oath of office, nor drawn a salary (although she has been offered the opportunity to complete the paperwork which would entitle her to do so). Though the oath of office is a prerequisite to the performance by a judge of their functions, the taking of the oath of office is not determinative of an individual's status as a judge, and in fact only a person already holding office as a judge is eligible to take the oath.

5.10. For the most part, the legislation regulating the appointment and office of judges is premised on there being judges in active service, acting judges and judges who have been discharged from active service; there is not a separate category for judges who have been appointed with effect from a specific date but who do not commence work at that date. For example, section 2(1) of the Judges' Remuneration Act, which states that "[a]ny person who holds office as a ... judge, whether in an acting or permanent capacity, shall in respect thereof be paid... an

[22] It should be noted that section 2 of the Judges' Remuneration Act is premised on judges being paid a salary and specified benefits and allowances, by virtue of holding office as such.

annual salary and ... allowances or benefits...", is based on an assumption that a person holding office as a judge will perform service as such and will thus draw a salary.

5.11. In our view, the most likely current status of the Chairperson, all things considered and based on the information provided to us, is that she holds office as a judge as of 1 January 2018, <u>but is not yet a judge performing active service</u>.

5.12. Having said this, it seems likely that the intention of the President when confirming her appointment was that she would commence performing active service on 1 January 2018, and that appointment – and its associated timing – persists to date. The kind of informal practical arrangement which seems to have been agreed between the Chairperson and the Judge President, that she will commence work on 1 April 2018, is not provided for or recognised in the applicable legislation, and its legal consequences can only be guessed at rather than definitively pronounced upon.

5.13. In addition, unless the Chairperson has the consent of the Minister of Justice and Constitutional Development, she may not (with effect from 1 January 2018) "accept, hold or perform any other office of profit or receive in respect of any service any fees, emoluments or other remuneration apart from his or her salary and any amount which may be payable to him or her in his or her capacity as such a Constitutional Court judge or judge". The mere fact that the Chairperson is not yet being paid a judicial salary does not, in our view, exempt her from the obligation to obtain Ministerial consent to continue in other paid positions until she commences active service on 1 April 2018.

6. QUESTION THREE: COMPOSITION OF THE INTERIM BOARD

6.1. The Legal Succession Act provides as follows regarding the composition of the Board of Control:

> *"(1) The affairs of the Corporation shall be managed by a Board of Control of not more than 11 members including the chairman, who shall be appointed and dismissed by the Minister.*
>
> *(2) At least—*
>
> *(a) one of the members of the Board of Control shall be an officer in the Department of Transport;*
>
> *(b) one of the members of the Board of Control shall be an officer in the Department of Finance;*
>
> *(bA) one of the members of the Board of Control shall be an officer in the Department of the State Expenditure;*
>
> *(c) one of the members of the Board of Control shall be nominated by the South African Local Government Association recognised in terms of section 2(1)(a) of the Organised Local Government Act, 1997 (Act No. 52 of 1997); and*
>
> *(d) three of the members of the Board of Control shall have expertise and experience in the management of a private sector enterprise.*
>
> ...
>
> *(5) The Board of Control may, subject to such conditions as it may stipulate, delegate any of its powers to any member of the Board, employee or other person with or without the power to delegate further.*

(6) Any action taken by a member of the Board of Control, employee or other person on behalf of the Corporation may be ratified by the Board of Control of not more than 11 members including the chairman, who shall be appointed and dismissed by the Minister. ..."

6.2. The Department of State Expenditure referred to in sub-paragraph 24(2)(bA) no longer exists; its functions are carried out by the National Treasury which is established in terms of the PFMA and consists of the Minister of Finance and the Department of Finance.[23] It is arguable that the requirement of a representative from the Department of State Expenditure has fallen away, since the purpose of requiring a representative of the Department of Finance to be appointed to the Board of Control would be met through compliance with sub-paragraph 24(2)(b).

6.3. **If our view on the redundancy of sub-paragraph 24(2)(bA) is correct, it appears that the minimum requirement for the Board of Control is six persons, including a chairman, composed of the persons referred to in paragraph 24(2).** That provision is stated in peremptory language without any provisions governing vacancies, with the implication that the Board can only be properly constituted if at least the six people designated above form part of it.

6.4. Hoexter describes it as being "axiomatic that administrators must be properly appointed, properly qualified and properly constituted when they take administrative action."[24] She goes on to say that –

6.4.1. "[o]ur case law is replete with examples of actions struck down as a result of failure to observe this fundamental principle"[25]

6.4.2. "[a]s a general rule, and unless a quorum is specified, action must be taken by all the members of a statutory body, since '[t]he qualifications and numbers of members have been selected for a purpose and that purpose would be defeated if the body were to be deprived of the services of one or more of its members';[26]

6.4.3. the general principle that all members must act may on occasion be sacrificed to practical necessity, for example where a decision has to be made as a matter of urgency and not all members can be present;[27] and

6.4.4. as regards voting, the default position (i.e in the absence of legislation providing for a majority or some other basis for decision-making) is that unanimity is required.[28]

6.5. In PRASA's case, the Legal Succession Act only sets out the rules regarding composition of the Board of Control, and ratification by such Board; it also permits the Minister to make

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[23] Section 5 of the PFMA.
[24] C Hoexter, Administrative Law in South Africa (2nd ed, Juta, 2012) at page 256.
[25] Ibid at page 256-257 and the judgments referred to therein.
[26] Ibid at page 257 citing various commentators and court decisions.
[27] Ibid.
[28] Ibid.

regulations in connection with, *inter alia*, the activities, powers, functions and duties of PRASA, the Board of Control or a member of the Board of Control; the holding of, and procedures at, meetings of the Board of Control and any committee thereof; the limitation or prohibition of the exercise of the capacity or powers of the Corporation; and the conditions or restrictions subject to and the manner in which the Board of Control shall manage the affairs of the Corporation.

6.6. In the absence of any such regulations, it must be concluded that the default positions expressed by Hoexter and described above would apply to PRASA.

6.7. We understand that for the period 19 October 2017 to 4 February 2018, there was no representative of the Department of Finance (National Treasury) appointed to the Interim Board. In addition, we understand that the Interim Board has been making decisions based on its own rules of procedure, including that a quorum of a simple majority of its members is required, and that the vote of a majority of its members is sufficient to pass a resolution. **Based on the jurisprudence and legal principles described above, our view is that the defect in the composition of the Interim Board (19 October 2017 to 4 February 2018), and possibly also the Interim Board's application of its own quorum and majority voting rules, are all likely to be considered material non-compliance with the requirements of the Legal Succession Act, if challenged, affecting the validity of decisions taken by the Interim Board during the period of its tenure.**

6.8. There has been a wealth of jurisprudence over the last couple of years regarding the legal effects of unlawful administrative action, a complex area of law the key features of which can be distilled as follows:

6.8.1. there is a "clear distinction" between "the constitutional invalidity of administrative action", on the one hand, and, on the other, "the just and equitable remedy that may follow from it";[29]

6.8.2. it is not wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent;[30]

6.8.3. until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence. This important principle does not undermine the supremacy of

[29] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, SASSA and Others* 2014 (4) SA 179 (CC). It was for this reason that the Court declared invalid a tender whose award was affected by irregularities, while nevertheless suspending the declaration of invalidity pending determination of a just and equitable remedy. Upsetting the award might have had disastrous consequences for millions of vulnerable grant recipients. Hence it was just and equitable to keep the unlawful award temporarily in place by the exercise of the broad remedial powers the Constitution has vested in the Constitutional Court.

[30] *Bengwenyama v Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

the Constitution or the doctrine of objective invalidity. In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally *effective*, despite the fact that it may be objectively invalid;[31] and

6.8.4. an organ of state, like any other party, must therefore challenge an administrative decision to escape its effects. This it can do reactively, provided its reasons for doing so are sound, and there is no unwarranted delay.

6.9. The upshot of these provisions is that a court always has a discretion on the relief to be ordered when it declares administrative action to be invalid. Thus, it may opt to preserve the consequences of invalid action depending on a consideration of all relevant factors. **It is therefore not possible to state with certainty what the impact of improper constitution of the Interim Board will be, on decisions taken by the Interim Board during the period where it was not properly constituted. Similarly, even if a court were to find that the Minister's appointment of the Chairperson to the Interim Board pending her judicial appointment was irrational, it would not necessarily follow that decisions taken by her in her capacity as Chairperson, or taken by the Interim Board during her tenure, had no effect.**

7. CONCLUSIONS

In summary, our conclusions are as follows:

7.1. on the date of her appointment as Chairperson of the Interim Board, Adv. T Makhubele SC was a judicial nominee who would, as a matter of legal necessity, be appointed by the then President as a judge, in due course;

7.2. with effect from 1 January 2018, the Chairperson has held office as a judge;

7.3. the Chairperson has not, to date, commenced performing active service as a judge, and the current arrangement between her and the Judge President of the High Court is that she will commence active service from 1 April 2018;

7.4. the Ministerial decision to appoint the Chairperson may constitute administrative action as contemplated in PAJA, and even if not must be made in accordance with the legality principle which requires that the decision be lawful – for a legitimate governmental purpose – and rational, in the sense of being supported by the information before the Minister and the reasons given for it, as well as being objectively capable of furthering the purpose for which the power was given, and for which the decision was purportedly taken;

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[31] See *Merafong City Local Municipality v AngloGold Ashanti Limited* (CCT106/15) [2016] ZACC 35 (24 October 2016) and *Department of Transport and Others v Tasima (Pty) Limited* 2017 (1) BCLR 1 (CC) (9 November 2016).

7.5. whether it was lawful and rational for the Minister to appoint the Chairperson on a short-term (interim) basis, and knowing that she was bound for the bench is difficult to give a firm view on without further information, but there is at least a risk that if challenged the Minister's decision could be found to be unlawful;

7.6. the appointment of the Chairperson to the Interim Board when she was a judicial nominee is unlikely to be considered a breach of the separation of powers principle, and similarly her continued membership of the Interim Board, provided she is winding up her PRASA affairs and taking steps to prepare herself for judicial office;

7.7. based on the information provided to us, it appears that the composition of the Interim Board was defective up to at least 5 February 2018;

7.8. as such, the decisions of the Interim Board for the period of defective composition are likely to be considered legally invalid for lack of authority, if challenged in a court;

7.9. notwithstanding formal invalidity, such decisions may well have legal consequences until set aside by a court; and

7.10. a court has discretion to craft just and equitable remedies, taking all relevant factors into account, even where it has held that an administrative action is legally invalid.

We trust you will find the above in order. Please let us know if you have any questions.

Kind regards

Edward Nathan Sonnenbergs Inc.