

OPINION

EX PARTE: PASSENGER RAIL AGENCY OF SOUTH AFRICA

(CONSULTANT)

IN RE:

PRASA'S PROSPECTS OF SUCCESS IN DEFENDING THE BOC'S DECISION OF 29 NOVEMBER 2021 NOT TO CONFIRM THE GCEO'S EMPLOYMENT (PROBATION) DUE TO POOR PERFORMANCE, PARTICULARLY IN LIGHT OF THE JUDGMENT OF THE LABOUR COURT DELIVERED ON 1 JULY 2024, IN WHICH THE ARBITRATION AWARD BY RETIRED JUDGE NUGENT, WHICH RETROSPECTIVELY REINSTATED THE GCEO TO HIS POSITION WAS MADE AN ORDER OF COURT.

PREPARED BY: ADV WR MOKHARE SC

WITH

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INSTRUCTED BY: NINGIZA HORNER ATTORNEYS

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A. INTRODUCTION

1. We are briefed to provide legal opinion to the Board of Control (“BOC”) of Passenger Rail Agency of South Africa (“PRASA”) on the following:

1.1 PRASA’s prospects of success in defending the BOC’s decision of 29 November 2021 not to confirm the Group Chief Executive Officer’s (“GCEO”) employment or probation due to poor work performance.

1.2 We are particularly requested to take into account the following factors:

1.2.1 The process followed and the timing of the decision.

1.2.2 The non-communication of the BOC’s decision to Mr ZK Matthews (the GCEO at the time) immediately after the decision was taken, and the omission to include the decision as one of the grounds of termination of employment contract in the termination of employment contract letter from the Chairperson of the BOC (“the Board”),

addressed to Mr Mathews dated 30 November 2021.

1.2.3 The purported termination of employment contract of Mr Mathews communicated in a letter dated 22 April 2022 on grounds of probation.

1.3 In addition, we are requested to also advice on PRASA's prospects of success, if it decides to appeal against the Labour Court judgment of 1 July 2024, and if not, what legal recourse exists for PRASA, taking into account PRASA's concerns that the judgment may set wrong legal precedent with regard to State Security and the usurping of the State Security Agency's ("SSA") authority and powers to decide on matters of security clearance and security of the State.

2. Mr. Matthews was appointed as GCEO with effect from 8 March 2021.¹ He was placed on precautionary suspension on 18 November 2021.² On 30 November 2021, PRASA terminated his employment contract

¹ The commencement date is reflected in the contract of employment concluded between PRASA and Mr. Matthews on 31 March 2021.

² Letter from Chairperson of the board, to Mr. Matthews, dated 18 November 2021.

on grounds that he possesses dual citizenship of South Africa and the United Kingdom (“UK”), which, according to the Board, Mr Mathews has failed to disclose to the Board.³

3. Mr Mathews challenged his dismissal at the Labour Court by way of an urgent application, resulting in affidavits filed by both Mr Mathews and PRASA. In January 2022, the parties agreed to refer the dispute to an expedited private arbitration under the auspices of the Arbitration Foundation of Southern Africa (“AFSA”) and the Labour Court application was withdrawn.
4. Retired Judge Nugent was appointed as arbitrator. In that arbitration, the parties agreed that the dispute to be arbitrated by the arbitrator was one described in the Labour Court affidavits. The arbitrator requested Mr Mathews to also in writing set out the cause of action he seeks to pursue with precision which he did.
5. The parties exchanged further affidavits in the form of witness statements with the right to give oral evidence and cross examination. Both parties agreed that there was no need for oral evidence, and both

³ On 29 November 2021, the board resolved to terminate Mr. Matthews’ employment, as reflected in resolution 1, passed by the board. The board’s decision was communicated to Mr. Matthews in a letter dated 18 November 2021, issued by Chairperson of the board, to Mr. Matthews.

stood by the evidence they have presented in affidavits. The arbitrator was requested to consider that evidence and issue an award. The arbitrator rendered an award on 14 April 2022 in favour of Mr Mathews. He ordered PRASA to promptly reinstate Mr Mathews to the position of GCEO retrospectively, as if his employment had not been terminated.⁴

6. PRASA did not comply with the award. It did not reinstate Mr Mathews. Instead, the Board resolved to challenge the award at the Labour Court by way of review, despite the fact that the parties had agreed in their pre-arbitration minute that the award of the arbitrator would be final and binding and not subject to appeal. The review application was filed with the Labour Court despite that what PRASA and Mr Mathews embarked upon was a private arbitration in terms of the Arbitration Act, the award of which can only be reviewed by Court on limited grounds set out in section 33 of the Arbitration Act.

7. It was not surprising that the Labour Court dismissed the review application with costs, given the limited grounds available in law to review the award issued by a private arbitrator. There existed no basis in fact and law for PRASA to have challenged a well-reasoned award

⁴ Arbitration award issued on 14 April 2024 by Arbitrator, retired Judge R. W Nugent.

encored firmly on the correct facts and the law. On 1 July 2024, the Labour Court dismissed the review application, and simultaneously made the award an order of court. From 1 July 2024, the award has assumed the status of a court order which must be complied with in terms of section 165(5) of the Constitution.

8. The documents considered in the preparation of this opinion are the following:

8.1 A memorandum addressed to us by our instructing attorneys dated 3 July 2024. The memorandum provides instructions about the board's decision not to confirm the GCEO's employment due to poor performance and also details our mandate.

8.2 A memorandum from PRASA dated 3 July 2024, addressed to our instructing attorneys requesting this opinion and setting out the relevant background.

8.3 A letter from Mr Matthews dated 1 July 2024, addressed to the Chairperson of the board.

8.4 PRASA's letter dated 22 April 2022, addressed to Mr.

Matthews informing him about the decisions taken by the board at its meeting of 19 April 2022.

- 8.5 The Minister of Transport's letter dated 17 November 2021, conveying the outcome of the application for GCEO's security clearance and advising on next steps if the board decides to employ Mr. Matthews in circumstances where he does not meet security clearance requirements.
- 8.6 The State Security Director-General's decision of 11 November 2021, addressed to the Minister of Transport, conveying the outcome of Mr. Matthews application for security clearance.
- 8.7 The board's letter dated 28 September 2021, addressed to Mr. Matthews detailing the outcome of his probation performance review 1.
- 8.8 PRASA's initial offer of employment to Mr. Matthews dated 5 March 2021.
- 8.9 PRASA's final offer of employment to Mr. Matthews dated 31 March 2021.

- 8.10 Mr. Matthews acceptance of final offer dated 31 March 2021.
- 8.11 Labour Court judgment issued on 1 July 2024, per Acting Judge Boda.
- 8.12 Arbitration award issued by Arbitrator, retired Judge R. W Nugent, dated 14 April 2022.
- 8.13 Letter dated 18 November 2021 placing Mr. Matthews on precautionary suspension.
- 8.14 Minutes of special board meeting held on 29 November 2021.
- 8.15 Mr. Matthews written submissions to Adv. Mokutu SC, dated 26 November 2021.
- 8.16 Letter dated 30 November 2021 terminating Mr. Matthews employment.
- 8.17 A copy of the employment contract entered into between PRASA and Mr. Matthews.
- 8.18 PRASA's memorandum about the GCEO's first probation

review report, dated 15 August 2021.

- 8.19 Investigation Report about Mr. Matthews duty to disclose his dual citizenship, dated 27 November 2021, submitted by Adv. Mokutu SC in his capacity as the appointed investigator.

B. FACTUAL BACKGROUND

9. On 5 March 2021, PRASA extended an offer of employment to Mr. Matthews for appointment to the position of GCEO on a 5-year fixed term contract with effect from 8 March 2021.⁵ The proposed remuneration package was R 5 200 000.00 Total Guaranteed Package per annum. The offer was subject to re-negotiation of salary and incentives to the GCEO.⁶

10. The offer was conditional upon:

10.1 the acceptance of the employment agreement within 7

⁵ PRASA's initial offer of employment, dated 5 March 2021.

⁶ PRASA's initial offer letter dated 5 March 2021, unnumbered second para, line 5.

calendar days from date of the offer.⁷

10.2 PRASA obtaining a favourable outcome of Mr. Matthews personal security vetting and clearance, background screening and checks.⁸

10.3 A performance contract being concluded between Mr. Matthews and the Chairperson of the board.⁹

10.4 An initial 6-month probationary period which may be extended by a further 3 months subject to the outcome of a probation review.¹⁰ The probation conditions and guidelines were to be found in the approved Probation policy which can be obtained from the Human Capital Management Department.¹¹

11. The initial offer letter explicitly records that:

⁷ PRASA's initial offer letter dated 5 March 2021, para 1, lines 7-8.

⁸ PRASA's initial offer letter dated 5 March 2021, para 2, lines 9-10.

⁹ PRASA's initial offer letter dated 5 March 2021, para 3, lines 11-12.

¹⁰ PRASA's initial offer letter dated 5 March 2021, para 4, lines 13-16.

¹¹ PRASA's initial offer letter dated 5 March 2021, para 4, lines 13-16.

*“Upon successful completion of your probationary period, your employment with PRASA will be confirmed in writing. Should you fail to meet the required standards at the end of your probationary period your services with PRASA will be terminated.”*¹²

12. On 5 March 2021, Mr. Matthews accepted PRASA's initial offer of a 5-year contract, and agreed to assume duties on 8 March 2021, subject a re-negotiated salary package and performance incentives and benefits of GCEO.¹³ The handwritten notation, records that Mr. Matthews will assume duties on 8 March 2021, subject to the re-negotiations being concluded by 31 March 2021.¹⁴

13. On 31 March 2021, the board extended a revised final offer of employment to Mr. Matthews with the new offer including *inter alia*, a revised total remuneration package of R 5 800 000.00 per annum, a sign-on incentive fee of R 300 000.00 and additional benefits relating to company car, cell-phone allowance and performance bonus.¹⁵ The

¹² PRASA's initial offer letter dated 5 March 2021, unnumbered para 8, lines 17-19.

¹³ Mr. Matthews accepted the initial offer, on 5 March 2021. He signed and dated his acceptance of the initial offer.

¹⁴ The handwritten notation reads: *“I will assume my duties on March 8th 2021 subject to the conclusion of an acceptable salary performance incentives and benefits being concluded by March 31st 2021.”*

¹⁵ The revised final offer made by the board, dated 31 March 2021, paras 1-4, lines 7-17.

revised final offer was still conditional upon the conditions as set forth in the initial offer of employment, as described above together with the record about the consequences that would follow if probation period is successful or unsuccessful.¹⁶ On the same day, Mr. Matthews confirmed his acceptance of the final offer.¹⁷

14. On 31 March 2021, PRASA and Mr. Matthews entered into a written 5-year fixed term contract of employment.¹⁸ The employment contract recorded that Mr. Matthews appointment was subject to a 6-month probationary period.¹⁹ The probationary period was aligned to the conditions set out in the initial offer and revised final offers extended to Mr. Matthews.²⁰

15. Mr. Matthews was appointed as GCEO from 8 March 2021 until 7 February 2026.²¹ Mr. Matthews's appointment was subject to a probation period in terms of clause 7 of the employment contract which

¹⁶ Revised final offer letter dated 31 March 2021, p 2, unnumbered first paragraph, sub-para iv.

¹⁷ Mr. Matthews acceptance of final offer signed and date 31 March 2021.

¹⁸ Employment contract, p 17 shows that both parties signed the contract of employment on 31 March 2021.

¹⁹ Employment contract, clause 7.

²⁰ Clause 7 of the employment contract read with the initial offer as contained in letter dated 5 March 2021 read with revised final offer as contained in letter dated 31 March 2021.

²¹ Employment contract, clause 3.2.

provides as follows:

“7. PROBATION PERIOD

7.1 *The Employee’s appointment shall be subject to an initial **six (6) months’** probation period, during which period the Employee’s suitability for continued employment will be assessed.*

7.2 *If it is found that the Employee’s performance during the initial period of probation is below standard, the Employer may elect to extend the probation period by **three (3) months.***

7.3 *During probation period, the Contract of Employment may be terminated on **one (1) week’s written notice**, in accordance with the provisions of the Labour Relations Act.”*

16. Termination of the employment relationship is dealt with under clause 11 of the employment contract which provides:

“11. TERMINATION

11.1 *Either party may terminate the Contract of Employment on three month’s written notice if.....The Employer may terminate the Employee’s employment on notice of one week during the probation period.*

11.2 *The Employer shall be entitled to terminate the Employee's employment with or without notice:*

11.2.1 *if the Employee commits a material and irremediable breach of any of the provisions of this Contract of Employment.*

11.2.2 *by reason of the Employer's operational requirements.*

11.2.3 *by reason of the Employee's misconduct, negligence or poor work performance.*

11.2.4 *for any other reason recognised as sufficient in law.*

11.3 *In lieu of the notice set out in 11.1 above, Employer may elect to pay the Employee the compensation to which the Employee would have been entitled if the Employee had worked the notice period. Similarly, the Employee may in lieu of notice, elect to forfeit the compensation to which he would have been entitled to if he had worked during the notice period."*

17. On 15 August 2021, the Chairperson of the board presented a written memorandum to update PRASA's board of control governance committee about the GCEO's first 3 months of probation.²² The GCEO's first performance evaluation took place on 30 July 2021 and continued on 13 August 2021²³. General comments indicated that the

²² Written memo dated 15 August 2021, prepared by the Chairperson of the board addressed to the Governance Committee of the PRASA Board of Control ("*Written memo dated 15 August 2021*").

²³ Written memo dated 15 August 2021, para 3.1.

GCEO's performance was progressing well.²⁴ The Chairperson of the board and Mr. Matthews agreed that:

*"4.2 The Chairperson and the GCEO agreed that the GCEO needs to engage WITS or GIBS to improve and recap leadership skills and approach Pretoria University school of rail to develop clear understanding of RAIL and understanding PRASA."*²⁵

18. The GCEO scored 2.4 for the first 3 months review, which was below the acceptable performance score of 3.²⁶ It was recommended that a second probation review be scheduled towards the end of September 2021 or in the first week of October 2021 at which time the governance committee was expected to review Mr. Matthews performance during the first 6 months of his appointment.²⁷ It was stated as follows:

"will give the board an opportunity to have a meaningful probation performance review and decide whether to confirm Mr. Matthews employment with PRASA or extend the probation period by a

²⁴ Written memo dated 15 August 2021, para 4.1.

²⁵ Written memo dated 15 August 2021, para 4.2.

²⁶ Written memo dated 15 August 2021, para 4.4.2.

²⁷ Written memo dated 15 August 2021, para 4.4.3.

*further 3 months in line with clauses 3.2 and 3.7 of the probation policy.*²⁸

19. On 28 September 2021, the Chairperson of the board conveyed the outcome of Mr. Matthews “probation performance review 1”. The Chairperson addressed a letter to Mr. Matthews and recorded that:²⁹

19.1 Mr. Matthews appointment was subject to a probationary period.

19.2 In the first three months of his employment, Mr. Matthews completed regional visits for the purpose of familiarising himself with PRASA’s business operations. He concluded a performance agreement detailing key deliverables from his first 100 days in office.

19.3 On 13 August 2021, Mr. Matthews’s “one on one” probation performance review was concluded. His performance score was agreed to be 2.46. According to PRASA’s performance rating, a 2.46 rating score was “*below acceptable*”

²⁸ Written memo dated 15 August 2021, para 4.4.3.

²⁹ Letter dated 28 September 2021, written by board Chairperson, addressed to Mr. Matthews.

performance indicating generally that the performance deliverables were not met during the period under review.”

- 19.4 Having assessed the outcome of his performance, the board concluded that Mr. Matthews did not meet the performance standards required of the GCEO.
- 19.5 Mr. Matthews probationary period was extended for a further 3-months during which time he would be afforded the opportunity to improve his performance to meet the performance targets agreed to.
- 19.6 The board recorded its commitment to work towards remedying the deficits in Mr. Matthews performance and invited him to continue sharing the challenges he experienced so that the board may assist to the extent it was able to do so.
- 19.7 Mr. Matthews was invited to identify training and development entities including the University of Pretoria Rail chamber to develop his understanding of RAIL and PRASA business. The board urged Mr. Matthews to consider these options and to respond with requisite urgency.

20. The arbitration award notes that on 3 November 2021, Mr. Matthews attended a meeting with Adv. Sethene who informed the GCEO that the board “*wanted to terminate his employment due to poor work performance.*”³⁰ We have not been provided with any documentation relating to the meeting held between Adv. Sethene and Mr. Matthews.
21. On 11 November 2021, the State Security Agency conveyed its decision that the application for security clearance investigation to the level of TOP SECRET for Mr. Matthews could not be issued because Mr. Matthews holds dual citizenship in South Africa and the United Kingdom. Mr. Matthews did not comply with the Minimum Information Security Standards (“MISS”) because of his dual citizenship.³¹ On the same date, the Minister of Transport (“Minister”) informed the Chairperson of the board that the application for security clearance by Mr. Matthews in his capacity as PRASA GCEO was declined on the basis that Mr. Matthews holds dual citizenship.³²
22. On 17 November 2021, the board was made aware by the Minister that

³⁰ Arbitration award, p 9, para 34.

³¹ Letter from Director -General of State Security Agency to the Minister of Transport, dated 11 November 2021.

³² Minister’s letter dated 11 November 2021.

TOP SECRET security clearance was declined.³³ On 18 November 2021, the board resolved to place Mr. Matthews on precautionary suspension.³⁴ The reason for the precautionary suspension was noted in the following terms:

“It has been brought to my attention that there are serious allegations of misconduct relating to gross dishonesty that you have committed in your capacity as the Group Chief Executive Officer of PRASA.”³⁵

23. On 17 November 2021, Mr. Matthews was informed and acknowledged receipt of his precautionary suspension. The notice to Mr. Matthews confirmed that he was being placed on precautionary suspension with full pay.³⁶
24. The board initiated an investigation to determine whether the GCEO had a contractual and/or legal duty to inform the board about his dual

³³ Investigator's report, p 5, para 5.1.

³⁴ The board's decision is reflected in a letter dated 18 November 2021, issued by Chairperson of the board and addressed to Mr. Matthews. We were not furnished with a copy of the board's resolution dated 18 November 2021.

³⁵ Letter of 18 November 2021, p 1, unnumbered first paragraph, lines 103.

³⁶ Letter of 18 November 2021, placing Mr. Matthews on precautionary suspension.

citizenship.³⁷ The investigation was also directed to report on whether the GCEO's failure to disclose his dual citizenship amounted to a breach of the employment relationship.³⁸ Adv. Mokutu SC was appointed as the investigator.³⁹

25. Adv. Mokutu SC held interviews with relevant parties.⁴⁰ The GCEO was legally represented by his attorney at the interview.⁴¹ In addition to the interview, and at his attorney's request, Mr. Matthews was afforded the opportunity to make written submissions.⁴² These written submissions were duly received by Adv. Mokutu SC after the interview.⁴³

26. In his written submissions, it is noted that Mr. Matthews completed and signed "Executives and Management Annual Declaration of Interest

³⁷ Investigation report dated 27 November 2021, prepared by Adv. Mokutu SC (*"Investigation report"*).

³⁸ Investigation report, p 2, para 2.

³⁹ Investigation report, p 2, para 1, lines 1-3.

⁴⁰ Investigation report, p 6, para 6.

⁴¹ Investigation report, p 10, para 22.

⁴² Investigation report, p 10, paras 22-23.

⁴³ Investigation report, p 11, para 23, lines 3-4.

Form 2021/2022".⁴⁴ It is admitted that Mr. Matthews did not disclose his dual citizenship when making the declaration.⁴⁵ Mr. Matthews written representations reads as follows:

"34. Our client omitted certain information from the Declaration Form out of sheer forgetfulness and not to intentionally mislead PRASA. In light of the fact that PRASA already had on record the information set out in the Questionnaire Form, we are of the view that this inconsistency is of no consequence."

27. Adv. Mokutu SC held that the issue of Mr. Matthews dual citizenship should have been disclosed when he applied for appointment to the post or during the interviews or when he signed the declaration of interest form.⁴⁶ Adv. Mokutu concluded that the:

"GCEO has materially and intentionally withheld his British citizenship status from PRASA ...In my view, such omission goes to the trust relationship."⁴⁷

⁴⁴ Mr. Matthews written submissions to Adv. Mokutu SC, dated 26 November 2021 ("GCEO's written submissions").

⁴⁵ GCEO's written submissions, p 9, para 34.

⁴⁶ Investigator's report, p 16, para 36, lines 3-6.

⁴⁷ Investigator's report, p 27, para 75.

28. Having received Adv. Mokutu SC's report, the board convened a special board meeting on 29 November 2024. The board noted that after receiving Adv. Mokutu SC's report, the board requested a legal opinion from Adv. Cassim SC about the next steps.⁴⁸ The board was advised by Adv. Cassim SC's preliminary views that there were grounds for terminating the GCEO's contract of employment in line with clause 11 of the employment contract.⁴⁹ The investigation report establishes that there was a material non-disclosure by the GCEO and this goes to the trust relationship between the board and the GCEO.⁵⁰ The adverse investigation report demonstrates that there was an irretrievable breakdown in the relationship between the GCEO and the board.⁵¹
29. At the meeting held on 29 November 2021, the board also received a report that in the course of the investigation, Adv. Mokutu SC discovered a conflict of interest⁵². It came to light that the GCEO was a director to a company that was doing business with PRASA and in

⁴⁸ Minutes of special board meeting, 29 November 2021, p 3, para 4.6, lines 1-3.

⁴⁹ Minutes of special board meeting, 29 November 2021, p 3, para 4.6 (c), lines 1-2.

⁵⁰ Minutes of special board meeting, 29 November 2021, p 3, para 4.6, (e) lines 1-4.

⁵¹ Minutes of special board meeting, 29 November 2021, p 3, item 4.6.

⁵² Minutes of special board meeting, 29 November 2021, p 4, "Deliberations and Comments", second unnumbered paragraph, lines 5-6

his disclosure form, the GCEO stated that “*he did not have such a company*”⁵³. In his interview with Adv. Mokutu SC this issue was raised and the GCEO “*conceded that it was an oversight of not disclosing the company.*”⁵⁴ It was noted that the investigator did not report on the conflict of interest because Adv. Mokutu SC was only mandated to deal with the dual citizenship issue.⁵⁵

30. The board meeting of 29 November 2021, also dealt with the GCEO’s performance during his probation period.⁵⁶ It appears that on 18 November 2021, the board had discussed this issue and was advised through a legal opinion that the GCEO should be requested to provide reasons why the board should not terminate his employment based on his poor work performance during his probationary period, as extended.⁵⁷ The Chairperson’s report suggested that in the termination letter to be sent to Mr. Matthews the issue of the GCEO’s poor performance score during his probation should be recorded as an

⁵³ Minutes of special board meeting, 29 November 2021, p 2, item 4.2, lines 1-4.

⁵⁴ Minutes of special board meeting, 29 November 2021, p 2, item 4.2, lines 5-7.

⁵⁵ The Minutes also record that the GCEO’s attorneys maintained that GCEO’s directorships should not form part of the investigation and the investigation should be confined to the dual citizenship enquiry.

⁵⁶ Minutes of special board meeting, 29 November 2021, p 1, item 4 notes that “GCEO Probation” was added to the Agenda. The minutes record the discussion on this item, at p 7, para 7.

⁵⁷ Minutes of the special board meeting, 29 November 2021, p 7, item 7a), lines 1-9.

additional basis for the termination.⁵⁸ In this regard, the board resolved that it *“will not confirm the GCEO’s probation and in that respect the Board also release the GCEO from his contract in terms of clause 11 of his employment contract.”*⁵⁹

31. The board resolved to terminate the employment contract with Mr. Matthews.⁶⁰ Mr. Matthews received a letter of termination of employment on 30 November 2021. The letter reflected the board’s decision to terminate based on Mr. Matthews non-disclosure of his British citizenship to PRASA.⁶¹ Notable and of concern, there was no mention about his poor performance scores and the board’s decision to terminate his employment contract based on this ground.

32. It was in these circumstances that both the ensuing arbitration and the review before the Labour Court primarily dealt with the termination of employment relationship based on Mr. Matthews’s failure to disclose

⁵⁸ Minutes of special board meeting, 29 November 2021, p 2, item 7.2.

⁵⁹ Board resolution 2 of 29 November 2021, as reflected in the Minutes of special board meeting, 29 November 2021, p 8.

⁶⁰ Board resolution 1 of 29 November 2021, as reflected in the Minutes of special board meeting, 29 November 2021, p 7.

⁶¹ Termination letter dated 30 November 2021.

his British citizenship.

C. THE ARBITRATION

33. In the arbitration, Mr. Matthews challenged the termination of his employment. It was agreed that the arbitration award would be final and binding and not subject to appeal.⁶²

34. The Arbitrator held that as a matter of law, the board and not the Minister held the power to appoint and terminate Mr. Matthews employment as GCEO.⁶³

35. In the arbitration, PRASA raised Mr. Matthews's failure to disclose the interests he had in 28 companies.⁶⁴ The Arbitrator, having considered Mr. Matthews response, held that this challenge held no merit because there was no evidence that any of the companies engaged in any business with or business similar to PRASA.⁶⁵

36. The arbitration proceeded on the sole reason for termination, being

⁶² Arbitration award, p 3, para 5, lines 4-5.

⁶³ Arbitration award, pp 21-22, paras 77-79.

⁶⁴ Arbitration award, p 5, para 13.

⁶⁵ Arbitration award, p 5, paras 14 -15, 72.

the GCEO's failure to disclose his British citizenship. It was noted that Mr. Matthews lodged an appeal to the President against the refusal to grant him security clearance and the outcome was still awaited at the time that the arbitration was underway.⁶⁶

37. It appears that Mr. Matthews responded to the allegations about poor work performance during his probation.⁶⁷ The Chairperson responded that the allegations about poor work performance were not relevant to the arbitration⁶⁸ because the GCEO was dismissed for:

“breach of contract by materially and intentionally withholding his British citizenship from PRASA and not for poor performance. The performance reviews and discussions regarding his performance are not relevant to these proceedings.”⁶⁹

38. The Arbitrator noted that the reason advanced by PRASA for the GCEO's dismissal was not the refusal of the security clearance.⁷⁰ Instead PRASA's reason for termination was that the GCEO failed to

⁶⁶ Arbitration award, p 4, para 10.

⁶⁷ Arbitration award, p 9, para 32, lines 3-4.

⁶⁸ Arbitration award, p 9, para 32, line 4.

⁶⁹ Arbitration award, p 9, lines 5-8.

⁷⁰ Arbitration award, p 4, para 11, lines 2-4.

disclose his dual citizenship.⁷¹ The Arbitrator held that there were no grounds to find that the failure to disclose his dual citizenship was material to his employment and necessitated disclosure⁷². The Arbitrator held that there was no duty to disclose, and he also held that the non-disclosure was not shown to be material.⁷³ The Arbitrator held that there was no fair reason to terminate the GCEO's employment.⁷⁴

39. The Arbitrator awarded Mr. Matthews reinstatement as GCEO with effect from the time his employment was terminated, as if there had been no termination.⁷⁵ PRASA was also directed to pay Mr. Matthews's costs, including the arbitrator's fees.⁷⁶

D. LETTER OF TERMINATION DATED 22 APRIL 2022

40. It would appear that upon receipt of the Arbitration award the board held its meeting on 19 April 2022, and a second letter of termination of

⁷¹ Arbitration award, p 4, para 11, lines 4-5.

⁷² Arbitration award, p 24, para 85.

⁷³ Arbitration award, p 25, para 89, lines 1-4.

⁷⁴ Arbitration award, p 25, para 89, line 3.

⁷⁵ Arbitration award, p 1, para 1.

⁷⁶ Arbitration award, p 1, para 2.

employment contract was addressed to Mr Matthews.

41. The termination letter dated 22 April 2022 recorded probation as the reason for termination. It was recorded as follows: *'Decision to terminate based on probation'*:

"6. As you would know, your employment with PRASA prior to your termination on the 30th on the 30th of November 2021 was still subject to probation. This is contained in their employment contract that states as follows:

*6.1. The employee's appointment shall be subject to an initial **six (6) months'** probation period during which the employees' suitability for continued employment will be assessed.*

*6.2. If it is found that the employees' performance during the initial period of probation is below standard, the employer may elect to extend the probation period by **three (3) months**.*

7. In addition the final offer of employment signed on the 31st of March 2021, expressly states that 'upon successful completion of your probation period of your employment with PRASA will be confirmed in writing, should you fail to meet the required standards at the end of your probation period your services with PRASA will be terminated (our own emphasis).

8. During the meeting of the 19th of April 2022, the board discussed

the issue of your probation and particularly its decision on the 29th of November 2021 not to confirm your probation due to unsatisfactory performance and to release you from their employment contract.

9. *On the 29th of November 2021, the board had convened a special board meeting wherein the board resolved, inter alia, as follow:*
 - 1) *The board adopted REMCO report in terms of which REMCO recommended that the GCEO's probation should not be confirmed and in that respect the board also release the GCEO from his contract in terms of clause 11 of his employment contract.*
 10. *The decision of the board could not be formally communicated to you at the time due to the fact that the board had also resolved to terminate your employment contract for reasons associated with your non-disclosure of your dual citizenship as aforementioned.*
 11. ***In the circumstances, you are hereby informed that your probation was not confirmed as resolved in the board meeting of the 29th of November 2021. The board has resolved to implement its decision of the 29th of November 2021. Your employment contract is hereby terminated. There reason of termination is that your probation is not confirmed due to unsatisfactory performance”.***
42. The second purported termination of Mr Mathews’ employment contract was invalid and of no force and effect given that at the time

the termination was effected on 22 April 2022, Mr Mathews was already dismissed on 30 November 2021, and the Board had refused to implement the award of the arbitrator. It was not legally possible for the Board to terminate an employment contract of a dismissed employee. Such termination is in law regarded as *pro non scripto* (which means that it is as if it has never happened).

43. The Board could only have been legally competent to terminate Mr Mathews' employment contract for the second time if it had first complied with the award of the arbitrator and reinstated Mr Mathews. In the absence of reinstatement, the Board was in no position to dismiss Mr Mathews again as it purported to do. So, Mr Mathews remains reinstated by the award of the arbitrator and the court order of 1 July 2024, and PRASA is obliged in law to comply with the court order and the award by reinstating Mr Mathews, who, as a matter of law is regarded as still an employee of PRASA.

44. In the premises this means that the only termination which was valid is the one which was set aside by the Arbitrator and confirmed by the Labour Court in its judgment of 1 July 2024.

E. THE LABOUR COURT REVIEW

45. PRASA took the arbitration award on review to the Labour Court. According to the Labour Court judgment, PRASA relied on four grounds of review:⁷⁷

45.1 Whether the Arbitrator committed a reviewable irregularity by reviving a fixed-term contract, the enforcement of which is in violation of NSIA;

45.2 Whether the Arbitrator's decision to reconsider SSA's decision amounts to an excess of powers;

45.3 Whether reinstatement was an appropriate remedy considering that Mr. Matthews did not have security clearance; and

45.4 Whether the Arbitrator exceeded his powers by second-guessing SSA's decision and arriving at conclusions which overturned SSA's findings.

⁷⁷ Labour Court judgment, p 12, para 5.

46. The Labour Court recorded that all four grounds rested on the basis that SSA did not give Mr. Matthews a security clearance and that failing to fulfil this condition of employment, the Arbitrator was precluded from reinstating him.⁷⁸
47. The Labour Court held that the security clearance requirement is not in the employment contract, which contains a non-variation clause.⁷⁹ PRASA's case against reinstatement was accordingly based on a term that was not in the employment contract⁸⁰. As at the time of the review application, Mr. Matthews appeal to the President, against the SSA's decision to refuse security clearance, was still to be decided.⁸¹
48. The Labour Court found that security clearance is a term included in the offer letters preceding the employment contract but did not form part of the contract.⁸² The Court held that even if it assumed in PRASA's favour that the offer letters had contractual force, the security

⁷⁸ Labour Court judgment, p 15, para 18, lines 1-4

⁷⁹ Labour Court judgment, p 12, para 23, lines 1-2.

⁸⁰ Labour Court judgment, p 12, para 23, lines 3-4.

⁸¹ Labour Court judgment, p 12, para 24, lines 12-13.

⁸² Labour Court judgment, p 12, para 24, lines 3-4.

clearance issue was not made a suspensive condition.⁸³ The Labour Court noted that it was common cause that the employment relationship had already commenced.⁸⁴ The Labour Court held that there is no legal requirement to subject the GCEO to a security vetting and that “*PRASA chooses to do so*”.⁸⁵

49. The Labour Court recorded that PRASA did not contest the factual findings made by the Arbitrator.⁸⁶
50. The Court held that the failure to obtain security clearance did not prohibit PRASA from employing Mr. Matthews. PRASA “*would have had a choice to continue with the employment relationship despite the negative outcome. PRASA itself acknowledges in its heads of argument that the ‘NSIA does not have an express statutory provision making Matthews continued employment unlawful.*”⁸⁷
51. The Labour Court held that the Arbitrator was empowered to order

⁸³ Labour Court judgment, p 12, para 24, lines 5-6.

⁸⁴ Labour Court judgment, p 12, para 24, line 8.

⁸⁵ Labour Court judgment, p 13, para 25.

⁸⁶ Labour Court judgment, p 14, para 27.

⁸⁷ Labour Court judgment, p 13, para 26

reinstatement as a remedy, under the terms of reference.⁸⁸ The Court held that the Arbitrator did not exceed his powers as he was called upon to determine whether Mr. Matthews was unfairly dismissed and that is what the Arbitrator dealt with.⁸⁹ The Arbitrator conducted the arbitration in accordance with the terms of reference.⁹⁰

52. Under the heading, application to make the arbitration award an order of court, the Labour Court held that there was no bar on the award being made an order of court.⁹¹ The Labour Court held that in this case, the fixed term contract remains in existence and this was not a case in which the Arbitrator or the Court would be reviving an expired fixed term contract.⁹²

53. The Labour Court has on good grounds dismissed the review application and made the arbitration award an order of Court. PRASA was directed to pay the costs of the review and the application to make

⁸⁸ The terms of reference for the arbitration do not form part of the brief issued to me. We state the Court's finding as reflected in the judgment.

⁸⁹ Labour Court judgment, p 14, para 28.

⁹⁰ Labour Court judgment, p 14, para 28.

⁹¹ Labour Court judgment, p 14, para 31.

⁹² Labour Court judgment, p 15, para 32.

the award an order of court.⁹³

F. CONCLUSION

54. In light of the above exposition, we advise as follows:

54.1 There are no prospects of success in PRASA appealing the judgment of the Labour Court dated 1 July 2024;

54.2 The judgement is correct in law and fact;

54.3 PRASA should comply with the award dated 14 April 2022 by retired judge Nugent, and the judgment and orders of the Labour Court dated 1 July 2024 by reinstating Mr Mathews as GCEO retrospectively;

54.4 The award of the arbitrator is unassailable and correct in law and fact;

54.5 The purported termination of employment contract of Mr Mathews in a letter dated 22 April 2022 based on the Board's

⁹³ Labour Court judgment, p 15, para 34.

decision of 29 November 2021 on grounds of probation based on poor work performance is null and void ab initio and it's of no force and effect;

54.6 The purported termination of employment contract of Mr Mathews contained in a letter dated 22 April 2022 is in violation of the award of the arbitrator and the Labour Court judgment and order dated 1 July 2024;

54.7 PRASA is legally precluded from giving effect to the said purported termination otherwise PRASA Bord would be in contempt of the Labour Court judgment and order;

54.8 Nothing prevents PRASA from subjecting Mr Mathews to a lawful termination process after it has reinstated him in compliance with the award and Labour Court order, but after Mr Mathews' appeal to the President has been determined, especially if the appeal is determined against him;

54.9 The Board is legally precluded from dismissing Mr Mathews based on probation or poor work performance once it has reinstated him in terms of the award and the Labour Court order unless it lawfully starts the process afresh and on good

cause shown;

- 54.10 There is nothing in the award and the Labour Court judgment and order which offend against the principle of separation of powers and the powers and duties of the SSA;
- 54.11 The award and the Labour Court judgment were determined on the peculiar facts and circumstances of this case and no inappropriate precedent has been set, nor are any novel legal issues underpinned in the award and the judgment.
55. We advise accordingly.

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10 July 2024