

011

THE ORGANISATION UNDOING TAX ABUSE

("OUTA")

CONSTITUTION OF A VOLUNTARY
ORGANISATION

As revised on the 18 of February 2016

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1 BACKGROUND

The Organisation Undoing Tax Abuse (OUTA) was originally established on 12 March 2012 under the name The Opposition to Urban Tolling Alliance ("OUTA").

The original purpose of the organisation upon date of establishment was to represent the interests of its constituent Directorship and also the interests of bodies and groups in related industries as well as motorists and the public in general in objecting to and taking such lawful steps as may be required to suspend and/or Interdict and/or otherwise prevent the Implementation of the Gauteng Freeway Improvement Plan ("GFIP") and or to take such further or alternative steps as the Organisation deems necessary to protect and advance the interests of its Directorship.

The public has requested that OUTA expand its capacity to serve the promotion, protection and advancement of the Constitution of the Republic of South Africa in matters relating to policy, laws or conduct that offend the rights, values and principles enshrined in the Constitution.

2 NAME

The name of the Organisation is: The Organisation Undoing Tax Abuse; ("OUTA") and hereafter referred to as the "Organisation".

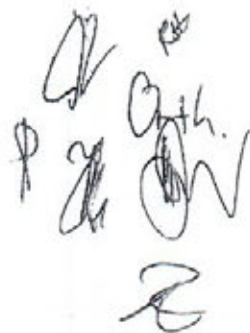
3 OBJECTIVES

The Organisation is a public, non-profit organisation established for the sole object of the advancement of Constitution of the Republic of South Africa and more specifically the interests of its donors, members and the public at large with regards to policy, laws or conduct that offend the rights, values and principles enshrined in the Constitution.

Donors and members are persons who contribute financially to the organisation.

4 LEGAL STATUS

The Organisation is a body corporate with its own legal identity, which is separate from its individual directors. The Organisation shall continue to exist notwithstanding a change in the composition of its Board of Directors. The Organisation may collect and distribute funds from its Directors; enter into contracts, and sue or be sued in its own name.

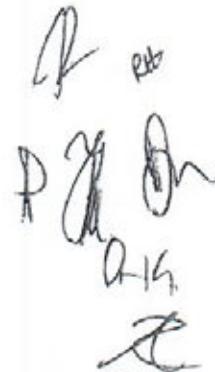
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5. **NON-PROFIT DISTRIBUTING CHARACTER**

- 5.1 The Income and property of the Organisation shall be used solely for the promotion of its stated objectives. The Board of Directors and the office-bearers shall have no rights to the property or other assets of the Organisation solely by virtue of their directorship or in the capacity as office-bearers. No portion of the income or property of the Organisation shall be paid or distributed directly or indirectly to any person (otherwise than in the ordinary course of such undertakings as are embarked upon in order to realise the objectives set out in paragraph 3 hereof), except as:
- 5.1.1 Reasonable compensation for services actually rendered to the Organisation;
 - 5.1.2 Reimbursement of actual costs or expenses reasonably incurred on behalf of the Organisation.
 - 5.1.3 Upon the dissolution of the Organisation, after all debts and commitments have been paid, any remaining funds or assets shall be transferred to another non-profit organisation and which has objectives the same or similar to the objectives of the Organisation; or in such alternative manner in which the Board of Directors (and Directors) consider appropriate;
- 5.2 Should the Organisation become an approved public benefit organisation then upon the dissolution of the Organisation and after all debts and commitments have been paid, any remaining assets shall not be paid to or distributed amongst Directors. They shall be donated to other non-profit organisation which the Board of Directors considers appropriate and which has similar objectives to the Organisation;
- 5.3 The Organisation intends to apply to the Commissioner of the South African Revenue Service for exemption from appropriate taxes and duties. In compliance with the provisions of the Income Tax Act.

6. **POWERS**

The Organisation, acting through its Board of Directors, or at General Meeting, shall have all the powers necessary to carry out its stated objectives. Such powers shall include, but not be limited to, the General Investment and Administrative Powers set out in the attached Schedule B.

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7. **STRUCTURE OF THE ORGANISATION AND ADDRESS**

7.1 **The Board of Directors**

7.1.1 Powers

7.1.1.1 The affairs of the Organisation shall be controlled and managed by the Board of Directors subject to the terms of this constitution and to the resolutions of Directors in General Meeting, the Board of Directors may exercise all the powers of the Organisation.

7.1.1.2 In the General Meeting, the Organisation may review, approve or amend any decision taken by the Board of Directors but no such resolution of the Organisation shall invalidate any prior action taken by the Board of Directors in accordance with the provisions of this Constitution.

7.1.2 Election

7.1.2.1 The Board of Directors were elected by the founding Directors at the General Meeting at which the first Constitution was adopted.

7.1.2.2 At the first Annual General Meeting (AGM) and at every subsequent AGM the board of directors shall determine the composition of the Board of Directors by ballot.

7.1.2.3 Board of Directors shall be Directors of the Organisation,

7.2 **Composition**

7.2.1 The Board of Directors shall comprise at least four [4] but not more than [9] Directors, of which no more than two directors may be non-voting (non-executive) directors. The Board of Directors shall comprise:

7.2.1.1 the Chairperson;

7.2.1.2 the Vice-Chairperson;

7.2.1.3 a Secretary;

7.2.1.4 at least one [1] other person.

7.2.1.5 The Board of Directors may co-opt additional non-voting Directors as it may consider appropriate from time to time. The co-opted Directors shall serve for such period as the Board of Directors considers appropriate.

7.3 **Board of Directors/Director Vacating Office**

7.3.1 The office of a Board of Directors Director shall be vacated if a Director:

7.3.1.1 resigns; or

7.3.1.2 becomes unfit and/or incapable of acting as such; or

7.3.1.3 would be disqualified, in terms of the Companies Act or equivalent legislation in force from time to time, from acting as a Director of a Company; or

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- 7.3.1.4 is removed by the Board of Directors, by resolution adopted by at least 2/3 of its Directors in office from time to time. The Board of Directors shall not be obliged to furnish reasons for its decision/s regarding removal except to the Director removed and to the Directors of the Organisation in General Meeting.
- 7.3.2 Should a position on the Board of Directors fall vacant, the Board of Directors, by resolution adopted by at least two-thirds (2/3) of its Directors, may co-opt any Director/s to fill the vacancy/ies. The office of any person so co-opted as Director of the Board of Directors shall lapse at the next General Meeting.
- 7.4 **Procedure at Board of Directors Meetings**
- 7.4.1 The Board of Directors shall conduct its meetings and regulate its proceedings as it finds convenient, provided that:
- 7.4.1.1 The Chairman, or in his or her absence, the secretary, shall chair all meetings of the Board of Directors which he or she attends. In the absence of the Chairperson and the secretary, the remaining Directors of the Board of Directors shall elect a chairperson from those attending.
- 7.4.1.2 The Board of Directors shall meet quarterly and at any time the written request of any two (2) Directors of the Board of Directors
- 7.4.1.3 The quorum necessary for the transaction of any business of the Board of Directors shall be two-thirds (2/3) of the Directors serving at the time.
- 7.4.1.4 Each Director shall have one (1) vote.
- 7.4.1.5 Questions arising shall be decided by a majority of votes. Should there be an equality of votes the Chairperson shall have a casting vote.
- 7.4.1.6 Minutes shall be kept of the proceedings of the Board of Directors, and a record of attendance at each meeting. The minutes shall be signed by the Director chairing the meeting, and shall be available at all times for inspection to any Director of the Board of Directors
- 7.4.1.7 A resolution signed by all Directors of the Board of Directors shall be valid as if passed at a duly convened meeting of the Board of Directors
- 7.4.2 The Board of Directors may delegate any of its powers to any of its Directors, or to a special purpose committee. The Director, committee, employee or agent to whom such delegation is made shall conform to any regulations and procedures that may be stipulated by the Board of Directors from time to time.
- 7.4.3 The Board of Directors may appoint a Chief Executive and other officers and employees as it may consider necessary from time to time upon such terms and conditions as it may consider appropriate.

7.5 **General Meetings**

7.5.1 Annual General Meeting

7.5.2 An Annual General Meeting (AGM) of the Organisation shall be held within a period of fifteen (15) months of the adoption of this Constitution. Subsequent AGMs shall be held within three (3) months of the end of each financial year.

7.5.3 Annual General Meetings shall be convened by the Chairperson on not less than twenty-one (21) days prior written notice to all Directors entitled to attend the meeting. This notice shall state the date, time and place of the meeting and in broad terms the business to be transacted at the meeting.

7.5.4 The business of an Annual General Meeting shall include:

7.5.4.1 the presentation and adoption of the Annual Report of the Chairperson;

7.5.4.2 the consideration of the Annual Financial Statements;

7.5.4.3 the election of Directors to serve on the Board of Directors for the following year;

7.5.4.4 the appointment of Auditors;

7.5.4.5 other matters as may be considered appropriate.

7.6 **Other General Meetings**

7.6.1 Other General Meetings of the Organisation shall be convened at any time by the Chairperson or at the written request of:

7.6.1.1 the Board of Directors;

7.6.2 Any General Meeting other than the Annual General Meeting shall be convened on not less than fourteen (14) days written notice to all Directors. The notice shall state the date, time and place of the meeting and in broad terms the business to be transacted at the meeting: provided that: should the Chairperson, having been requested to give such notice, fail to give it within seven (7) days of the request, the persons requesting the meeting shall be entitled themselves to give notice of and to convene the meeting.

7.7 **Quorum**

7.7.1 A quorum constituting a General Meeting of the Organisation shall be the greater of:

7.7.1.1 3 Directors; or

7.7.1.2 one half (1/2) of the Directors.

7.7.2 Should any General Meeting have been properly convened but no quorum be present, the meeting shall stand adjourned to another date, which shall be within seven (7) days thereafter. The notice reflecting such adjournment shall be given to the persons and in the manner provided for in this Constitution. At such reconvened General Meeting, the Directors then present or represented shall be deemed to constitute a quorum.

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7.8 **Resolutions and Voting**

- 7.8.1 At all General Meetings, a resolution if it is put to the vote shall be decided by means of a show of hands or by ballot. A vote by ballot shall be held only if demanded by the Chairperson or not less than one half (1/2) of the persons voting in person or by proxy. The result of the vote shall be the resolution of the meeting.
- 7.8.2 Each Director present or represented at such meeting shall be entitled to one (1) vote.
- 7.8.3 Questions arising shall be decided by a majority of votes. Should there be an equality of votes the Chairperson shall have a casting or second vote.

7.9 **Minutes**

Minutes shall be kept of the proceedings of all General Meetings, and a record of attendance at each meeting. The minutes shall be signed by the chairperson of the meeting, and shall be available for inspection copying by any Director on two (2) days' notice to the Secretary.

7.9.1 **Powers**

Subject to the provisions of Clause 7.1.1.2 above, a duly convened General Meeting of the Organisation, at which a quorum is present, is competent to carry out all the objectives and to exercise all the powers of the Organisation as set out in this Constitution.

7.10 **Notices**

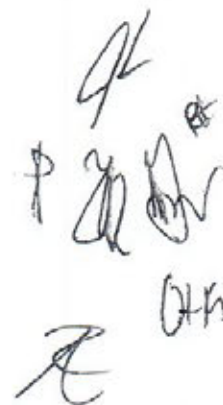
- 7.10.1 Notice of all meetings provided for in this Constitution, shall be delivered personally, or sent by e mail, to the last such address notified by each person concerned to the Organisation, or in any other manner as the Board of Directors may decide from time to time.
- 7.10.2 The accidental omission to address notice/s to any person shall not invalidate the proceedings of any meeting.

7.11 **Address**

- 7.11.1 The address of the Organisation will be 10th Floor, O Keefe & Swartz Building, 318 Oak Avenue, Ferndale.

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8. **FINANCIAL MATTERS**
- 8.1 **Bank Account**
The Board of Directors shall –
- 8.1.1 open a bank account in the name of the Organisation with a Registered South African Bank. The Board of Directors shall ensure that all monies received by the Organisation are deposited in the abovementioned bank account as soon as possible after receipt; and
- 8.1.2 appoint Alchemy Financial Services Inc. ("AFSI") as its auditors and shall further be entitled hereunder to instruct AFSI to provide such additional services as may be required for the proper and effective administration of the Organisation's financial affairs.
- 8.2 **Signatures**
All cheques, promissory notes and other documents requiring signature on behalf of the Organisation shall be signed by two (2) of the Board of Directors.
- 8.3 **Financial Year End**
The Organisation's financial year-end shall be the last day of February unless otherwise agreed.
- 8.4 **Financial Records**
The Board of Directors shall ensure that the Organisation keeps proper records and books of account, which fairly reflect the affairs of the Organisation.
- 8.5 **Annual Narrative Report and Financial Statements**
- 8.5.1 The Board of Directors shall ensure that the Organisation prepares an annual narrative report describing the Organisation's activities and an Annual Financial Statement for each financial year. The Annual Financial Statements shall conform with generally accepted accounting principles and shall include a statement of Income and expenditure and a balance sheet of assets and liabilities.
- 8.5.2 Within two (2) months after drawing up the Annual Financial Statements, the Board of Directors shall ensure that its books of accounts and financial statements are audited and certified in the customary manner by AFSI or such alternative leading accounting firm as may be appointed by it.
- 8.6 A copy of the Annual Financial Statements and annual narrative report shall be made available to all Directors as soon as possible after the close of the financial year.

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9. **AMENDMENTS TO THE CONSTITUTION AND DISSOLUTION**

The terms of this Constitution may be amended, the name of the Organisation may be changed and the Organisation may be dissolved by resolution of sixty six per cent (66%) of the Directors present at a General Meeting: provided that proper notice of the meeting is given not less than twenty-eight (28) days prior to the date of the Meeting and such notice states the nature of the resolution to be proposed.

10. **INDEMNITY AND POWER TO INDEMNIFY**

- 10.1 Subject to the provisions of any relevant statute, Directors of the Board of Directors and other office bearers shall be indemnified by the Organisation for all acts done by them in good faith on its behalf. It shall be the duty of the Organisation to pay all costs and expenses, which any such person incurs or becomes liable for as a result of any contract entered into, or act done by him or her, in his or her, said capacity, in the discharge, in good faith, of his or her duties on behalf of the Organisation.
- 10.2 Subject to the provisions of any relevant statute, no Director of the Board of Directors and or other office bearer of the Organisation shall be liable for the acts, receipts, neglects or defaults of any other Director or office bearer, or for any loss, damage or expense suffered by the Organisation, which occurs in the execution of the duties of his or her office, unless it arises as a result of his or her dishonesty, or failure to exercise the degree of care, diligence and skill required by law.
- 10.3 In the event that the Organisation should embark upon litigation as herein contemplated it shall be entitled to join with other parties in the launching of such proceedings and to indemnify co-applicants or additional plaintiffs from and against the legal costs of such legal proceedings.

11. **DISPUTES**

- 11.1 In the event of a disagreement between the Directors of the Board of Directors and/or the Organisation regarding the interpretation of this constitution then a minimum of one third of the directors of the Organisation shall be entitled to declare a dispute. Such declaration shall be in writing, state the issue in dispute, and be addressed to the Board of Directors
- 11.2 The Board of Directors shall consider such declaration within one (1) week of receiving it. Should the Board of Directors not be able to resolve the dispute to the satisfaction of the person(s) declaring it, the dispute shall be referred to informal mediation and in the absence of agreement regarding a mediator or should mediation not resolve the dispute, the dispute shall be referred to arbitration.
- 11.3 The arbitration shall be finally settled under the rules of Arbitration of the Arbitration Foundation of South Africa. The seat of Arbitration shall be Johannesburg, South Africa.



SCHEDULE B

POWERS OF THE BOARD OF DIRECTORS

The Board of Directors shall conduct and manage all of the affairs of OUTA and shall be entitled execute all matters and things not specifically required to be done at a general meeting, including ensuring that OUTA operates efficiently and in terms of its objects and attainment thereof as set out in the constitution. Without limiting the rights of management, the Board of Directors shall have the following special powers:

1. to convene a meeting;
2. to hold and have the custody and control of the funds and other property of OUTA.
3. open and operate banking accounts either itself or by authorising the secretary to do same in the name of OUTA for the purpose of transacting its business.
4. to take legal action, on behalf of the Organisation, in any court of competent jurisdiction.
5. to accept or refuse applications for Directorship;
6. Impose, collect and/or receive subscriptions, levies, donations, or other monies and invest or apply such monies to the advancement of the interests of OUTA;
7. to cooperate or affiliate with anybody having similar interests or objects likely to further the interests of OUTA and its Directors;
8. employ and remunerate staff or professional advisors and generally incur such liabilities and expenses as are necessary to conduct the affairs of OUTA;
9. the Board of Directors may, at its discretion, reimburse any person as deemed necessary from time to time, reasonable travelling expenses and accommodation or other expenses necessarily incurred. Such expenses that may be required shall at all times be authorised by at least 2 Directors of the Board of Directors and preferably prior to the expense being incurred;

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10. generally be responsible for the administration of the affairs of OUTA within the framework of this constitution as may be required to be done in pursuance of the interests of good management of OUTA and for the promotion of its objects.

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Schedule C

Directors and signatures

Signed in Johannesburg on this 18th day of February 2016

Board of Directors

The Board of Directors currently consists of the persons listed below;

Chairperson: Wayne Llewellyn Duvenage

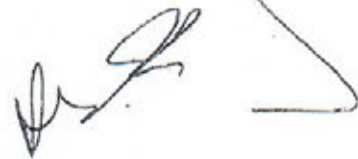
Vice Chairperson: Christiaan Eduard Le Roux

Secretary: Leopold Jean Joseph Pauwen

Director Ivan Herselman

Director Robert Norman Hutchinson

Director Oya Hazel Gumede



SF2

WEBBER WENTZEL

in alliance with > Linklaters



The Honourable Mr Joe Maswanganyi, MP
The Minister of Transport
Forum Building
159 Struben Street
Pretoria

90 Rivonia Road, Sandton
Johannesburg, 2196
PO Box 61771, Marshalltown
Johannesburg, 2107, South Africa
Docex 26 Johannesburg
T +27 11 530 5000
F +27 11 530 5111
www.webberwentzel.com

By hand

By email: info@dot.gov.za; Ntsienli@dot.gov.za;
mojape101@dot.gov.za; joe@senape10.co.za

Your reference	Our reference	Date
	V Movshovich / P Dela / D Cron / J Coyle / M Kekana 3019081	22 June 2017

Dear Sir

Notice of Intention to terminate membership of the Board of Control of PRASA

1. We act for the Passenger Rail Agency of South Africa ("PRASA") and its Board of Control ("the Board") (collectively, "our clients"). As you know, the Board is currently comprised of Dr PS Molefe, Mr X George, Ms MJ Matlala and Mr WS Steenkamp.
2. We refer to the Minister of Transport's ("the Minister's") letters, dated 5 June 2017, addressed to members of the Board and entitled "Notice of Intention to Terminate your membership of the Board of Control of PRASA" ("the notices to remove").

Overview

3. Regrettably, it appears that the office of the Minister is, again, attempting unilaterally to decapitate the entire Board.
4. It is inexplicable that, in attempting to do so, the Minister is simply ignoring the judgment of the Honourable Mr Justice Mabuse, dated 10 April 2017 (*Molefe and Others v Minister of Transport and Others* (17748/17) [2017] ZAGPPHC 120 (10 April 2017 ("the

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: BW Abraham RB Africa NG Alp OA Ampofo-Anti RL Appelbaum DC Bayman
 AE Bennett AP Blair DHL Booysen AR Bowley JL Brink S Browne MS Burger RI Carrim T Cassim SJ Choig A Christie KL Collier KM Colman
 KE Coster K Couzyn JJ Daniels CR Davidow JH Davies PM Daya L De Bruyn PU Dela JHB de Lange DW de Villiers BEC Dickinson MA Diemont
 DA Dingley G Driver HJ du Preez CP du Toit SK Edmondson AE Esterhuizen MJR Evans AA Felekis GA Fichardt G Fitzmaurice JB Forman C Gabriel
 CP Gaul KL Gawith OH Geldenhuys MM Gibson SJ Gilmour H Goolam CJ Gouws PD Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis
 XNC Hlatswayo S Hockey CM Holifield PM Holloway HF Human AV Ismail ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser M Kyle
 J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SJ Meltzer CS Meyer AJ Mills JA Miller D Milo NP Mngomezulu S Mogebe
 M Moloi J Moolman LE Mostert VM Movshovich RA Nelson BP Ngoepe A Ngubo ZN Ntshona MB Nzimande L Odendaal GDP Olivier N Paige
 AMT Pardini AS Parry S Patel GR Penfold SE Phajane TC Phala MA Phillips D Ramjattan GI Rapson Z Rawoot K Rew G Richards-Smith NJA Robb
 DC Rudman S Rupan M Seder H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh J Smit MP Spalding PS Stein
 MW Streufl LJ Swaine JM Swanepoel Z Swanepoel A Thekoi A Toefy PZ Vanda PP van der Merwe SE van der Meulen CS Vanmali JE Veeran
 D Venter B Versfeld MG Versfeld TA Versteid DM Visagie J Watson DP Wild KL Williams K Wilson RH Wilson M Yudaken Chief Operating
 Officers: SA Boyd

Judgment")) and is attempting belatedly to resuscitate the very grounds previously rejected by the Court (in a final judgment). The Judgment is annexed marked "A".

5. It appears that the Minister is urgently attempting to remove the Board not due to concerns which have, on the Minister's version, endured since 2014 and which have led to no removal action to date, but rather as a response to the Board's Chairman addressing a letter to the President of the Republic, highlighting the Minister's defaults in relation to PRASA, as well as the Chairman having made allegations pertaining to the Minister in an affidavit to the effect that the (current) Minister tried unduly to influence the Chairman to resign. The Minister has, days after such letter was addressed to the President and the affidavit deposed, attempted to resuscitate alleged historic defaults of the Board in an attempt to justify its removal.
6. The Minister's conduct thus appears coloured by ulterior purpose, and in any event there is a reasonable apprehension of bias.
7. This apprehension of bias is compounded by the Minister's statements made during a Portfolio Committee on Transport meeting at which the Minister queried the reason for investigation Swifambo and Mr. Mabunda bearing in mind that neither were identified in the public protector's report. The Minister further stated that if such investigations were to be conducted, the Minister was of the view that such investigations should be conducted by the SIU. As a result of this exchange and the perception of conflict of interest that it creates, the Minister is disqualified from taking any decision to remove the current Board.
8. We note, moreover, that the notices to remove state a range of conclusions, indicating that the Minister has predetermined the matter and is intent on removing the Board (notwithstanding any representations that may be made). We also record, with particular alarm, that the Minister appears to have scheduled a press conference for Friday, 23 June 2017 (tomorrow). Although we do not know the purpose of this conference, if it is the Minister's intention to announce the dismissal of the Board (or, indeed, any action in respect of the Board members), this would amount to an extreme and unlawful pre-judgment of the matter by the Minister. It would also render these representations meaningless and defeat our clients' rights of *audi*.
9. Moreover, there has been no prior investigation into the alleged defaults, much less a meeting between the Minister and the Board to discuss the issues raised. It is thus

unclear on what basis the Minister can have formed the opinions recorded in the notices of removal.

10. In order for proper *audi* to have been afforded and a proper process to be followed, the Minister should first have investigated any areas of concern, met and engaged with the Board so as to obtain relevant facts and only then formed a *prima facie* view. Instead, the Minister has secured no view from the Board before effectively determining that the Board members should be removed. Further, the timing of the Minister's notices to remove and the purported press conference is (at best for the Minister) surprising; at worst, suspicious. The Minister is well aware that the Board members' tenure expires on 31 July 2017 - ie. a mere 6 weeks after the Board's responses are due. In this time, there are actions of extreme importance which are due to proceed, relating to investigations performed under the Board's tenure (including the outcomes of over 140 investigations by Werksmans attorneys, over 200 investigations by National Treasury and their service providers, and analysis of millions of documents) and civil proceedings instituted by the Board.
11. The majority (ie. over 90%) of these investigations have unearthed widespread corruption in PRASA, which the Board has, unwaveringly, sought to uncover and act upon. This is precisely the injunction given to the Board by the Public Protector.
12. Despite the significance of these actions, and the clear need for the Board's Institutionalised knowledge, the Minister seeks urgently to remove the Board, by resuscitating arguments which are years' old, baseless, and which cannot be laid at the feet of the Board. A substantial number of those arguments have already been rejected by the High Court.
13. It is thus not surprising that the Minister's prefaced actions have already given rise to public speculation that he is attempting to thwart investigations into corruption at PRASA, with both the National Transport Movement and the South African Federation of Trade Unions reportedly condemning the Minister's prefaced actions, and threatening mass action if the Board is so unceremoniously removed.
14. The Minister's approach is, moreover, inherently contradictory. On the one hand, the Minister professes to be concerned about the corporate governance of PRASA. On the other hand, however, the Minister has, since his appointment:

- 14.1 refused to meet with the Board;
 - 14.2 refused, despite repeated correspondence and his legal obligations under the Legal Succession to the South African Transport Services Act, 1989 ("the Act"), to appoint members to the Board to render the Board fully quorate (withholding, *inter alios*, a representative from the Minister's own Department of Transport);
 - 14.3 refused to appoint a permanent Chief Executive Officer;
 - 14.4 sought to hamstring the Board from operating optimally; and
 - 14.5 prejudged its competence and actions.
15. The Minister has sought to explain his malfeasance and breach of statutory duties by alleging that he cannot appoint the missing members of the Board as this would be a lengthy process; simultaneously, he indicates that he can, presumably within a matter of days, replace the Board and appoint new Board members. Those claims are mutually exclusive and the Minister's reliance on them renders his approach incoherent. The Minister's predecessor, of course, managed (albeit unlawfully) to appoint an entire interim Board within 48 hours. If the appointment process is indeed a lengthy one, then the Minister seeks to remove from PRASA the only body statutorily mandated to manage the affairs of PRASA (the Board) whilst he undertakes the lengthy process of appointment he alludes to. In the interim, PRASA would be completely hamstrung.
16. There is no principled or actual reason why the Minister cannot appoint new Board members expeditiously.
17. The Board currently consists only in 4 members, and has 7 vacancies. If the Minister were to fill these posts, the new Board members would constitute the majority of the Board. There is, in these circumstances, no warrant to strip the Board of its institutional knowledge (a mere 6 weeks before a new Board would have to be briefed and a proper handover effected) by removing the only 4 members with any knowledge of the corruption investigations, reports, court proceedings and relevant documentation.
18. It is also remarkable that the Minister, in his letter to our clients dated 15 June 2017, annexed marked "B", has sought to question the authority on which Webber Wentzel has been appointed to represent PRASA. Even more remarkable are the Minister's subsequent letters of 20 June 2017, annexed marked "C" and "D" respectively:

- 18.1 In the first letter, to the Board, the Minister states that the Board is inquorate and that any decisions made by the Board *"will be susceptible to court challenge"* and its decisions *"rendered null and void"*. The Minister thus *"implores"* the Board *"to desist from taking and implementing any decisions"* and threatens to hold the Board members personally liable for any decisions taken while inquorate; and
- 18.2 The Minister also sent another letter on 20 June 2017 to the Acting Group CEO of PRASA, Mr Lindikhaya Zide, again stating that the decisions of the Board *"will be susceptible to review proceedings in a court of law"* and urging Mr Zide to *"desist from implementing any decision taken by the Board"*, threatening to hold Mr Zide personally liable for any decision of the Board which is implemented by Mr Zide or the executive.
19. The above letters of 20 June 2017 are difficult to understand and, in fact, completely incoherent in light of the Minister's letter to the Board of 15 June 2017, annexed marked "E", in which he urged the Board to implement a turnaround plan and key strategic plans without delay. In this letter, the Minister also directed the Board to put systems in place to curb fruitless and wasteful expenditure.
20. The Minister thus adopts a schizophrenic approach - lambasting the Board for poor performance and urging it to take pointed and immediate action; while simultaneously hamstringing the Board and completely undermining its authority to act as well as instructing others to undermine its authority. It is particularly concerning that the Minister, on his version, would have PRASA completely handicapped by virtue of having an inquorate Board. Instead of urgently remedying the problem, however, the Minister has refused to take any measures, such as appointing Board members, and instead is content on decapitating the entire Board and rendering PRASA crippled. That this is occurring when urgent steps need be taken by the Board simply compounds the irrationality of the Minister's position, as the Board is seized with the finalisation of incredibly important investigations and ensuring that matters can be handed over to any incoming Board members with confidence and ease. The Minister is plainly sabotaging the Board, and PRASA. That he then, incredibly, simultaneously, calls upon the Board to implement decisions and manage PRASA smacks of hypocrisy and can only be seen as the Minister attempting to set the Board up for failure.
21. This approach is totally incoherent and also impossible to understand in light of the fact that it is the Minister alone who has resulted in the Board being inquorate and,



furthermore, it is the Minister alone who can remedy the situation. Indeed, the Minister has been called upon by the Board to do so - to no avail. The inescapable inference is that the Minister is seeking, once again, to capitalise on his own failings, thereby destabilising and retarding the functioning of PRASA and the effectiveness of its (willing and able) Board. This cannot be countenanced, especially at a time when PRASA is in a vulnerable hand-over period and the need for continuity and expedience is thus heightened. It is, of course, obvious that PRASA falls within the Minister's exclusive mandate and he has a duty and responsibility to safeguard its interests, as well as the interests of the public. The Minister has done the opposite - openly abusing his powers by paralysing a major parastatal. The Minister's conduct thus expose questionable motives and possible ulterior purposes as well as a wanton disregard for his office and attendant responsibilities.

Unreasonable period to answer

22. The notices to remove afforded our clients a mere 7 working days in which to respond to wide-ranging allegations made against them. Given the scope and breadth of the allegations made against the Board by the Minister, that time period was plainly insufficient. This unreasonable deadline smacks of the Minister merely paying lip-service to the constitutional requirements of *audi*.
23. On 14 June 2017, we addressed a letter to the Minister, requesting an extension of the time in which our clients were to respond.
24. The Minister responded to this request in terms of a letter dated 15 June 2017, stating that, in his view, the 7 day time limit took into account the fact that some of the allegations made in the notices "have been within the knowledge of your clients for some time now" and are "not new". The Minister thus expressly acknowledges the historic nature of the submissions made in the notices to remove. In any event, the Minister afforded our clients until 16h00 on Thursday, 22 June 2017 to submit their written representations - an extension of 4 working days.
25. The Minister also refused to commit to meet with our clients before receiving our clients' written representations.
26. These submissions have thus been prepared in the limited time available, in accordance with the strictures imposed by the Minister. Our clients reserve the right to supplement

these submissions in due course, should they be afforded an opportunity, and stand by their request to be afforded more time to engage with the Minister regarding their proposed removal.

27. If the Minister intends to announce the dismissal of the Board tomorrow, however, the preparation of these submissions and the request for oral engagement with the Minister would - of course - be (unlawfully and unfairly) rendered nugatory. It would also expose the completely disingenuous and *mala fide* approach taken by the Minister in respect of the Board.

Timing

28. Assuming that the Minister can properly consider the submissions in merely one week (which is denied) and would still wish to remove the Board, all that the Minister would achieve is to remove the Board from PRASA for a period of about 4 weeks.
29. Given that this is the Board which has been in place since 2014 and there are no new allegations of any misconduct (as expressly acknowledged by the Minister in his letter of 15 June 2017), there is no reason at all why the Board would not be permitted to serve out its term.
30. In sum, the Minister avers that the Board has, for years, mismanaged PRASA, which is denied. There is no trigger now, however, which would warrant the entire Board's summary removal, or the summary removal of any member of the Board. The Minister's version is chronologically unsustainable. He would have our clients accept that, despite his knowledge of the Board perpetuating allegedly unlawful (or irregular) conduct for many, many months, as well as failing in its governance of PRASA, he has done nothing to remove them on these bases until now (despite being in office for months). This is simply unbelievable.
31. A similar scenario arose when the Minister's predecessor attempted - unsuccessfully - to use the excuse of allegedly historic failings of the Board to remove the Board in February / March 2017.

Res judicata - delay

32. To this end, our clients draw the Minister's attention to the Judgment, where His Lordship Mr Justice Mabwe stated the following:



"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." (emphasis added).

33. As the (current) Minister will no doubt be aware, the (previous) Minister attempted to explain the earlier attempt at removing the Board based on allegations pertaining to:
 - 33.1 The alleged poor performance of PRASA;
 - 33.2 PRASA's alleged failure to meet certain performance targets;
 - 33.3 The alleged failure by the members of the Board to repay "unduly paid Board fees";
and
 - 33.4 The alleged irregular appointment of Werksmans' attorneys.
34. These allegations were rejected by the High Court. All of these allegations are historic in nature, and have been (repeatedly) addressed in correspondence by the Board. The Minister cannot now attempt to take drastic measures on the back of such historic issues.

35. In addition, the new incumbent of the office of the Minister has been in office for over two months and has expressed no concerns to the Board in relation to their performance. Indeed, the Board has had no interaction with the Minister since he took office, save for one interaction which the chairman had with the Minister after his repeated requests to so meet. If the Minister honestly believed that these historic alleged defaults disqualified the Board members and that PRASA was in need of immediate protection from them, then he would have acted immediately to safeguard its interests. It is not credible to suggest that the Minister was seriously concerned about these allegations but has nevertheless been content to let the Board continue to function, whilst there was serious misconduct by the Board. This is particularly so where the Minister alleges that his knowledge of the Board's alleged failures predates his appointment to the office of Minister.

36. The Minister's notices of removal thus smack of ulterior purpose. The Minister was seemingly happy for the Board to remain in place, despite full knowledge, for some time, of alleged historic transgressions by the Board – but now, mere weeks from the end of the Board's tenure, suddenly the Board must urgently be removed.

37. The question thus begs to be asked - what has changed?

Dr Molefe's letter to the President - ulterior purpose by the Minister

38. What has changed is that the Board has elevated the Minister's statutory failings to the highest levels and has made statements on oath which bear directly on the propriety of the Minister's past conduct.

39. On 26 May 2017 - a mere 7 days before the notices of removal were received - Dr Molefe, the Chairman of the Board, addressed His Excellency, the President of the Republic, recording the impasse between the Board and the Minister and calling for urgent intervention. A copy of this letter is annexed marked "F".

40. The Chairman also set forth in an affidavit (in the matter where PRASA is attempting to force the Directorate for Priority Crime Investigation ("DPCI") to act on the corruption matters PRASA has referred to it many months ago) the circumstances in which the current Minister attempted unlawfully to influence the Chairman to resign (at a time when other members of the Board also "elected" to resign voluntarily, following encouragement by the Minister to do so). Relevant extracts of the affidavit are annexed marked "G".

41. Almost immediately, the Minister responded:
- 41.1 not by addressing Dr Molefe's concerns;
 - 41.2 not by responding to the President;
 - 41.3 not by attempting to resolve the impasse;
 - 41.4 not by denying that he was instrumental in attempting to secure the resignation of Dr Molefe,
 - 41.5 not by appointing new members to the Board;
- but by seeking to remove the entire Board.

42. The Minister's actions thus appear to be triggered by Dr Molefe's letter to the President and the affidavit, and not any true corporate governance concerns, which, on the Minister's version, have endured since 2014.

Perception of bias, conflict of interest and prejudgment

43. In any event, the Minister is not in a position to consider and determine the appropriateness of removing the Board, by virtue of at least the reasonable perception of bias and conflict of interest.
44. The Minister is directly implicated by the Board in attempting unduly to influence the Chairman and other Board members to resign.
45. The investigations which have been (and are being) conducted since August 2015, under the instruction of the Board, are due to be finalised in July 2017. These investigations have implicated some highly connected individuals and bear directly on the management and operation of PRASA from 2008. These investigations implicate officials within government and, particularly, the Department of Transport ("DoT").
46. The current Minister was previously an officer in the DoT and is now the executive authority responsible for PRASA and the DoT's performance.
47. Moreover, the current Minister had, prior to his appointment, apparently been lobbying for PRASA to cease certain investigations (which were not expressly identified in the Public Protector's report), to transfer these investigations away from PRASA's control should



they be pursued and to withdraw, alternatively settle, litigation flowing from some of the investigations conducted to date. PRASA has, however, unequivocally indicated that it intends to take this litigation forward, with steps to be taken in the immediate future.

48. The positions that the Minister has taken, to date, create a reasonable apprehension on the part of our clients that the Minister will be biased against them, or that he operates under a conflict of interest.
49. Moreover, the wording of the notices to remove gives rise to the ineluctable conclusion that the Minister has already determined that the Board is guilty of numerous wrongs and is unfit to manage the affairs of PRASA. The notices to remove indicate that the Minister intends to remove the Board unless convinced otherwise. Considering that this determination precedes the Minister's consideration of the matter, this amounts to clear bias against the Board members. The Minister has already prejudged them and found them guilty. He cannot disabuse himself of this when he now considers their representations.
50. Indeed, the language of the notices to remove indicate that the Minister has closed his mind on the issue. The language employed is not the language of a decision-maker calling for representations which will then inform his or her conclusions and decision, but rather the language of one who has already decided the issue, is putting up conclusions and is merely paying lip-service to *audi*:
 - 50.1 *"the malfeasance identified in the Public Protector's report has festered since [the] Board took over"*;
 - 50.2 *The 2015 - 2017 quarterly reports "have consistently shown gross decline in performance, lack of or inadequate governance oversight and poor financial management at PRASA"*;
 - 50.3 *"the irregular expenditure which was at a staggering R1.5 billion was showing an increasing trend. This points to a lack of proper internal controls and accountability in respect of oversight, governance, leadership, project management, financial management and revenue collection"*;
 - 50.4 *"you do not take your fiduciary duties seriously nor respect the findings of the Auditor-General (a chapter 9 institution) and Parliament"*;

have resigned since the Judgment have done so after being improperly pressured or coerced to resign. The Board believes this pressure to have been applied by, *inter alia*, individuals within the Department of Transport, including the current Minister.

57. It is further telling that the Minister has, throughout his tenure, taken steps only to retard the functioning of the Board:
 - 57.1 despite repeated request, he has refused to appoint a member to the Board from his own department, the Department of Transport;
 - 57.2 similarly, he has failed to appoint (or take any steps to procure the appointment of) a member to the Board from the Department of Finance; and
 - 57.3 he has failed to appoint a permanent Group Chief Executive Officer to PRASA, despite this being a priority item for PRASA since early 2016.
58. In light of the Minister's failings, which have simply exacerbated the challenging environment in which the Board operates, it is hypocritical for the Minister now to criticise perceived failings of the Board when he has clearly done all in his power to destabilise and prejudice the Board.
59. The Minister has, seemingly, actively avoided interacting with the Board. He has refused, alternatively failed to respond, to invitations to meet, and instead arranged and/or partook in three PRASA events without any reference to the Board, namely the Presidential launch of the New Rolling Stock, the viewing of the Afro 4000 locomotives and the visit to the factory site being developed by Gibela.

Management faults

60. There is no running away from the fact that PRASA operates in a challenging environment. Indeed, the Public Protector report, "*Derailed*", rendered plain some of these issues.
61. The Board has, however, taken the Public Protector's findings extremely seriously and has taken every conceivable measure, over the past two years, to give full effect to the Public Protector's injunctions.
62. In discharge of the Board's fiduciary duties and statutory responsibilities, the Board resolved to implement the recommendations in the Public Protector's report (which

included a recommendation that further investigations be instituted on the matters raised in that report). The Public Protector instructed that there be investigations of every contract above R10 million from 2012. To this end, Werksmans was tasked with conducting investigations into dozens of contracts and National Treasury is investigating the contracts above R10 million that are not being investigated by Werksmans.

63. Werksmans and the Board engaged with, *inter alios*, the DPCI, forensic auditors, National Treasury and multiple witnesses to progress investigations into suspected corruption and corporate governance malfeasance. During the course of this exercise, many million documents have been reviewed or placed in issue.
64. The results have been alarming. Through the efforts of the Board and Werksmans, it appears that the true extent of wasteful, irregular, fruitless or unlawful expenditure within or by PRASA ranges from R 13 to R 24 billion. Indeed, the AG report for the 2015/16 years, based on information uncovered by the Board, identified irregular expenditure approximating R 14 billion. This expenditure is not in any way attributable to the current Board.
65. As a result of these investigations, the Board has:
 - 65.1 instituted civil proceedings - two review applications - to review and set aside unlawful contracts involving over R 7 billion. These cases have not been finalised, and are in differing stages in the court processes;
 - 65.2 instituted proceedings to recoup monies lost as a result of corruption / unlawful behaviour, and to discipline any employees involved in such misconduct;
 - 65.3 submitted 39 reports pertaining to over 60 entities in terms of section 34 of the Prevention and Combating of Corrupt Activities Act, 2004; and
 - 65.4 placed the DPCI on terms to render the necessary assistance to ensure the timeous and proper investigation of the various issues unearthed by the Board;
66. In relation to this last process, it is of great significance that the litigation between, *inter alios*, PRASA and the DPCI has reached a most sensitive stage, with the answering affidavits of the DPCI and the NPA due to be delivered on 28 June 2017 (although the State Attorney has now requested an extension until 15 July 2017). PRASA's replying affidavit would thus be due 10 days thereafter. As such, PRASA requires a reliable and

knowledgeable deponent, such as Dr Molefe, to go on oath in response to any answering papers received. It is notable that the answering affidavits and replying affidavit will almost certainly ventilate further allegations made in the founding affidavit, which directly concern the Minister.

The appointment of Werksmans

67. Werksmans attorneys were appointed in the same manner that any legal service provider is appointed by PRASA. Werksmans were on PRASA's panel of approved legal service providers, and appointment was done in this context.
68. Werksmans was appointed as follows:
 - 68.1 Werksmans was added to the approved panel of legal service providers pursuant to a tender, prior to the appointment of the incumbent members of the Board;
 - 68.2 the Public Protector's report required investigation and action by legal specialists;
 - 68.3 Werksmans was identified as a possible service provider in this respect, given its specialty and capacity to perform forensic investigations; and
 - 68.4 meetings were held between PRASA and Werksmans, the scope of work identified and rates were negotiated. Given the anticipated volume of work, set and/or discounted rates were secured from Werksmans and from the service providers they identified they would likely have to use, such as forensic investigators.
69. A written agreement was concluded appointing Werksmans and setting out the scope of work to be performed, the (set) rates to be charged by Werksmans the (discounted) rates to be charged by forensic sub-contractors and how various disbursements fell to be charged. The duration of Werksmans' engagement would be informed by the scope of work - it has subsequently been agreed that Werksmans will finalise the reports by no later than 31 July 2017 in this respect. A copy of the written agreement appointing Werksmans is annexed marked "H". It should also be noted that the rates charged by the sub-contractors were set at the rates used by the Auditor General in 2015 and have not been increased to date, notwithstanding the Auditor General's annual increases.



70. Werksmans is but one of the service providers appointed by PRASA and/or National Treasury to give effect to the Public Protector's findings and recommendations. Other service providers so appointed include:

- 70.1 NES;
- 70.2 Nexus Forensic Services (Pty) Ltd;
- 70.3 Bowman Gilfillan;
- 70.4 KPMG;
- 70.5 Tshisevhe Gwina Ratshimbilani Incorporated;
- 70.6 Strategic Investigations and Seminars;
- 70.7 SekelaXabiso;
- 70.8 Gobodo Forensic and Investigative Accounting (Pty) Ltd;
- 70.9 PPM;
- 70.10 Deloitte & Touche;
- 70.11 Fundudzi; and
- 70.12 PricewaterhouseCoopers.

71. All of the above appointments were made in comparable circumstances, and have (correctly) not been challenged. The views of the Minister now expressed in the notices to remove, however, appear to implicate and call into question all of the appointments of the above service providers, as well as all service providers appointed by PRASA in comparable circumstances and in terms of similar processes. This may have serious knock-on effects for PRASA, the service providers and the validity of the services actually rendered to PRASA. Apart from these glaring inconsistencies and potentially far-reaching consequences, there is simply no cogent reason for the witch-hunt regarding the appointment of Werksmans attorneys.

72. Moreover, the Minister has, for years, been aware of the appointment of Werksmans. At no time has the Minister taken any steps to review the appointment of Werksmans. This

is despite the Minister's knowledge of the costs of the investigation. In accordance with well-established legal doctrines, the Werksmans appointment remains valid unless and until set aside by Court.

73. In fact, rates have been negotiated with Werksmans to secure a discounted rate for work performed. Moreover, the cost of the investigation - under R130 million (which also includes the cost of various legal proceedings instituted as a consequence of the investigation) - pales into insignificance when one considers the amount of unlawful expenditure it has revealed, which exceeds R14 billion (and may well exceed R 20 billion).
74. The work undertaken by Werksmans utilises not just lawyers but a team of skilled forensic investigators, traversing a detailed set of investigations of enormous complexity relating to, as indicated, huge amounts of expenditure. The work, as indicated, has both civil and criminal components, requiring legal and forensic skills across disciplines. Securing such skills, in work that has taken years, inevitably is not an inexpensive undertaking.
75. Indeed, the office of the Minister has expressly accepted the appointment of Werksmans, and requested Werksmans and PRASA to bring the investigations to finality, culminating in an agreement that the investigations would be concluded by the end of July 2017.
76. By way of example, on 12 August 2016, the Minister addressed a letter to the Chairperson of the Board (annexed marked "I"), raising concerns as to the Werksmans' investigation. The concerns, however, did not relate at all to the appointment of Werksmans. The high point of any procedural concerns was that "*the money spent had not been budgeted for and can be regarded as irregular expenditure.*" A failure to budget, of course, does not detract from PRASA's obligation to comply with the Public Protector's findings and to honour the requisite mandate.¹
77. The Minister did not challenge the appointment of Werksmans or call for their work immediately to cease. Instead, the Minister:
 - 77.1 commended the Board for their efforts to clean up the organisation and enhance good corporate governance;

¹ *Free State Province v Terra Graphics (Pty) Ltd and Another* 2016 (3) SA 130 (SCA).



- 77.2 indicated that the scope of the investigation should be focused (thus indicating acceptance of Werksmans' appointment and indeed calling for the investigation to continue, albeit in a more focused manner); and
- 77.3 requesting that the investigation process be closed off (ie: brought to conclusion) and that the results be considered, which results could ostensibly lead to further investigation.
78. On 24 August 2016, the Board replied to the Minister's 12 August 2016 letter (a copy of this reply is annexed marked "J"), stressing that the fiduciary and statutory duties of the Board, as well as the Public Protector report, obliged the Board to continue the investigation. As stated in the letter, *"the proposed termination of the investigation will:*
- *signal that, not only the identified unlawful conduct but any future unlawful conduct can proceed with impunity to the detriment of the fiscus,*
 - *lead to the termination of the litigation which has already been instituted and will expose PRASA (and, by extension, the fiscus) to the tune of approximately R12 billion of possibly irregular, fruitless and wasteful expenditure,*
 - *will deprive PRASA's management of information necessary to identify and root out those officials who are still working against the interests of PRASA,*
 - *lead to the Board being found not to have acted in the interests of PRASA and in discharge of their fiduciary duties, their obligations in terms of the PFMA and in upholding the law as enshrined in the Constitution, and*
 - *lead to the Board being found to be flouting the law in not implementing the remedial steps, where the Board has already undertaken to implement such steps."*
79. It was further explained in this letter that *"Werksmans attorneys is one of the firms of attorneys on the panel of attorneys of PRASA. The allocation of this work to Werksmans was therefore done in the ordinary course of allocating work to attorneys on the PRASA panel. The only difference being that this appointment was done by the Board having considered the expertise and experience of Werksmans attorneys. We were advised that the panel of attorneys was constituted after an open tender process."* The scope of the

investigation, preliminary findings, the cost-effectiveness of the investigation and the need for Werksmans to continue were all explained in the letter.

80. After the letter was sent, the Minister did not challenge the above explanations, and instead confirmed that she did not intend to halt the investigations, but simply to impress the need to bring them to finality. The Minister was thus well aware of Werksmans' role and tacitly endorsed this role. The same is true of the Portfolio Committee.
81. On oath and before Mabuse J, the Minister later indicated that her 12 August 2016 letter was, on her version, to be interpreted as requiring Werksmans to expedite and bring to finality the investigations they were performing, and that "*Werksmans is free to produce a report that may be the subject of parliamentary enquiry into the affairs at PRASA.*"² There was no challenge to their very appointment.
82. The Minister also, on oath, only raised the issue that Werksmans' report was potentially not budgeted for. At no time was there any allegation that the appointment of Werksmans was in breach of PRASA's supply chain management policy, and that a written agreement was lacking.
83. There is, in any event, no basis for the allegation that the appointment of Werksmans is irregular, and there has been no finding of irregularity of any sort, by the Auditor-General or otherwise. The position has been explained in correspondence, and the Minister accepted the explanation and ostensibly recommitted herself to the investigation.
84. The Minister has, for years, therefore been aware of and accepted the appointment of Werksmans. The Minister has thus waived the right to raise, alternatively is estopped from raising this as an incidence of any alleged default. In any event, in the absence of a Court order setting aside such appointment, the appointment stands and must be adhered to by PRASA and the Minister.

The need for continuity

85. This investigations commissioned by the Board have, to date, uncovered the true extent of fruitless, wasteful and irregular expenditure at PRASA totalling at least approximately R14 billion.

² The Minister's answering affidavit in the matter culminating in the Judgment, para 68

86. The Minister's prefaced action interferes with the ongoing investigations at PRASA and may be an effort to frustrate the successful outcome of these investigations. The removal of the Board clearly threatens 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 Board also erodes the institutional memory and intimate knowledge of these investigations and the cases against individuals and companies involved.

87. As the Constitutional Court has held, in *Glenister v the President of the Republic of South Africa and Others*:³

"corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfill its obligations to respect, protect, promote and fulfill all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk."

88. There is thus a constitutional imperative to ensure that, particularly within public institutions, corruption is rooted out, uncovered and punished.

89. The Minister's actions are antithetical to this, and there is no explanation at all why the dire consequences of terminating the Board now - which may render nugatory hundreds of investigations and waste millions of Rand - are outweighed by the Minister's unfounded concerns that the Board has somehow conducted itself improperly. This is particularly so given that the Minister does not point to any trigger in the immediate past which warrants urgent removal of the Board, but rather relies on issues which have been in play for years.

Alleged unauthorised payments to the Board

90. The allegation that the removed directors had unlawfully enriched themselves was first made in or about July 2016.

91. At all times, PRASA had a remuneration policy (approved by the previous Board in 2014) in accordance with which directors would be compensated for Board meetings. That

³ 2011 (3) SA 347 (CC) at para [166].

policy was not extraordinary in any material respect and had consistently been applied by PRASA from 2014.

92. In 2016, pursuant to the Auditor General's comments, it was discovered that the Minister's approval had not yet been obtained for the remuneration policy, as contemplated in the Shareholders' Compact. In September 2016, the directors consequently wrote to the Minister to request approval of the policy (the letter is annexed marked "K"). The Minister has, to date, not responded. The Minister has not, however, cavilled at the substance of the remuneration policy.
93. I refer to the email dated 22 September 2016 from the AG's office (annexed marked "L"), which indicates that the request for approval, and the rates set forth therein, were completely in order and in no way gratuitous or excessive. That the Minister has failed to approve the PRASA remuneration policy without any cogent reason for doing so, cannot now be leveraged against the Board, which reasonably assumed that the payments were unobjectionable and constituted equitable compensation for the time and effort they had expended at PRASA. It was never envisaged that, in undertaking the mammoth task of giving effect to the Public Protector's findings, they were to do so for free.
94. It is the Minister's failure to approve the remuneration policy at all, let alone within a reasonable time, which is the cause of the problem. That failure is now being perpetuated by the incumbent Minister. The unreasonable withholding of approval is, in the circumstances, completely irrational and unexplained. It is also noteworthy that the Minister has taken no steps to implicate or recall payments made to directors prior to 2016, despite the fact that these payments were not made in terms of an approved remuneration policy. This dichotomy is questionable, inconsistent and irrational.
95. In any event, the authority of the Minister to block or disapprove PRASA's remuneration policy is less than clear as, in terms of the Act, the Minister has no power to regulate, determine, amend or approve the policies of PRASA. In fact, this is a competence which usually falls within the express authority of the Board, which is tasked under section 24 of the Act with managing the affairs of PRASA. It is thus arguable that the payments were not unlawful, whatever the position of the Minister.



Blanket decision to decapitate the entire Board

96. Each member of the Board should have individually been assessed to determine whether his/her removal was warranted. This is particularly so where the Board is, statutorily, comprised of individuals from different departments and with different skillsets.
97. Instead, the Minister has clearly used the exact same template for the notice to remove in respect of each Board member, with minor variations depending on repayment of alleged unlawfully paid amounts.
98. This copy-paste exercise indicates no application of the mind to the discrete facts pertaining to each member of the Board on an individual basis. Accordingly, the contemplated blanket termination of the Board is irrational.

Individual qualifications

98.1 Dr Popo Simon Molefe

- 98.1.1 Dr Popo Molefe, the Chairman of the Board, is a highly respected leader in the business world and the political arena.
- 98.1.2 Dr Molefe attended Naledi High School in Soweto and became politically active as a student, joining the Black People's Convention in 1973, and the South African Students' Movement in 1974. Molefe was also one of the founding members of the Azanian People's Organization.
- 98.1.3 In 1994, Dr Molefe was appointed Premier of the North West Province over two terms, disposing his mandate and fulfilling his duties with integrity and alacrity. During his tenure as Premier, Dr Molefe also founded the Popo Molefe Foundation which, *inter alia*, provides financial support to access education to the youth of disadvantaged communities.
- 98.1.4 Dr Molefe is also an astute businessman, acting as founding member and executive chairperson of Lereko Investment Holdings. Dr Molefe also led the establishment of the North West Development Corporation (Pty) Ltd, the North West State Transport Company and the North West Development Agency. Dr Molefe is also and has been a member on company boards, including Petro

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SA, Armscor, Anooraq, Equestra, Morvest, Protea Technologies, ZTE Mzansi, Global Airways and Tedcor Group.

98.1.5 Dr Molefe completed the Business Leadership Conflict Resolution Certificate at Harvard and studied towards a degree in communications. Dr Molefe also served as the Chancellor of the North West University, another clear example of his leadership abilities.

98.2 **Mr Xolile George**

98.2.1 Xolile George is a member of the PRASA Board of Control in his capacity as a representative of the South African Local Government Association ("SALGA"), of which he is the Chief Executive Officer. In both capacities, Mr George has prioritised matters of governance, administration and accountability.

98.2.2 Mr George has established a track record in various other government departments for service delivery. His previous positions include Executive Director: Economic Development, City of Johannesburg, where he earned the following accolades: Best Performing Manager, Manager of the Best Performing Region and Manager with the Best Management Strategy (City of Johannesburg). He also served as Director: Executive Support Services at the Amathole District Municipality, where he was responsible for advising the Executive Mayor, Council Speaker and Mayoral Committee on local government policy, legal and regulatory matters. Mr George also held a directorship at the Department of Local Government and Housing; and an advisory role at the Department of Land and Agriculture in the capacity of Economist and Land Use Planner.

98.2.3 Xolile George is an economist by training with the following qualifications: a Bachelors degree in Economics from the University of Fort Hare as well as an Honours and a Masters degrees in Economics from the University of Pretoria. He has also completed an Executive MBA through the Postgraduate School of Business in the Netherlands, a Postgraduate Diploma in Company Direction at the Institute of Directors, as well as the Executive Management Development, Business Leadership programme at the University of the Witwatersrand.

98.2.4 Other than being a member of the PRASA Board of Control, Xolile George is also a member of the board of directors at the Eastern Cape Rural Development Agency, and the South African Cities Network.

98.3 **Ms Mashila Matlala**

98.3.1 Ms Matlala is a committed member of the Board, with significant experience in various spheres of government and business endeavours.

98.3.2 Apart from her work at PRASA, Ms Matlala acts as a director of the National Development Agency, a state agency under the auspices of the Department of Social Development. As the senior manager for telecommunications policy, Ms Matlala has also contributed to the shaping of policy within the Department of Communications.

98.3.3 Ms Matlala is also involved in significant work as a member of the Management Committee of the WiFi Forum of South Africa, having chaired the Stakeholder Management Sub-Committee.

98.4 **Mr William Steenkamp**

98.5 William Steenkamp has fulfilled his mandate at PRASA in an exemplary and commendable manner. Mr Steenkamp is also a member of the board of PetroSA, South Africa's national oil company, and chairs its Human Capital Board Committee.

98.6 In addition to his duties as director, Mr Steenkamp has significant business experience and is the managing owner of Eagle Services, a fibre optic infrastructure company and socio-economic consulting business. Mr Steenkamp is also one of the founders and shareholders of Nexus Connexion, which is the BEE company partner of NEOTEL. Furthermore, He serves on the Perishable Products Export Control Board and chairs its Information and Communication Technology Committee.

98.7 William Steenkamp's educational qualifications include a Certificate of Management from the Management College of Southern Africa (MANCOSA).

99. The competence, skills and experience of the members of the Board are thus clear and well-established.

100. It must also be borne in mind that, when the Board took control of PRASA, PRASA was in a dire financial, governance and commercial position, having been subject to rampant corruption and irregular and unlawful conduct by PRASA officials - some of which is detailed in the Public Protector's report; and a great deal more which has been uncovered by the investigations undertaken by Werksmans and National Treasury.
101. The turnaround of PRASA, in these circumstances, has been extremely challenging. The Board has, however, made significant strides in addressing the irregularities and misconduct which formed the norm at PRASA under its prior Board of Control. This includes the civil prosecution of two major unlawful tenders, Swifambo and Siyangena (amongst others) and attempts to compel the DPCI to address serious allegations of criminal activity. These advances have been made despite a number of challenges, including a lack of cooperation and communication from the Minister, a lack of cooperation from the police authorities and DPCI and interference by government "deployees" within the management structures of PRASA.
102. The Board has thus done the best job possible, given the long-standing corruption and mismanagement which was prevalent at PRASA prior to the Board's appointment.

Answer to select paragraphs

103. I address select paragraphs below. Much of the content of the notices to remove has been addressed above and thus will not be addressed below. The failure expressly to address any paragraph does not amount to any admission of the contents thereof.

Ad para 1

104. It is telling that, since 30 March 2017, the Minister has not interacted with the Board in respect of any of the issues raised by the Board; has ignored all requests for a meeting with the Board (bar one encounter with Dr Molefe); has refused to appoint a permanent Group Chief Executive Officer; has refused to appoint a representative to the Board from his department, being the DoT, and has refused (to the Board's knowledge) to take any steps to appoint (or procure the appointment of) a member to the Board from the Department of Finance.
105. Moreover, the Minister has not, during this period and until 15 June 2017, communicated any concerns in respect of the operation of the Board (historic or emanating from his term of office). It is thus surprising, given the Minister's repeated failures to assist the Board

and fulfil his statutory duties, to read that the Minister has already predetermined that all Board members fall to be dismissed.

Ad paras 3 and 4

106. The Board has - relentlessly, and despite the lack of Ministerial assistance - sought to give effect to the findings and recommendations of the Public Protector. Indeed, under the Board's direction, massive corruption and irregularities have been uncovered. Given the irregularities brought to light that were previously deliberately concealed by others, it is hardly surprising that the updated reports pertaining to PRASA paint a more sombre picture.
107. The Public Protector, in various meetings with the Board and Werksmans, endorsed PRASA's efforts.
108. Given the extent of the historic corruption and irregular expenditure, there is no "quick-fix" in the offing whereby the Board could realistically have been expected to turn around the performance of PRASA in but a few years. Instead, the Board has given effect to the Public Protector's recommendations and is actively pursuing all leads unearthed in the resultant investigations. These include the launch of civil proceedings to recover millions of Rands, criminal investigations, as well as imposing more stringent internal controls to guard against such historic abuses being repeated.
109. To the extent that the Minister seeks further information on the internal controls now instituted within PRASA, a presentation can, on reasonable notice, be arranged.

Ad paras 5 - 6

110. The 14 June 2016 (there being no 4 June 2016 letter) and 27 January 2017 letters were before the Court in the Judgment; and were dismissed by Mabuse J as not grounding any basis to remove the Board. This issue is thus *res judicata* and the Minister cannot simply resurrect it in the face of a final Court order.
111. There had been regular correspondence and interaction with the Minister after the 14 June 2016 letter. To suggest that those concerns had survived, unaddressed, and can now simply be resuscitated some 11 months later is unsustainable.



112. Similarly, had there been material concerns as at 27 January 2017, doubtless the Minister would have acted then.
113. As was determined in the Judgment, *"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."*
114. Moreover, the fact that targets may have been missed cannot be viewed in isolation and laid at the feet of the Board. The turnaround strategies proposed by the Board will take some time to implement, and were delayed through the unfortunate insertion of the DoT emissary, Mr Letsoalo, at your predecessor's behest, contrary to the Board's requirements of a permanent GCEO.
115. What is urgently required to address such operational issues is a permanent GCEO, whom the current Minister continues to refuse to appoint.

Ad para 15

116. The Compact is a bilateral agreement, imposing duties and obligations on the Minister (as the Executive Authority). By way of example, clause 9.1 of the Compact provides that *"[t]he Executive Authority, where required through, or assisted by the Accounting Authority, undertakes to allow the Group Chief Executive Officer of PRASA to attend to the operational aspects and business of PRASA as has been approved in the Corporate Plan embodied in Annexure "A" "*. Despite this, the Minister has not seen fit to consent to the appointment of a Group Chief Executive Officer.
117. Any failures under the Compact are thus equally attributable to the Minister, and cannot ground removal from the Board mere weeks from the end of its term.

Conclusions

118. Our clients contend that, in light of the above:
- 118.1 The Minister should not remove any of the Board members from the Board, on any of the bases alleged in the notices of removal or otherwise;

- 118.2 The Minister should immediately, within 48 hours of the date hereof, appoint members to the Board from at least the Department of Transport and the Department of Finance in order to ensure the Board is quorate; and
- 118.3 The Minister should, as soon as possible, meet with the Board to discuss various operational issues and any other issues he may have in respect of PRASA.
119. In the event that the Minister is not persuaded by the contents of these submissions, then our clients contend there must be an immediate meeting to discuss the various concerns raised by the Minister and address why our clients' answers are not satisfactory.
120. If, at any time, the Minister intends to terminate the membership of any Board member's membership, our clients request that the Minister, at least five working days prior to giving effect to such decision, notify our clients (care of the author hereof) in writing of such intention to terminate, with supporting reasons, so that our clients may properly exercise, and vindicate, their rights in law on an urgent basis.

Yours faithfully



WEBBER WENTZEL

V Movshovich

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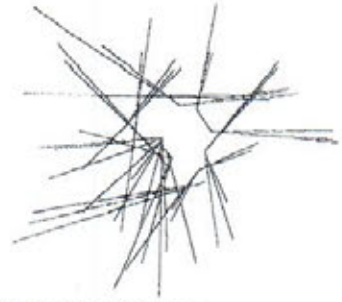
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Your reference

Our reference

Date

V Movshovich / P Dela / D Cron /
 J Coyle / M Kekana
 3019081

26 June 2017

Dear Sir

Appointments to the Board of Control of PRASA

1. We act for the Passenger Rail Agency of South Africa ("PRASA") and its Board of Control ("the Board") (collectively, "our clients"). As you know, the Board is currently comprised of Dr PS Molefe, Mr X George, Ms MJ Matlala and Mr WS Steenkamp.
2. We refer to two letters from the Minister of Transport ("the Minister") dated 20 June 2017, both entitled "*Taking and implementation of decisions by the Board of PRASA*":
 - 2.1 the first letter was addressed to members of the Board and is annexed marked "A" ("*your letter to the Board*"); and
 - 2.2 the second letter was addressed to the Acting Group Chief Executive Officer of PRASA, Mr Lindikhaya Zide ("*Mr Zide*") and is annexed marked "B" ("*your letter to the AGCEO*"),

(collectively referred to as "*your 20 June 2017 letters*").

Senior Partner: JC Els Managing Partner: SJ Hutton Partners: BW Abraham RB Africa NG Alp OA Ampofo-Anti RL Appelbaum DC Bayman
 AE Bennett AP Blair DHL Booysen AR Bowley JL Brink S Browne MS Burger RJ Carrim T Cassim SJ Chong A Christie KL Collier KM Colman
 KE Coster K Couzyn JJ Daniels CR Davidow JH Davies PM Daya I de Bruyn PJ Dela JHB de Lange DW de Villiers BEC Dickinson MA Diemont
 DA Dingley G Driver HJ du Preez CP du Toit SK Edmundson AE Esterhuizen MJR Evans AA Felekis GA Fichardt G Fitzmaurice JB Ferman C Gabriel
 CP Gaul KL Gawith OH Geldenhuys MM Gibson SJ Gilmour H Goolam CI Gouws PO Grealy A Harley JM Harvey MH Hathorn JS Henning KR Hillis
 XNC Hlatshwayo S Hockey CM Hoffeld PM Holloway HF Humen AV Ismail ME Jarvis CM Jonker S Jooste LA Kahn M Kennedy A Keyser PN Kingston
 M Kyle J Lamb L Marais S McCafferty MC McIntosh SJ McKenzie M McLaren SJ Meltzer CS Meyer AJ Mills JA Milner D Milo NP Mngomezulu
 S Mogale M Moloi J Moolman LE Mostert VM Movshovich RA Nelson BP Ngoepe A Ngubo ZN Ntshohle MB Nzimande L Odendaal GJP Olivier N Paige
 AMT Pardini AS Parry S Patel GR Penfold SE Phajene TC Phala MA Phillips D Remjetan GI Rapson Z Rawoot K Rew G Richards-Smith NJA Robb
 DC Rudman S Rugan M Sader H Samsodien JW Scholtz KE Shepherd AJ Simpson N Singh N Singh-Nogueira P Singh J Smit MP Spalding PS Stein
 MW Straeuli LJ Swaine JM Swanepoel Z Swanepoel A Thakor A Toefy FZ Vanda PP van der Merwe SE van der Meulen CS Vanmali JE Veeran
 D Venter B Versfeld MG Versfeld TA Versfeld DM Visagie J Watson DP Wild KL Williams K Wilson RH Wilson M Yudaken Chief Operating
 Officer: SA Boyd

3. In your 20 June 2017 letters, you raise the point that several members of the Board have resigned and that, as a result, the remaining four members of the Board fall short of a quorum. As such, you allege that *"any decision taken by the current Board will be susceptible to a court challenge and the decisions taken thereof rendered null and void"*. In your letter to the Board, you also implore the Board *"to desist from taking and implementing any decisions as it does not form a quorum"* and threaten to hold the Board members *"personally liable for any decisions taken whilst you do not form a quorum"*. Your letter to the AGCEO contains similar protestations, imploring Mr Zide to *"desist from implementing any decision taken by the current Board"* and threatening to hold Mr Zide *"personally liable for any decision taken by the Board and implemented by you and your executive"*.
4. Your 20 June 2017 letters are remarkable and difficult to understand in light of your letter to the Board dated 15 June 2017, annexed marked "C", in which you direct the Board to *"put systems in place"* and *"deal with"* alleged fruitless and wasteful expenditure at PRASA.
5. Your recent instructions to the Board are thus clearly contradictory and internally inconsistent.
6. Moreover, your letters of 20 June 2017 are concerning to say the least as they illustrate that you:
 - 6.1 are prepared to paralyse and hamstring the Board and, therefore, the operations of PRASA;
 - 6.2 have little regard for your responsibilities, as Minister, to protect and advance the interests of PRASA and the public;
 - 6.3 have little to no regard for the critical and important decisions which must be made by the Board;
 - 6.4 are prepared to jeopardise ongoing and important investigations and litigation in respect of PRASA;
 - 6.5 have incited and condoned insubordination within PRASA;
 - 6.6 are interfering with the independence of the Board;



- 6.7 have completely undermined the authority and position of the Board; and
- 6.8 as such, must be motivated by ulterior purposes.
7. As you are no doubt acutely aware, you have the responsibility to appoint members of the Board in terms of the Legal Succession to the South African Transport Services Act, 1989 ("the Act"). Your 20 June 2017 letters evince your statutory failings and unlawful conduct; not that of the Board or PRASA.
8. As such, when the composition of the Board was initially compromised in April 2017, as a result of the resignation of three of its members, the remaining members addressed you to apprise you of the composition of the Board and to request that you make appointments to ensure that the Board is properly constituted. The letter was sent to the Minister in this regard on 20 April 2017 and is annexed marked "D". The Minister failed to take any action in this regard and has, in fact, avoided interacting or meeting with the Board.
9. As a result, and as you may also be aware, PRASA addressed a letter to the President, imploring him to intervene and request that you fulfil your duties and appoint additional members of the Board. The letter, dated 26 May 2017, is annexed marked "E".
10. It is trite law that where a public officer is afforded a power, there is a concomitant duty to exercise such power, and to do so timeously and properly. The Minister is thus not permitted simply to ignore his statutory duties, deliberately or otherwise. It is even more unacceptable for the Minister to instruct the remaining members of the Board not to act because the Board "[does] not form a quorum" when its composition is attributable to the Minister. As you will also know, it is you who has encouraged members of the Board to resign, thus further imperilling its functions.
11. Despite the pleas from the Board urgently to exercise your statutory powers, you have failed to appoint additional members of the Board.
12. It is in the public interest and in the interests of our clients to ensure that PRASA is operational and that its legal and financial position is not compromised. Our clients cannot be held hostage by the Minister and will continue to act in the best interests of PRASA. The Minister must do the same.
13. You are thus, once more, requested to appoint the additional members to the Board. If you fail to make a decision in this regard on or before 30 June 2017, our clients will have

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Page 4

no option but to seek urgent relief from the courts and compel you to fulfil your statutory duties.

Yours faithfully

WEBBER WENTZEL

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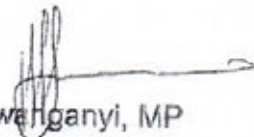
Ref: V Movshovich / P Dela / D Cron / J Coyle / M kekana 3019081

Dear Sirs

**RE: REPRESENTATIONS ON THE NOTICE OF INTENTION TO TERMINATE
MEMBERSHIP OF THE BOARD OF CONTROL OF PRASA**

1. The above matter and your clients representations enclosed in your letter dated 22 June 2017 as well as your letter dated 27 June 2017 requesting that I appoint additional members to the Board of PRASA, refer.
2. I am applying my mind and also taking legal advice on your client's representations together with their request of additional members being appointed to the Board.
3. I will therefore revert to your clients with my responses on both issues before close of business on Tuesday 4 July 2017.

Yours Sincerely


Mr M.J. Maswanganyi, MP
Minister of Transport

Date: 30/06/2017

A handwritten signature or mark, possibly initials, located in the bottom right corner of the page.



MINISTER
TRANSPORT
REPUBLIC OF SOUTH AFRICA

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Dear Sirs

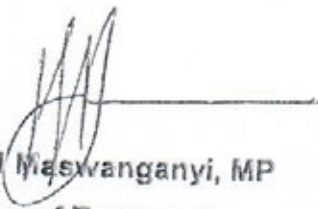
RE: APPOINTMENTS TO THE BOARD OF CONTROL OF PRASA

1. Your letter dated 27 June 2017 regarding the above matter refers.
2. I will not deal with all the issues you raised in your letter; but will focus on the relevant parts.
3. Please take note that I have already called for the nominations of persons to serve on the Board of Control of PRASA as per the provisions of the Legal Succession of the Transport Services Act No. 9 of 1989, as amended. The process to finalise the appointments would obviously include nominations of

representatives from both the Department of Transport as well as the Department of Finance (Government Representatives).

4. It would therefore serve no purpose to just focus on the Government Representatives, as the appointment process is the same except for the fact that in their case the request for nominations is not advertised.

Yours faithfully



Mr M.J. Maswanganyi, MP

Minister of Transport

Date: 04 July 2017