

SOUTH AFRICA / JUDGMENT

Gama v Transnet Limited and Others (09/38956) [2009] ZAGPJHC 75 (7 October 2009) [2009] ZAGPJHC 75

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

09/38956

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IN

THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC
OF SOUTH AFRICA)

CASE

NO: 09/38956

In

the matter between:

gama,
siyabonga Applicant
and
TRANSNET
LIMITED
AND
12 OTHERS
First to Thirteenth Respondents

JUDGMENT

SPILG J.

THE ALLEGATIONS

Mr Gama is the Chief Executive Officer of Transnet Freight Rail (TFR), previously known as Spoornet. TFR is one of apparently four operating divisions of Transnet Limited.

On 1 September 2009 Mr Maharaj, who is the Group Executive: Human Resources of Transnet Limited (Transnet) took the decision to institute disciplinary proceedings against Mr Gama and to suspend him on full pay until either the disciplinary process was finalised or until the suspension was lifted.

Mr Maharaj's decisions are challenged in proceedings brought by way of application before this Court. They are challenged on the grounds that the current Acting Group Chief Executive of Transnet, Mr Wells, could not delegate his admitted authority in such matters to Mr Maharaj. The applicant contends that only the full Board of Transnet could take the decisions to bring disciplinary proceedings against him or to authorise his suspension.

THE

ISSUES

At the outset, I admit to sharing the difficulties expressed by the respondents in appreciating the basis of the challenge. The heads of argument presented on behalf of the applicant contend that the process followed of bringing disciplinary proceedings and of suspending Mr Gama were not lawful or fair in that Mr Wells could not delegate his powers to Mr Maharaj. The reason advanced is that Mr Wells was tainted by accusations levelled against him by Mr Gama in relation to an aspect of one of the transactions in issue in the disciplinary proceedings. The applicant, however, disavows any reliance on an unfair labour practice under the Labour Relations Act, No. 66 of 1995 (the LRA) for reasons that ought to be clear when dealing with jurisdiction. What they do concern, according to what is set out in the

applicant's heads of argument, are "... issues of public law, administrative justice, corporate governance and legality, as well as fairness in corporate actions." During argument Mr Kennedy on behalf of the applicant explained that all these issues are confined to the legality of the delegation of authority to Mr

Maharaj by Mr Wells. Nonetheless they also appear to enter the realm of fairness of corporation decision-making functions and their impact on the applicant's constitutional rights.

The factual basis underpinning the legal challenge is that Mr Wells was precluded from delegating the decision-making power to bring disciplinary proceedings against Mr Gama or to suspend him by reason of Mr Gama's own accusations against Mr Wells, and that Mr Wells' alleged involvement in the process continued to have an influence over the Board and did assert itself over one of the Board's appointed sub-committees. In short Mr Wells' involvement in the process, however tangential, rendered the entire process tainted.

The nub of the complaint is the perceived bias of Mr Wells. This is evident from the following extract of Mr Gama's replying affidavit:

"It was specifically in relation to the authority of Mr Maharaj to take a decision to institute disciplinary action (or suspension), what was stated by my attorney, Mr Langa, was that if the Board had delegated authority directly to Mr Maharaj, there might not have been an objection. However, the objection arose because Mr Maharaj was purportedly sub-delegated this authority by Mr Wells. Mr Wells should have had no involvement at all in the matter and he should not have sub-delegated such authority to Mr Maharaj in circumstances where Mr Wells was not objective or independent. Clearly Mr Maharaj has acted on the instructions and at the behest of Mr Wells."

Moreover there are allegations of Mr Wells' continued involvement in furnishing reports to the full Board after Mr Gama had accused Mr Wells of shifting the blame onto him in respect of a locomotive contract (to which one of the disciplinary charges against Mr Gama related). It is apparent that the thrust of the applicant's complaint against the decisions taken by Mr Maharaj, and their support by a sub-committee appointed by the Transnet Board as well as the subsequent endorsement or ratification by the full Board itself, concerns the influence that Mr Wells is said to have exerted over Mr Maharaj and the Board. It is also contended that Mr Maharaj was too junior to take the decisions. Although this position appeared to have been abandoned in the cited extract from Mr Gama's replying affidavit, I shall nonetheless deal with it.

In order to put in perspective the issue of perceived bias on the part of Mr Wells', its alleged impact on the legality of the decisions taken by Mr Maharaj, and their endorsement or ratification both by the Board's sub-committee and subsequently the full Board of Mr Maharaj's decision, it is necessary to set out the basic complaints that are the subject matter of the disciplinary enquiry against Mr Gama. It is also necessary to set out Mr Gama's allegations as to why Mr Wells is biased against him and why this has tainted the entire disciplinary process launched against him.

The sequence of events from initial investigation to an internal forensic audit conducted by Ernst & Young as well as subsequent

investigations prior to Mr Maharaj taking the challenged decisions concern, if proven, serious allegations regarding maladministration

in respect of two separate contract awards. The first relates to the impropriety of a tender process regarding what has been termed the "50 like-new locomotives" and which I will refer to as "the locomotive contract". The second disciplinary charge relates to the procurement of security services from General Nyanda Security Risk Advisory

Services (Pty) Limited (GNS).

The disciplinary charge in respect of the locomotive contract is that Mr Gama concluded the agreement in disregard of an express condition laid down by Transnet's Board that Transnet Rail Engineering should carry out all engineering on the assembly and maintenance of the locomotives. It is alleged that the failure to adhere to this Board stipulation resulted in serious financial consequences for Transnet.

Among the averments in relation to the GNS contract is that Mr Gama concluded this agreement without following an open tender process and without having authority to do so. The applicant's authority regarding a contract of this nature is said to be limited to a value of R10 million, whereas the total estimated value of the GNS contract was just under R19 million and that to date some R55 million has been spent.

In his formal response of 20 July 2009 Mr Gama for the first time contended that Mr Wells was attempting to shift the blame for the overspend on the locomotive contract and that in fact it was Mr Wells who had adversely affected Transnet financially by intervening in the locomotive contract and "unwinding the transaction". It is this complaint against Mr Wells together with averments that Mr Wells and certain others are conspiring to destroy Mr Gama's chances of becoming Group Chief Executive (GCE) of Transnet that form the foundation of perceived bias. The applicant alleges that this bias has tainted the process and

explains why disciplinary steps are being taken against him only at a stage when the appointment of a new GCE by Government is imminent.

Mr Gama originally relied on Mr Wells being a co-contender for the Transnet GCE position. However, the facts reveal that Mr Wells

withdrew his candidature at an early stage. Nonetheless, Mr Gama persisted with the allegations that Mr Wells' involvement directly taints the process and that Mr Wells is also involved in a conspiracy to prevent Mr Gama from becoming the next GCE of Transnet.

In regard to the legal consequences raised by Mr Gama's allegations of taint and bias in the delegation process and why only the full Board could consider the issues, the applicant has relied on a failure of administrative justice, a breach of his constitutionally protected rights and an entitlement to challenge the legality of the process adopted by reference to what can best be described as either a common law power of review arising from the contractual relationship between the parties or arising out of fair corporate governance principles.

The application was brought as one of urgency. It was contended that Cabinet was about to consider appointing the new GCE for Transnet. It was also contended that the very act of taking disciplinary proceedings against him and particularly of suspending him is seriously damaging to Mr Gama's reputation. When it was revealed that Cabinet was not due to meet during the week when the application was set down for hearing, the applicant sought to contend that the matter was no longer urgent.

However, the respondent's position was that a delay in the resolution of the issues raised was prejudicial to the entire disciplinary process. A delay would frustrate an expeditious resolution of the disciplinary proceedings and the suspension issue. A delay would also have a debilitating effect on Transnet and possibly the appointment of a new GCE. I also believe that important public interest matters arise concerning accountability and their expeditious resolution having regard to the circumstances of this case and its impact on possibly the largest State-owned and taxpayer funded enterprise.

I was satisfied that the matter was sufficiently urgent to be dealt with on an accelerated basis. At that stage all that remained

outstanding was the applicant's replying affidavit which he had undertaken but failed to file prior to the set down date. The

replying affidavit was subsequently filed and the matter was heard on Friday, 25 September 2009.

A further issue that was raised, by me, concerns Mr Gama's contract of employment. On analysis it appeared that the applicant still relied on a common law review based on fairness which was to be implied from the contractual relationship. On Wednesday, 30 September, I heard argument on whether or not the contract should be furnished. My concern was that a further application might be brought to the High Court based on the terms of the contract and that it might be contended that issues relating to the actual terms of the contract, or those to be inferred from it, were not before me. I was concerned that a process of launching one High Court proceeding after another, whether by the one party or the other, would effectively undermine the proper administration of justice and frustrate the desirability of finality in litigation.

I was assured by the applicant that there would be no further proceedings before the High Court in relation to the issues raised

before me or in relation to any challenge or claim arising out of the employment contract itself. I was assured by all the parties

that the contract was not relevant to a determination of any of the matters that had been identified, including the possibility of a common law review to be discerned from the contractual relationship. I am, in any event, bound by the SCA and constitutional

authorities that require a court to confine itself to the record of evidence placed before it (e.g. *Director of Hospital Services v Mistry* 1979

(1) SA 626 (A)).

A subsidiary issue raised was whether or not the joining of all the remaining members of the Transnet Board was competent.

This left one other issue of concern to me. Although all the parties agreed that I enjoyed jurisdiction for one or other reason, it remained necessary to be satisfied that the High Court exercised jurisdiction outside the consent of the parties.

jurisdiction

All the parties have effectively consented to the jurisdiction of this court. However, parties cannot clothe the High Court with jurisdiction if it is excluded by statute.

I must therefore consider whether the provisions of section 157(1) of the LRA precludes the High Court from dealing with the matter on the ground that the issues before me can only be determined under the exclusive jurisdiction accorded to the Labour Court. See *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008

(4) SA 367 (CC) at para 113.

Fortunately it is unnecessary in the present case to deal with the tension between section 157(1) on the one hand and the concurrent

jurisdiction of the High Court as dealt with in section 157(2) of the LRA and the inherent original jurisdiction of a High Court as entrenched in the Constitution on the other. Accordingly, the case of *Makhanya v University of Zululand*

[2008] 8 BLLR 721 (SCA) which binds me on what portion of the *Chirwa* judgment (which also binds me) constitutes its decision need not be considered in any detail.

I am satisfied that the way in which the applicant has pleaded his claim (see *Makhanya* at paras [30] and [34]) and the substance of the claim (see *Chirwa* at paras [124] and [125]) fall squarely within the concurrent jurisdiction of the High Court. This is because they both are

concerned with a constitutional challenge based on rights of administrative review (see *Chirwa*, para [54]; *Transman (Pty) Ltd v Dick and Another* 2009 (4) SA 22 (SCA) at para [16] and *Makhanya* at paras [18] and [26]) and also with the enforcement of common law contractual rights or rights under corporate law in relation to the exercise of delegated powers. (Compare *Kriel v Legal Aid Board* [2009] 9 BLLR 854 (SCA) at para [16] which appears distinguishable because reliance was still placed on the unreasonableness of the dismissal). The question of whether the applicant has embarked on 'forum shopping' and therefore may be precluded as a matter of policy from pursuing his claim in the High Court does not arise since he has not approached another Court to enforce the claims that arise in this matter. (See *Makhanya* at para [61])

Furthermore, the resolution of the issues in this matter are also concerned with the legality of steps taken to initiate disciplinary proceedings against a person whom it is alleged is guilty of maladministration and that Transnet considers itself obliged to pursue disciplinary proceedings since the investigations allegedly reveal a breach of the Public Finance Management Act, No. 1 of 1999 (the PFMA), a concern supported by independent legal advice from two different law firms.

It is pre-eminently the concern of a High Court exercising original jurisdiction to consider issues of this nature if the underlying

substance of the issues play a role as indicated in *Chirwa*. The present case involves rights issues, which it is apparent from the stance taken by Transnet, ought not to be the subject matter of conciliation and negotiation by reason of the obligations they were advised they have to initiate disciplinary proceedings by reason of an alleged transgression of the PFMA.

It should be sufficient for present purposes to refer to *South African Association of Personal Injury Lawyers v Heath and others*

[2000] ZACC 22; 2001 (1) BCLR 77 (CC) at para [4] where the Court said the following;

"... and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State."

Although this was said in the context of the Special Investigating Units and Special Tribunals Act, it is clear that the purpose of the PFMA Act is similarly to hold accountable both the Board and officers (such as Executive Management) of State-owned corporations and other government controlled entities. I also refer to sections 195(1) and (2)(b) of the Constitution which require public administration to be accountable and to meet high standards of professional ethics. If the application of these constitutional provisions and statutes such as the PFMA are to develop and be applied with reference to public accountability within State-owned corporations then it is pre-eminently the domain of the original jurisdiction exercised by the High Court (with the added advantage of its diverse composition) and ought not to be confined to a specialised court concerned exclusively with labour relations matters.

Accordingly, I am satisfied that this court enjoys jurisdiction under any of the authorities by which I am bound and which I understand are likely to be considered further in the matter of *Gcaba v Minister of Safety and Security and others* (CCT 64/08), a case argued before the Constitutional Court on 7 May 2009.

STATUS OF TRANSNET

It is necessary to establish the status of Transnet in order to determine whether its Board and management function principally within a commercial corporate environment subject to principles applicable to those areas of law or whether their actions are to be treated as simply the exercise of a state or administrative power.

Transnet Limited was incorporated as a public company pursuant to the provisions of the Legal Succession to the South African Transport Services Act, Act 9 of 1989 (the Legal Succession Act).

In terms of this Act, Transnet became the successor to the South African Transport Services and took transfer of all its assets (save those relating to certain rail commuter services). See section 3.

In terms of the Legal Succession Act, and despite the provisions of section 32 of the Companies Act 61 of 1973, the Registrar of Companies incorporated Transnet Limited as a public company with the State as its only member and shareholder. Moreover, the provisions of section 2(6) of the Legal Succession Act excluded only sections 66, 190 and 344(d) of the Companies Act from applying- and then only while the State remains the sole beneficial member and shareholder.

Accordingly, Transnet is essentially subject to all the provisions of the Companies Act.

It is clear that Transnet is intended to operate as a commercial enterprise under the ordinary provisions of the Companies Act and is subject to the common law principles governing corporations, including those relating to corporate governance which renders its Board and management subject to fiduciary obligations. Its formation as a public company was directed at transforming it from a government agency (see section 3 of the Legal Succession Act) and at allowing it to operate on profitable commercial lines with the potential of attracting investor shareholders (see the wording in section 2(6) and 20 of the Legal Succession Act). This is apparent from the following further considerations.

The State's interest in Transnet is exercised through the Minister of Public Enterprise. The Minister may direct Transnet to discontinue any activity that is contrary to the strategic or economic interests of the country (see section 17). In principle this is no different from the actions of a majority shareholder who dictates the course a company is to take. It does not affect the Board's or management duties to have regard to the best interests of the company and to comply with all the common law rules relating to corporate governance.

Transnet was not burdened with an unprofitable operating division. Hence the separation of those rail commuter operations that required subsidisation. These were hived off to a separate entity, namely the SA Rail Commuter Corporation Limited under the responsibility of a different Minister. See Chapter V of the Legal Succession Act.

The composition of the Transnet Board was not circumscribed by the Legal Succession Act. This was not an oversight since the same Act carefully structured (in section 24) the makeup of the SA Rail Commuter Corporation Board, uniquely termed a Board of Control. Transnet is incorporated with a Memorandum and Articles of Association under the Companies Act. Hence the Transnet Board and its executive officers are clearly intended to be subject to the provisions of the Companies Act and the common law, such as those relating to corporate governance, which have

developed in relation to corporations. See Coetzee DJP's explanation in the Full Bench decision of *ex Parte NBSA Centre Ltd* 1987

(2) SA 783 (T).

The fact that the Transnet Board and its officers are subject to the express provisions of sections 50 and 51 of the PFMA in regard to their fiduciary duties and their accountability does not denigrate from their actions remaining subject to corporate laws. The PFMA amplifies these duties and obligations, which are of special application to all State-owned entities, whatever from they take.

Although initially an employee of Transnet was deemed to be an employee of the State, there was a specific sunset clause that terminated the situation three years after the Legal Succession Act became operative (see Section 9(3) read with section 9(2)).

In short, whilst Transnet is a State-owned enterprise its structure and objectives are those of a public listed company and its board and officers execute their functions within the laws relating to corporations with, where applicable, the heightened duties and responsibilities imposed by the PFMA.

WHETHER THE DECISIONS TO INSTITUTE DISCIPLINARY PROCEEDINGS OR TO SUSPEND THE APPLICANT CONSTITUTED ADMINISTRATIVE ACTION SUBJECT TO THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000 ("PAJA")

Transnet is specifically identified as a major public entity under Schedule 2 of the Legal Succession Act. It is also a statutory body, fulfilling a public function and is obliged to act in a manner consistent with the strategic and economic interests of the country. See Section 17 of the Legal Succession Act.

Nonetheless, this alone does not render every action taken by Transnet, whether through its Board or executive management, subject to the provisions of PAJA. See Chirwa

per Ngcobo J (as he then was) at paras 139-150 and the minority decision of Langa CJ at paras 181-194.

Chirwa, Transman and Makhanya have confirmed that a Transnet employee or a person in a similar position, even though a public servant of an organ of State, is precluded from challenging his dismissal by relying on the rights of review provided for under PAJA. This is because the decision does not constitute "administrative action" for the purposes of triggering the application of that Act but is based on the exercise of a contractual power (Chirwa at paras 142, 143 and 148; *Kriel v Legal Aid Board* [2009] 9 BLR 854 (SCA) at paras 13 and 14 and cases cited at para 15).

It is therefore evident that the decision to delegate the authority to decide whether or not to discipline Mr Gama is not justiciable under PAJA. In any event, the decision in my view is similar to a decision taken to prosecute which does not necessitate administrative action and is not subject to review (see *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009

(2) SA 277 (SCA) 290 at para [35]).

I am also satisfied on balance that the decision to suspend Mr Gama similarly does not constitute "administrative action". Although it may be contended that the suspension of one of the highest-ranking executives within Transnet, responsible for one of its most important operating divisions, impacts on the operations of an organ of State, it nonetheless constitutes the exercise of a power conferred under corporate law in discharge of a corporate function involving both corporate and commercial considerations.

COMMON LAW and constitutional RIGHTS TO CHALLENGE

A company can only perform acts through its duly authorised directors, managers and employees. This requires the appropriate delegation of powers, generally with suitable limitations. The source of these powers generally reside in the Board which in turn delegates to individual directors or executive management, with further powers of sub-delegation conferred by appropriate Board resolutions.

The respondents argued that the Board has the power to delegate management functions in general and disciplinary powers in particular under section 24(5) of the Legal Succession Act. In my view this is incorrect. Section 24(5) falls within the provisions

of Chapter V which deals with a different legal entity, namely the South African Rail Commuter Corporation. I have already commented on their separate legal existence from Transnet, how that arose and why the governance of Transnet is founded on corporate law principles.

Mr Pretorius, on behalf of the first to third respondents, also relied on Article 81 of the Articles of Association of Transnet which provides that, subject to certain limitations that are not relevant, the management of the business and the control of Transnet vests in the directors who "... in addition to and without limitation of the powers expressly conferred upon them by the Companies Act or these Articles may exercise or delegate to any one or more persons (including without limitation a committee) all such powers and delegate to anyone or more persons (including a committee) the doing of all such acts (including the right to sub-delegate) as may be exercised or done by the Company and are not in terms of the Companies Act or by these Articles expressly directed or required to be exercised or done by a general meeting, subject, nevertheless, to that management not being inconsistent with any resolution passed by a General Meeting."

Furthermore, under Article 82, the directors are accorded the power to appoint such sub-committees with such functions and powers as the Board may consider necessary for the effective exercise of their functions.

The applicant does not challenge resolution 2004/P4 of 2004 which delegated functions, including disciplinary powers, to the GCE of Transnet. The applicant also accepts that in terms of that resolution the GCE was entitled to sub-delegate his or her powers.

Although the legality of the sub-delegation by Mr Wells in his capacity as Acting GCE is challenged, the applicant accepts that Mr Wells sub-delegated his disciplinary powers to Mr Maharaj. Indeed, Mr Gama had previously been brought before a disciplinary body pursuant to the exercise of these delegated powers.

For reasons that appear in the previous section, there can be no administrative justice challenge under PAJA to the delegation and sub-delegation of the powers conferred on Mr Maharaj to consider whether or not to bring disciplinary charges against Mr Gama.

The question of whether the delegation of the authority to consider bringing disciplinary charges against Mr Gama or to suspend him involved a breach of a constitutional requirement or of a common law right under either contract or principles of corporate governance needs to be considered both by reference to the facts and the existence of the legal right contended for in the circumstances of the case. It is accordingly necessary to set out the facts in some detail.

THE

FACTS

The key facts are not in dispute. Accordingly it is unnecessary to invoke *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*

[1984] ZASCA 51; 1984 (3) SA 623 (A), bearing in mind that the applicant effectively seeks final relief.

On 31 January 2008 the then Minister of Public Enterprises addressed a letter to Transnet's then chairperson, Mr Fred Phaswana. Mr Phaswana was informed that the Department of Public Enterprises had received information concerning allegations of "... corruption and procurement irregularities in Transnet, relating in particular, to the awarding of the locomotive tender." The Minister conveyed the Department's concern that it was necessary to investigate and assess the alleged irregularities. The irregularities related to what has been previously referred to also as the "50 Like-New Contract".

Investigations then commenced during the first half of March 2008 and focussed principally on irregularities in the tender process. During May 2008, disciplinary action was instituted against the then General Manager: Engineering of TFR who was considered at the time to have been primarily responsible for the procurement process.

During the course of the investigation, it appeared that Mr Gama had concluded the locomotive agreement on the strength of a specific Board resolution but that he had not complied with the condition to which Board approval was subject, namely "... that Transwerk would carry out all engineering on assembly and maintenance".

During September 2008, Transnet's then GCE, Maria Ramos, received an anonymous letter alleging irregularities in TFR's Security

Department. This included the award of a security contract to GNS.

In both October and November 2008 a number of further anonymous communications were received, including by the GCE, all relating to alleged misconduct and irregularities in the TFR Security Department.

At a meeting held with Transnet's group forensic manager and Mr Oates of Ernst & Young, who are Transnet's internal auditors, Mr Gama was informed of the anonymous communications. He was advised that the internal audit department would be conducting investigations.

On 12 February 2009 Mr Oates forwarded a draft status report to Ms Ramos, at her request, relating to both investigations, i.e. in respect of the locomotive acquisitions and the GNS contract.

On 13 February 2009 Ms Ramos, at her last Transnet board meeting as GCE, briefed it on the status of both investigations. Ernst & Young's draft status report identified concerns about Mr Gama's role and conduct in relation to each of the investigations. Ms Ramos then handed over the issues raised in the investigations to the Board.

Earlier on the same day, the Board, during the course of a closed session which excluded the executive directors, debated its preferred candidate to replace Ms Ramos' as GCE. Prior to the meeting, the Corporate Governance and Nominations Committee (GCM Committee) of the Transnet Board had decided on a short-list of five candidates pursuant to a process that had commenced in the last quarter of 2008, after Ms Ramos' intended resignation became known. Although Mr Wells had made himself available on 9 December 2008, he withdrew his candidacy three days later. This occurred before the first meeting of the CGM Committee was convened to consider candidates and before interviews were conducted (on 9 and 10 February).

The shortlist of five candidates included Mr Gama. During its closed session the Board recommended Mr Pravin Gordhan as its preferred candidate to the Minister. The other candidates were not ranked. However, the Board's recommendation that was conveyed on 13 February 2009 through its then Chair, Mr Phaswana, was that Mr Gama was not suitable for appointment as GCE. The Minister was advised that "Mr Siyabonga Gama, was thoroughly considered but there are important gaps, relative to the requirements for this position. He currently requires greater cognitive development to handle the complexity of this position."

After Mr Pravin Gordhan had withdrawn as a candidate, the Minister requested a detailed report containing profiles on all the other candidates. On 9 March 2009 Mr Phaswana responded. Mr Phaswana's letter again indicated concerns regarding Mr Gama and added that, since the previous letter of 13 February 2009 to the Minister, the Board had received documentation and reports including the internal auditors' report, that contained serious allegations of misconduct on the part of Mr Gama, and which required the company to conduct investigations. Mr Phaswana indicated that it was necessary to commence a new appointment process "... as none of the other shortlisted candidates are at the level required."

After the Board meeting Mr Phaswana then dealt with the report together with the chairpersons of the Board Committees, namely the Risk Committee, the Remuneration Committee and the Audit Committee. At that time Mr Everingham was the chairperson of the Audit Committee. They then discussed the Ernst & Young report on 19 February

2009. Subsequently a meeting was held with attorneys appointed by the Board for the purpose of apprising them of the report and to obtain advice. On 26 March 2009 the attorneys advised that the PFMA "... obliges Transnet's Board to take disciplinary steps against the TFR CE [Mr Gama]".

On 23 April 2009 Transnet's head of internal audit, together with the attorney who provided the advice, reported on the forensic

investigation to a closed session of the Board Committee Chairpersons. The Board decided to hand the investigation regarding

both contracts over to the Executive. It was also decided that Mr Wells would review the advice given and, in his capacity as acting GCE, would take appropriate steps on behalf of Transnet.

Mr Wells then also sought legal advice from a different firm of attorneys. Its purpose was to establish Transnet's legal obligations in dealing with a matter of this nature and to advise on the appropriate process that should be followed.

On 11 May 2009 Mr Wells held a meeting with Mr Gama and informed him of the legal opinion that Wells was considering following with regard to certain allegations made against Mr Gama. This is confirmed in a letter addressed by Mr Gama to Mr Wells on 18 May 2009.

In the letter of 18 May 2009 Mr Gama confirmed that during their discussion on 11 May 2009, he had referred to enquiries previously

directed to him by Ernst & Young and contended that Ernst & Young's investigation was still ongoing. Mr Gama expressed concern that his reputation could be prejudiced as a result of untested allegations. The letter concluded with Mr Gama urging that appropriate safeguards be taken to ensure that there would be no damage to his career or reputation as a result of any possible perceptions created or leaks as a result of Mr Wells' investigations.

At a special meeting of the Board held on 2 June 2009 Mr Wells updated the Board on the investigations. At a subsequent Board meeting on 18 June 2009 Mr Phaswana informed the Board that the forensic investigation had been handed over to Mr Wells for execution and finalisation. The Board was also advised that a report would be furnished once the investigations had been finalised.

On 18 June 2009 Mr Wells addressed a letter to Mr Gama which confirmed the receipt of legal advice that had been obtained by the Board relating to the seriousness of the issues. This required that the matter be dealt with at an executive level and the letter informed Mr Gama that the Board had appointed Mr Wells to deal with it.

The letter of 18 June 2009 afforded Mr Gama an opportunity to respond formally to the issues raised regarding both the locomotive contract and the GNS issue. The letter was comprehensive and set out details of the complaints. In regard to GNS, one of the issues was that the contract approved by Mr Gama was for an estimated total value of R18,9 million whereas he only had authority to conclude a contract up to R10 million, the letter also indicated that the process of appointing GNS "was flawed and there is a strong indication that it was manipulated".

On 19 June 2009 Mr Gama requested time to address the issues raised. He also requested the legal opinion obtained by the Board and access to documentation at Transnet Rail Engineering (TRE) and Ernst & Young.

On 13 July 2009, Mr Gama then addressed a letter to the Chairperson, Mr Phaswana, referring to Mr Wells' refusal to provide a copy of the legal opinion. Mr Gama contended that this "... vitiates the process of administrative justice and fairness". The letter concluded with Mr Gama expressing concern that the tenure of the Board was nearing an end and it should not determine such an important or major decision "... days or hours before the end of its tenure," as it would infringe the duty of care required at a time when they would have, what Mr Gama termed, "a diminished responsibility towards the company".

On 17 July 2009 Mr Phaswana replied to Mr Gama. He stated that Mr Gama had no right to a copy of the legal opinion, nor was it necessary for Mr Gama to have the document in order to respond. Mr Phaswana also recorded that the initial investigations into both the locomotive contract and the security services contract had been conducted by the Transnet internal auditors before the Board took legal advice. He also rejected the suggestion that the outgoing directors of the Board had diminished responsibility and asserted that they remained subject to their fiduciary duties until their tenure on the Board ended.

On 20 July 2009 Mr Gama addressed a comprehensive response to Mr Wells, who was now the Acting GCE, to the allegations regarding both the locomotive contract and the security services contract. Mr Gama contended that when Mr Wells proceeded to unwind the locomotive transaction he had in fact incurred significant and unwarranted expenses for Transnet and that Mr Wells was now attempting to shift the blame onto Mr Gama. Mr Gama contended that this was disingenuous and that in fact Mr Wells was now attempting to reinstate the original contract. Mr Gama claimed that Mr Wells' had adversely affected Transnet by wrongly intervening as he had done. Mr Wells was not implicated whether directly or indirectly in the security services contract.

A special meeting of the Board was held on 28 July 2009 at which Mr Wells updated the Board on the investigation. He did not advise the Board of Mr Gama's accusations against him. After Mr Wells left the meeting, a concern was raised about a perception that the Board had conflated the succession process with the forensic investigations. The Board emphasised that the February 2009 decision not to recommend Mr Gama for appointment as GCE, on the grounds of unsuitability for the position, had been raised before the Board became aware of the forensic investigations. However, in view of the sensitivity surrounding the forensic investigations, and

alive to a media report that there was a succession battle between Mr Wells and Mr Gama, the Board decided to appoint a sub-committee to assist Mr Wells in finalising the investigation and to notify the Board of its recommendations.

A sub-committee of the Board was then appointed. It consisted of the Chairperson of the Board, Mr Peter Joubert and Mr Everingham (who since 11 August has been serving as Acting Chairperson of the Board). This is recorded in the minute of the closed session meeting of 28 July 2009.

The sub-committee met and came to the view that Mr Wells in his capacity as acting CGE should proceed with disciplinary proceedings against Mr Gama. The sub-committee considered further legal advice from Transnet's attorneys on 13 August 2009 that "... there were grounds for concluding that Mr Gama had breached the provisions of the PFMA and that Transnet was obliged to take such disciplinary steps against him".

Accordingly, both the then chairperson and his successor (Acting) as well as Mr Joubert had considered Mr Gama's letter of 20 July 2009, including the allegations made regarding Mr Wells and the conclusion sought to be drawn that the investigation had been motivated by Mr Wells' attempt to cover up his own mistakes.

The sub-committee then reported to the full Board at a special meeting held on 24 August 2009. At that stage Mr Gama's response of 20 July 2009 had still not been circulated to the full Board. Based on the sub-committee's recommendations, which considered Mr Gama's response, the full Board noted that the sub-committee had discharged its obligations in assisting Mr Wells to finalise the forensic investigation and in the circumstances (including a consideration of the legal advice obtained) the full Board "resolved unanimously that the acting Group Chief Executive should give effect to necessary disciplinary action."

Subsequent to the meeting, and on 24 August 2009, Mr Maharaj in his capacity as Group Executive : Human Resources addressed a notice to Mr Gama which was received by Mr Gama on the same day.

The document is headed "Notice to attend a disciplinary hearing". It informed Mr Gama that a pre-dismissal arbitration would be held into allegations of misconduct or incapacity on the grounds set out in the body of the notice. The grounds related both to the locomotive contract and the security services contract. It further informed Mr Gama that a pre-hearing meeting would be held at the offices of Bowman Gilfillan Attorneys on 27 August 2009 for the purpose of dealing with the conduct of the hearing, to resolve any preliminary issues that were capable of resolution and to ensure that the hearing would run smoothly.

The notice to attend a disciplinary hearing recorded that investigations into the security services contract had not been finalised and that Transnet reserved the right to deal with further matters that may be revealed.

The notice then dealt with the issue of suspension. I quote the relevant paragraph in full:

"Because of the seriousness of these allegations and the fact that, if proven, they may demonstrate that you cannot be trusted to execute your responsibilities in your present position and may result in your dismissal, and since, in these circumstances, your continued presence in the workplace may be prejudicial to the conduct of the enquiry itself Transnet is contemplating suspending you from your employment pending completion of the disciplinary process. You are invited to make written representations on the question whether it would be appropriate to suspend you pending completion of the disciplinary process and what other measures, if any, Transnet should consider to protect its interests during that period. You should address any such representations to Pradeep Maharaj by 12h00 on Wednesday, 26 August 2009."

On 26 August 2009 Mr Gama's attorneys addressed a letter to Mr Maharaj. The letter was copied to Prof. Everingham (now Acting Chairperson of Transnet), to Mr Wells as Acting GCE, the Minister of Public Enterprise and to the Deputy Minister of Public Enterprise. The letter recorded that Mr Gama objected to the validity and fairness of the steps being taken against him both in relation to the proposed disciplinary hearing and the proposed suspension. It was contended that these steps were taken and timed with a view to prejudice Mr Gama's prospects of filling the vacancy for the Group CEO position of Transnet "... for which our client is deemed to be a favourite / front-runner to be appointed in this position". This was in view of the fact that Cabinet was due to take a decision on the suitable candidate on or shortly after 26 August.

The letter of 26 August also stated that the actions were deliberate, devoid of good faith and motivated by an ulterior purpose. The letter then proceeded to challenge Mr Maharaj's authority to issue the notice of 24 August. Furthermore, it was also contended that Mr Wells and Mr Maharaj had already predetermined to suspend Mr Gama before allowing him an opportunity to make representations.

The letter of 26 August 2009 contended that the process was not bona fide and had been manoeuvred to create unnecessary urgency with the intention of prejudicing Mr Gama. The letter required proof of the authority upon which Mr Maharaj was entitled to issue the notice of 24 August, required additional time to submit representations in respect of his proposed suspension and required notification of the person responsible for considering whether or not to suspend Mr Gama, and the basis of such authority.

In this regard, Mr Gama's contended that only the full Board of directors should fairly and legally decide on his possible suspension. This was by reason of Mr Gama's seniority in Transnet and the allegations made against Wells which precluded him from taking such a decision. In the letter, confirmation was sought that the Board would take the decision regarding suspension. Mr Gama also requested an opportunity to personally address the Board "... in order to share other or further information that would indicate a conspiracy against him so as to place the Board in a better position to determine whether to suspend him or not."

Mr Gama was afforded an opportunity until noon on 28 August 2009 to make representations in regard to his possible suspension. The letter expanded on the concerns that gave rise to considering Mr Gama's suspension and included a statement that the allegations, if proven, may result in a finding that Mr Gama is unfit to hold office which would result in serious risks to the business if he continued to hold office.

Furthermore, in the letter it was contended that the disciplinary process itself may have a very serious impact on Mr Gama's ability to run his division and to work effectively within the executive team under the leadership of the current Acting GCE. It was claimed that the situation was exacerbated by reasons of Mr Gama's allegations of a conspiracy in relation to both the substance of the complaints and the timing of the process. The letter also indicated that management of the TFR executive team was likely to become very difficult during the period of the disciplinary process and that there was a real possibility that Mr Gama would not be able to devote the necessary time and attention to TFR business while dealing with the serious allegations. Mr Maharaj indicated that he would be taking the decision on suspension in his capacity as Group Executive: Human Resources "under authority delegated to me by the acting group CE (and in consultation where necessary with the acting group CE)". The letter claimed that all steps had been taken with the full knowledge and support of the Board.

On 27 August 2009 Mr Gama's response of 20 July 2009 was circulated to the full Board. Accordingly the full Board became aware of the allegations that Mr Gama had made against Mr Wells and of his alleged motives.

On 31 August 2009 Mr Gama's attorneys addressed another comprehensive letter to Mr Maharaj dealing with the issue of Mr Gama's proposed suspension. Prior to that, Mr Gama's attorneys had also indicated that the disciplinary hearing could only be chaired by an independent, senior and suitably experienced legal practitioner who has no connection with either of the parties.

On 31 August Prof Everingham's attorneys responded to the letter of 26 August. The letter dealt with matters covered elsewhere in this

judgment.

On 1 September 2009 Mr Maharaj addressed a letter to Mr Gama stating that he had given careful consideration to the representations made in relation to the question of his possible suspension. Mr Maharaj advised Mr Gama that, on the basis of a legal opinion provided to him, he was satisfied that he had the necessary authority to take the decision in relation to the question of suspension. Mr Maharaj stated that after balancing the representations made against the interests of Transnet "... during this difficult period" he had decided to suspend Mr Gama from his duties with immediate effect and that the suspension would continue until the disciplinary process was finalised or until the suspension was lifted. Mr Gama was requested to advise whether he required written reasons for the decision.

On 2 September 2009 Mr Wells issued a statement advising of Mr Gama's suspension and that the disciplinary process enjoyed the Board's unanimous support. It also confirmed that the disciplinary hearing would be adjudicated by an independent and external arbitrator.

At a subsequent meeting on 10 September 2009, the full Board unanimously confirmed its resolutions of 24 August 2009 and of 28

July 2009.

In my view the undisputed facts reveal the following:

The allegations of misconduct are serious and there is no objective indication that they have been trumped up. The reason is that they have been the subject matter of on-going investigations initiated well before any suggestion of Mr Wells' involvement in attempting to influence the outcome. The investigations and the decisions to institute disciplinary proceedings, including those against Mr Gama, have been subject to independent professional scrutiny by Ernst & Young, who are Transnet's internal auditor, (i.e. an independent auditor engaged as one of two independent auditors in order to satisfy good corporate governance principles) and also two sets of reputable firms of attorneys.

The advice given by the independent firms of attorneys was that the investigations revealed a breach of the fiduciary duties and

responsibilities owed under the PFMA. The attorneys advised that Transnet had an obligation to take disciplinary steps against those who were considered, on the evidence then available, to be held accountable.

Both the Transnet Board and its Executive had been concerned about their obligations to properly investigate the issues. There is no evidence to suggest that the investigations were ever put to bed and only resurrected because of Mr Wells' attempt to discredit Mr Gama, or because of an attempt to prevent Mr Gama from being appointed as GCE of Transnet. On the contrary, the investigations were expressly passed on by Ms. Ramos in her capacity as out-going GCE of Transnet to the Board and the Board then proceeded to place the responsibility for further investigations in the hands of its Executive.

There can be no quarrel with the Board's delegation of its authority to investigate, consider initiating disciplinary proceedings or consider the possible suspension of Mr Gama to Mr Wells prior to 20 July 2009, when Mr Gama for the first time claimed that Mr Wells had an ulterior motive for proceeding against him. This is because the Board and Mr Wells had been acting in terms of a long existing delegation of authority contained in a 2004 Board resolution. Moreover, the authority of Mr Wells to sub-delegate these powers to another was, on the face of it, pursuant to the same 2004 Board resolution.

Both a sub- committee of the Board as well as the full Board have supported the decisions taken to proceed with disciplinary charges

and to suspend the applicant.

I proceed to consider whether the facts support the applicant's challenge to the delegation of authority to Mr Maharaj on constitutional or common law grounds (arising either out of principles of corporate governance or contract).

Constitutional challenge

Mr Kennedy on behalf of the applicant contends that the delegation of authority by a person who is tainted itself taints any steps taken by the delegated functionary. As I understand it, the constitutional challenge goes to a perception of bias based on an interpretation of the constitutional principles governing public administration set out in sections 195(1) and (2)(b) of the

Constitution. The contention that Mr Wells has exerted undue influence over the Board itself or a sub-committee of the Board

extends the perception of bias to the decisions hitherto made by them as well. It however does not extend to the point that the full Board cannot now disabuse its mind and reconsider the entire matter, since this is effectively the order sought by the applicant.

The SCA in *Zuma supra* at paras [36] – [38] confirmed three principles. Firstly, that a failure to comply with a constitutional or statutory

requirement remains justiciable under the principle of legality, irrespective of whether or not PAJA applies. Secondly, actions in the form of initiating charges against a person are not wrongful merely because they are brought for an improper purpose. Finally, in order to offend the requirement of legality there must, in addition to an improper purpose, be a lack of reasonable and probable grounds to support the decision taken.

I have set out the facts in considerable detail. In my view reasonable and probable grounds exist for supporting the decision to institute disciplinary proceedings and to suspend Mr Gama.

It should also be borne in mind that the disciplinary proceedings are to be conducted before an independent, professional, and suitable skilled person.

I wish to make it clear that my decision does not in any way suggest that Mr Gama may be found to have been properly charged. He is clearly innocent until proven guilty and he has set out comprehensive reasons as to why the charges are without merit.

Nonetheless, as with any competent decision to initiate charges, it remains based on reasonable grounds. The requirements of accountable governance require a proper and expeditious ventilation of the issues.

It was also contended that the decisions taken breached Mr Gama's constitutional right to dignity under section 10 of the Constitution. In my view, the fact that a person faces disciplinary charges of misconduct inevitably affects his or her dignity. The applicant accepts that such an infringement is the inevitable consequence of any competently brought charge. It however

appears that the applicant's contention goes to the timing of the decisions taken, bearing in mind that he is a contender for the most senior position in possibly the largest State-owned corporation. Again, provided the requirements of legality in the process of bringing disciplinary charges and in suspending Mr Gama are met, the invasion of dignity is a necessary, reasonable and accepted consequence- and a constitutionally sound limitation- under section 36 of the Constitution. Moreover, the constitutional value of accountability addressed in the SA Association of Personal Injury Lawyers case *supra*, should not be overlooked in balancing competing constitutional interests.

There is also no case made out of perceived bias that can affect the legality of the process. Much less that of institutional bias. See *President of the Republic of South Africa v South African Football Union* [1999] ZACC 9; 1999

- (4) SA 147 (CC) at paras [45] and [48]; *Sager v Smith* 2001
- (3) SA 1004 (SCA) at paras [16] and [17]; *Council of Review, South African Defence Force and others v Mönnig and others* 1992 (3) SA 482 (A); *Swartz NO and Others v Wallach and Another* (WLD unrep. Case no. 15422/97, Judgment on 4 February 2002). I also refer to this aspect later.

Accordingly, a case has not been made out for a valid constitutional challenge to the legality of the decision to delegate or any other element of the process upon which the applicant has sought to rely, even tangentially.

CORPORATE GOVERNANCE AND OTHER COMMON LAW GROUNDS

In my view Mr Gauntlett and Mr Pretorius, on behalf of the various respondents, are correct in their respective submissions that such a case has not been properly made out in the founding papers. There is no evidence of an implied term nor has a case been made out of some infraction of a corporate governance principle either in relation to delegation of power or in the competence of the person who has been delegated.

The furthest the applicant has gone is to contend that Mr Maharaj is under the influence of Mr Wells, that there is a perception of bias that taints the entire process (i.e. a form of institutional bias) or that Mr Maharaj is too junior to take the decisions.

For the same reasons expressed earlier, I am satisfied that Mr Maharaj had the necessary authority. Furthermore, the mere fact that Mr Wells delegated his powers to Mr Maharaj cannot, without more, taint the decision taken by Mr Maharaj. There is no evidence placed before me to suggest that Mr Maharaj exercised anything other than an independent decision-making power notwithstanding the allegations, that are really conclusions without adequate foundation, made to the contrary and which I mentioned earlier.

I am fortified by the decision relied upon by Mr Pretorius of *Bulla v Akhawarray: MEC Finance, Northern Cape Government* [2004] 3 All SA 693 (NC) at paras 4,5 and 23. I respectfully adopt and apply the position stated by Olivier J in that case.

I have had some difficulty insofar as Mr Maharaj took the decision to suspend Mr Gama. Although Mr Maharaj and Mr Gama are at the same level of seniority (according to the respondents) the question of Mr Maharaj's competence to take a decision that is intrinsically concerned with the operational requirements of Transnet and its continued ability to function properly may have raised concerns. However, the applicant did not suggest that Mr Maharaj lacked the ability to make an informed decision and accordingly no factual basis has been laid that would support such a position. Moreover, both a sub-committee of the Board and the Board itself had endorsed Mr Maharaj's decision to suspend Mr Gama. In the case of the full Board, this was by way of a recorded Board resolution. The terms of the suspension make it clear that if the Board is so resolved it may at any stage reconsider the suspension.

I have assumed that there are competent grounds for challenging under common law review or by an application of corporate governance

considerations or contractual considerations the issues raised by the applicant. I would not wish this decision to be taken as an acceptance of any of the legal rights contended for.

In view of the facts presented in this case, it is unnecessary to consider the legal arguments raised. I would, however, respectfully

refer to the decision of Hodes AJ in *Pennington v Friedgood and Others* 2002(1) SA 251 (C) which rejected much of the argument now raised by Mr Kennedy on behalf of the applicant.

MISJOINDER

In my view the applicant improperly joined the fifth to thirteenth respondents. The tenth and eleventh respondents did not oppose the application. All the other members of the Board in their capacity as Board members did so. The costs will form part of the main costs order.

In my view it would be setting an undesirable precedent if a Board decision was challenged by requiring each and every member of the Board to either admit or deny allegations concerning decisions taken by the Board. A Board operates on principles of majority rule. In many cases these decisions are taken in closed session. Whilst there may exist exceptional circumstances where such a course ought to be left open to a litigant, I am satisfied that in the present case no such grounds have been disclosed.

CONCLUSION

The applicant has not made out a case for challenging the legality of the delegation of authority whether from the Board or by Mr Wells to Mr Maharaj nor can the decisions taken by Mr Maharaj be considered to be either tainted or raise adequate grounds for a perception of bias.

I also find that there has been an impermissible joinder of the fifth to thirteenth respondents. Since the tenth and eleventh

respondents have not opposed the application, it is unnecessary to deal with any cost issue in relation to them.

The decision I make clearly has no impact on any challenges that are open to the applicant under the LRA. In my view, there are no valid challenges to the decisions taken that arise within the jurisdiction of the High Court and which have been raised.

I accordingly make the following order:

The application is dismissed with costs, including the costs of the first to third respondents and of the fourth to thirteenth respondents

(excluding the tenth and eleventh respondents), such costs to include the costs of two counsel.

Spilg J

HEARINGS: 22, 25 and 30 September 2009

JUDGMENT: 7 October 2009

Applic; Adv P Kennedy SC

LANGA ATTORNEYS

1st-3rd Resp; Adv PJ Pretorius SC , Adv H Shoji

BOWMAN GILFILLAN ATTORNEYS

4th-9th & 12-13; Adv JJ Gauntlett SC,

Adv L Nokosi-Thomas, Adv H Maenetje, Adv M Blumberg

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