17/8/17.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 9034/2016

In the matter between:

MBULUNGENI MADIBA	First Applicant
NONCEBA LEVINE	Second Applicant
HENRIECK SEBANIE THYS	Third Applicant
ROGER CLIFFORD WHITE	Fourth Applicant
SIPHUMELELE MKHIZE-MANYENGE	Fifth Applicant
PULE ALEXIS PHINDANE	Sixth Applicant
JABULANE BLOSE	Seventh Applicant
WILLEM ANDREAS MEYER CARSTENS	Eighth Applicant
CHRISTINA MASHANGU MAYEVU	Ninth Applicant
ZUKILE JAMA	Tenth Applicant

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

16/08/17
DATE

SIGNATURE

and

MINISTER OF ARTS AND CULTURE	First Respondent
PAN SOUTH AFRICA LANGUAGE BOARD	Second Respondent
PAUL HENRY NKUNA	*Third Respondent*

JUDGMENT

Tuchten J:

1 The first applicant, together with the other persons described in the heading to this judgment as the second to tenth applicants and the third respondent, were appointed by the first respondent (the Minister) during April 2014 to act as members of the second respondent (the Board). By letter dated 12 January 2016, the Minister gave notice to the first applicant as chairperson of the Board of the Minister's decision to dissolve the Board.

2 By notice of motion dated 5 February 2016, the first applicant and, purportedly, the other persons cited as applicants applied for orders declaring the decision of the Minister to dissolve the Board to be unlawful and invalid and for the decision to be reviewed and set aside.

3 I have been careful in my references to the second to tenth applicants because, regrettably, the question whether these persons are indeed applicants is one of two preliminary issues which delayed the adjudication of the application on its merits. These issues must be disposed of before I enter upon the merits themselves.

4 In his founding affidavit, the first applicant alleged only[1] that he had been "duly authorised to depose to this affidavit on behalf of my co-applicants." There were no confirmatory affidavits delivered on behalf of the alleged co-applicants.

5 The allegation of authority was challenged by the Minister in his answering affidavit.[2] The Minister specifically pointed to the absence of confirmatory affidavits which, he said, indicated the absence of such authority. In reply,[3] the first applicant said:

> My co-applicants have deposed to confirmatory affidavits and it is regrettable that those were not forwarded to the [Minister].

6 But when the matter came before me there were still no confirmatory affidavits submitted by the alleged co-applicants. The matter was raised in argument and I pointed to the fact that at that late stage there had been no attempt yet to submit such confirmatory affidavits. Not even this observation, made in open court, elicited the submission of the alleged confirmatory affidavits.

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1 Para 3

2 Para 10.6

3 Para 5.3

7 I am driven to the conclusion that in fact the first applicant was never authorised to represent the alleged co-applicants and that the first applicant's false assertion of authority was a deliberate untruth designed to mislead the court. I hold that the first applicant is the only applicant before me.

8 Not only has the first applicant sought to mislead me but there is reason to believe that the first applicant's attorneys of record may have been guilty of untruthfully purporting to represent the persons reflected as the second to tenth applicants.

9 I do not however agree with the Minister's argument, made in the answering affidavit, that on this ground the application should fail. The first applicant is a person affected by the Minister's decision and as such is entitled to bring the application and have the decision submitted to judicial scrutiny.

10 The other preliminary issue with which I must deal relates to Advocate Zixolisile Feni. Feni had been the acting CEO of the Board, having been appointed as such by Board, and was reflected on the customary practice note submitted on behalf of the first applicant as the only counsel who would be representing the applicants at the hearing to take place in the opposed motion court. The Minister's

answering affidavit contained many factual allegations critical of Feni. In addition, the record discloses[4] that Feni either brought or was a party to at least seventeen court proceedings in the High Court and the Labour Court against or concerning the Board. Some of those proceedings were still pending when the report was compiled.

11 I was concerned when I established during my preparation for the hearing of this case that Feni was to be counsel for the first applicant. I caused the attorneys for the parties to be notified that the court would require argument on the question whether allowing the applicants' case to be presented by Feni would not probably lead to a failure of justice and what the approach of the court should be in this regard.

12 When the case was called in my customary roll call on Monday morning, the first day in the motion court week, Feni appeared alone for the applicants. The Minister opposed the application and was represented by counsel. The second and third respondents did not oppose the application and they were not represented at the hearing before me. I raised my concern with Feni. He told me that "he" had arranged for a co-counsel to appear with him. If my memory is correct,

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4 In an undated document headed "Litigation Report on Feni's Matters" attached as an annexure to the Minister's affidavit at 665-677.

I told Feni that the existence of a second counsel for the applicants would not solve the problem.

13 The case was called for argument the following day. At that stage I was told that Adv Kella appeared for the applicants together with Feni. I stated that this was unacceptable and that I proposed, *mero motu*, to direct the issue of a rule calling upon Feni to show cause why he should not be joined to the proceedings and interdicted from representing the applicants and why Feni and the applicants' attorneys of record should not be ordered to pay the costs of the proceedings contemplated by the court. At that stage Feni withdrew as counsel for the applicants although he remained in court for at least part of the first day's argument. The case was argued over two days. Argument was then presented by Adv D Kella for the first applicant.

14 These two issues have caused me to believe that both the first applicant's attorney of record and Feni may have acted unprofessionally, or worse. I have further concerns with the part Feni played in the events described in the affidavits. I shall therefore direct the State Attorney, who represents the Minister, to deliver copies of this judgment to the Law Society of the Northern Provinces and the

Pretoria Society of Advocates for such investigations and disciplinary actions as they may see fit.

15 The Board is an organ of state as contemplated by s 239 of the Constitution. It was established pursuant to the commitment to multilingualism in s 3 of the interim Constitution of 1993, a measure perpetuated by s 6(5) of the Constitution, which reads:

> A Pan South African Language Board established by national legislation must-
> (a) promote, and create conditions for, the development and use of-
> (i) all official languages;
> (ii) the Khoi, Nama and San languages; and
> (iii) sign language; and
> (b) promote and ensure respect for-
> (i) all languages commonly used by communities in South Africa, including German, Greek, Gujarati, Hindi, Portuguese, Tamil, Telegu and Urdu; and
> (ii) Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa.

16 Under s 6(4) of the Constitution, all the eleven official languages of the Republic must enjoy parity of esteem and must be treated equitably.

17 The Pan South African Language Board Act, 59 of 1995 (the Act)[5] preceded the Constitution. Section 2 established the Board. It is a juristic person and, under s 2(2), shall be represented by its chairperson or deputy chairperson or any of its members designated for a specific purpose.

18 Broadly, the Board must[6] promote the development of and the equal use and enjoyment of official languages, the development of other languages relevant in the Republic, multilingualism, the provision of translation and interpreting facilities and combat the use of any language for the purpose of exploitation, domination or division.

19 Section 4 establishes the independence of the Board, subject only to the Constitution[7] and the Act. No person may interfere with the Board in the exercise of its powers, duties and functions - except, obviously, to the extent that the Act or the Constitution prescribes otherwise. Under s 5, the members of the Board, who must number between 11 and 15 persons, are appointed by the Minister. The members of the Board, viewed collectively, must be as representative as possible of

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5 All references to statute in this judgment will be to the Act, unless otherwise specified.

6 Section 3

7 Although the Act refers to the interim Constitution, manifestly this provision should now be understood with reference to the Constitution which superseded the interim Constitution.

the official languages and language skills. Subject to the provisions of the Act relating to termination of individual members or the Board as a whole, members serve for a term of 5 years. The Minister may reappoint a member for a further single term.[8]

20 Under s 5(4), the Minister may terminate the Board on certain specified grounds. This provision requires no elaboration because the Minister did not act under s 5(4). In fact the Minister acted under s 5(5A), which reads as follows:

> The Minister may dissolve the Board on any reasonable grounds.

21 It seems to me that the term "Board" is used in two senses in the Act: firstly, as the governing body of the institution and, secondly, as the institution as such. Although this subject was not addressed in argument, it was implicit in the arguments advanced by both counsel that s 5(5A) contemplated the dissolution of the governing body and not the institution.

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8 Section 5(5)

22 There was some debate during argument about whether this power when exercised was a species of administrative action. But as counsel for the Minister accepted that the principle of *audi alteram partem* applied in the present circumstances, I need not decide the point but may assume that the principles of administrative action do indeed apply in relation to the present dispute.

23 The nature of the relationship between the Minister and the Board is at the heart of this enquiry. Under s 9, the Board must work closely with organs of state or other persons and institutions involved in the development and promotion of language. Under s 10, the Board must appoint a chief executive officer who must in consultation with the Minister appoint such staff as may reasonably be necessary to carry out the work of the Board. Under s 6(d), the CEO is accountable to the Board.

24 Under s 7, the Minister may make regulations pertaining to the salaries and generally all other matters affecting staff, their conduct, their promotion and their disciplining.

25 On the all important matter of financing, s 10A provides that the Board is to be financed from moneys appropriated by Parliament for that purpose, as well as from moneys generated by the Board itself from

services rendered, donations, interest earned on moneys invested and the like. Under s 10A(3)(a), the Board must annually, at a time determined by the Minister, submit a statement of the Board's estimated income and expenditure for the next financial year. The Board may however also submit supplementary estimates.

26 Section 10A(2)(b) provides:

> The Board may utilise its funds only in accordance with a statement of its estimated income and expenditure *which has been approved by the Minister.*[9]

27 The Minister is not granted absolute powers of approval. He may, under s 10A(3)(b), only grant such approval with the agreement of the Minister of Finance.

28 Section 10B expressly codifies the Board's duty to keep proper accounting records relating to its finances. Under s 12, the Board must issue regular reports on at least a quarterly basis on its activities and finances to Parliament and must furnish the Minister with such information as he may require in this regard.

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9 My emphasis

29 "Minister" is defined in s 1 of the Act to mean the Minister responsible for the administration of the Act. It is obvious, then, that the Minister, who has been burdened with responsibility for the administration of the Act, is responsible to Parliament - and to the Minister of Finance - to justify the public moneys allocated to the Board by Parliament and to exercise oversight in relation to the interaction between the Board and its staff. It is also obvious that the Minister is entitled in the exercise of this oversight role to receive such information from the Board as may enable him efficiently to carry out these functions.

30 The context in which the Minister made his decision to dissolve the Board is that the Board has had several periods of crisis since its establishment. During 2011, the parliamentary portfolio committee on arts and culture asked the predecessor of the present Minister to intervene and stabilise the affairs of the Board.

31 The Department of Arts and Culture (the DAC) then investigated the matter and found that the Board as an institution had failed to implement its mandate or even identify how it intended to fulfil its mandate. There were apparently serious problems in the functioning of the governing body of the Board on the one hand and the institution itself on the other.

32 The way forward chosen by the Minister's predecessor was to dissolve the Board, ie the governing body, and, on 15 June 2012, to appoint an official named Mxolisi Zwane as caretaker chief executive officer. Unfortunately Zwane made things worse. Although Zwane's appointment was initially envisaged as being for six months only, his appointment was renewed during 2012, 2013 and into 2014.

33 In April 2014, the persons reflected as applicants in this review and the third respondent were then appointed as board members. Shortly after appointment the Board members attended a workshop where they were told how the Board was supposed to work in terms of relevant legislation, what was expected of Board members, how they should discharge their obligations under relevant fiscal prescripts and how the DAC and the Minister viewed their relationship with the Board. The imperative of fiscal responsibility was emphasised.

34 During 2014, the Board appointed Feni as acting CEO. A measure of infighting attended this appointment. The third respondent went so far in a letter to the Minister dated 4 May 2015, as to allege that the first applicant had used undue pressures to induce other Board members to accept Feni's appointment.

35 There also appeared to be a lack of fiscal probity on the part of the Board. In the report of the Auditor-General in relation to the Board's 2014/15 financial year, a disclaimer of opinion was issued. This was because the Auditor-General found that there was not enough audit evidence to support an audit opinion and that the cash flow statement had been materially misstated. The Auditor-General also submitted a detailed management letter in which this officer recorded his opinion that there had been a failure of function by the Board in many material respects; in particular, amongst others, that no strategic plan for 2015 to 2020 had been tabled in Parliament prior to discussion of the budget vote, that the Board's financial and risk management systems were inadequate, that annual and quarterly reports had not been submitted, that the financial statements were not prepared in accordance with law, that material misstatements in the financial statements which had been identified by the Auditor-General had not been corrected, that the procurement system of the Board was not fair, equitable, competitive and cost effective as required by law, that tenders had been awarded to family members, associates and the like of persons in service of the Board but that the latter had not disclosed their interests as required by law, that no effective steps had been taken to prevent irregular and wasteful expenditure and that no steps were taken against persons in service of the Board who offended in this manner.

36 The Auditor-General noted that the Board as governing body had been grossly remiss in its functions; in particular, it failed to establish and gazette six provincial language committees,[10] exercise oversight over and monitor National Lexicography Units,[11] and the Board had exceeded its approved expenditure,[12]

37 The DAC formed the view that the members of the Board were not conducting themselves as required by law. It sought to intervene with the Board to correct these perceived shortcomings. On 3 March 2015, a meeting was held between a parliamentary portfolio committee and members of the Board.[13] The manifold shortcomings of the Board were highlighted in the minute of this meeting.[14] The minute records that the first applicant stated to the portfolio committee that there had been high levels of targets not achieved: in the area of financial services, 63% of targets had not been achieved and for language services, 43% of targets had not been achieved. No less than 75% of the Board's budget was being spent on salaries.

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10 As required by s 8(8)(b)

11 Referred to in s 8(8)(c)

12 In contravention of s 10A(3)(c)

13 A previous meeting had apparently been convened but none of the Board members attended it.

14 Page 274 of the record prepared in response to the notice of motion initiating the review. These documents will henceforth be identified by the letter R; thus R274.

38 The portfolio committee addressed a specific problem which had arisen connected to the employment by Zwane as acting CEO of no less than 49 employees. It is not in dispute that these employees were not needed for the performance of the functions of the Board.

39 The Board took the opinion of an advocate who submitted two written opinions to the Board. I shall refer to this advocate as advising counsel, to distinguish him from the advocates who appeared before me. I regret to say that the opinions were premised on an egregious error of law. But the error of law arose from the fact that the instructions to counsel included a very serious misstatement of the true factual position.

40 Advising counsel was instructed as to fact by the first applicant. He recorded in what he called his preliminary opinion dated 17 November 2014 that there were

> ... general and at this stage only partially specified and partly substantiated accusations that these appointments occurred in breach of [the Board's] employment policy and the Regulations,[15]

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15 Made under the Act

that many of the appointments had been in favour of the ex-employees of an organisation with which Zwane had been connected or had other undisclosed links to Zwane and that it

> ... went without saying that the appointments were not made by a Board appointed CEO; nor were they sanctioned or approved by the Board since it did not exist during this period.

41 Advising counsel went on to record that at the start of 2014, "prior employees" of the Board had applied to court to have Zwane's appointment and the "hiring"[16] set aside; and that this application was pending and was being opposed by the then Minister and certain employees. Advising counsel said that he was not sure at what stage this litigation presently was.

42 Advising counsel was told that Zwane had been removed as acting CEO of the Board during June 2014 but was not told that Feni had been appointed in Zwane's place as acting CEO of the Board.

43 Advising counsel then proceeded to conclude that Zwane's appointment as acting CEO of the Board was unlawful and invalid. On the strength of this conclusion, advising counsel advised that the

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16 Advising counsel's inverted commas

appointments of the 49 staff members who had been appointed by Zwane were all equally invalid. Advising counsel opined:[17]

> If no valid employment contracts exist, the employees are not subject to retrenchment or any other form of termination of the "employment contracts" [*sic*]. The contracts are not enforceable against the Board at the instance of the employees; and for the sake of good order, the "employees should be advised that the contracts will be disregarded.

44 Advising counsel then concluded that the affected staff members would obtain no redress under labour law because they would have to prove that they were employees and on the information provided to advising counsel, they would not succeed in doing so; and that the staff members would fail to obtain interim relief because they would not establish a *prima facie* right to remuneration and the balance of convenience favoured the Board because the Board was bankrupt and the staff members had received what advising counsel called illegitimate benefit over a time period.

45 Advising counsel advised the Board[18] to

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17 Paragraph 29 of the preliminary opinion

18 Paragraph 32

> .., act immediately to notify the Zwane employees that it does not recognise the employment contracts and will make no further payments under them: employees must have known that they were not dealing with the Board; and because Zwane was not a Board agent , he could not have made any representation binding on the Board ... . Notice should also be given that the Board's right to seek to recover money paid as salaries by the Board from the employees [*sic*].

46 Advising counsel followed up his preliminary opinion with a final opinion dated 27 November 2014. Advising counsel reiterated the advice that the employment contracts with affected staff members should be disregarded and that no further payment of salaries should be made. Advising counsel however recognised that litigation was likely to follow.[19]

47 The Board and Feni lost no time in giving effect to this advice. In a letter dated 1 December 2014, the Board wrote to the staff members to tell them that the Board did not recognise their employment contracts and would be making no further payments to them.

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19 Paragraph 39

48 I said that advising counsel had made an egregious error. It is that in s 213 of the Labour Relations Act, 66 of 1995, "employee" means

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
>
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer ... .[20]

49 This means that the 49 staff members were all entitled to have their relationships with the Board conducted in accordance with fair labour practice. The Board could only terminate these relationships in accordance with a fair procedure. The Board was obliged to inform the staff members of the advice it had received and consider their arguments before it came to any final decision on the matter. That is encompassed within the concept of *audi alteram partem*. It is ironic, given one of the grounds of attack on the Minister's decision, that the Board did not hear the other side before it made its decision.

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20 The different definition of "employee" for the purposes of Chapter V of the Labour Relations Act is not relevant for present purposes.

50 Advising counsel was instructed that Zwane's appointment had been unlawful. But under case no. 64902/2012 in this court, Feni himself had applied as applicant for an order setting aside Zwane's appointment as acting chief executive officer or administrator or executive authority of the Board on the ground of the alleged invalidity of the appointment. Mokgoatlheng J handed down a written judgment in the matter signed by the judge on 19 October 2013. The learned judge dismissed the application. He found in terms that Zwane

> ... had been validly appointed as the accounting officer [of the Board] and ... consequently has the power and authority to appoint any employee in the advancements of the mandates which he occupies in that position.

51 The first applicant says that the Board saw the judgment for the first time in March 2015.[21] But in my view, the probabilities point so strongly to the conclusion that Feni reported to the first applicant that Mokgoatlheng J had so ruled that any suggestion by the first applicant to the contrary must be rejected on the papers. I therefore find that the two of them decided to suppress this inconvenient truth when the decision was made to take advising counsel's opinion. They therefore both knew that the very basis of counsel's opinion was false and had

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21 Founding affidavit para 155

been procured by a fraudulent concealment from counsel of the true position.

52 But even if the first applicant only became aware of the judgment in March 2015, he continued to cause the Board act in accordance with the advice expressed in the opinions, which by then at the very latest he must have known was untenable, on the grounds that the judgment was wrong, that the judgment was a nullity and even that it was not binding on the Board because no actual order had been made against the Board.

53 I called for the file in case no. 64902/2012. All the papers had been removed from the file. I was however able to obtain from the Supreme Court of Appeal a copy of the notice of application for leave to appeal dated 23 April 2014 lodged in that court by Feni as applicant. This document referred to the judgment of Mokgoatlheng J as having been handed down on 23 April 2013. I am unable to explain the discrepancy in the dates.

54 The heading of the judgment of Mokgoatlheng J is misleading. It can be seen from the notice of application for leave to appeal that in this court Feni was the applicant, the Minister was the first respondent, Zwane was the second respondent and the Board was the third

respondent. There were two further respondents, Karabo Mbele and Sam Jafta respectively.

55 The application to the SCA for leave to appeal was dismissed on 7 May 2015.[22] So the order and findings of Mokgoatlheng J in case no. 64902/2012 were binding on Feni, the Minister and the Board. If advising counsel had been told of the facts relating to case no. 64902/2012 as they stood when he was instructed to advise, he could not have come to the conclusions to which he came. Feni and the first applicant must have known this was so.

56 The litigation which even advising counsel had predicted came to pass. The papers before me show that eight of the staff members brought arbitration proceedings against the Board before the CCMA under case no. GATW1736-15. The matter came before Commissioner Kruger. The Board argued that the dismissal had been lawful because the employment contracts were void. In an award made on 21 October 2015, Commissioner Kruger found that because an employment relationship had existed, the manner in which the aggrieved staff members had been dismissed had been unfair. He said[23] that he was flabbergasted by the way the Board had elected to

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22 I established this from a copy of the order of the SCA sent to my registrar by the registrar of the SCA.

23 Paragraph 27

handle this matter. I can only agree. The Commissioner decided not to burden the taxpayers with what might possibly turn out to be invalid employment contracts and instead awarded the staff members 10 months salary each by way of compensation. The salaries of the staff members appear from the award. Together they amount to R314 184 per month. So the callous and impetuous decision to fire these eight employees, based on an opinion which had been procured by fraud, cost the Board more than R3 million in damages! I have no reason to suspect that the other 41 employees did not receive awards similarly based on 10 months salary each.

57 The Minister addressed a letter dated 24 November 2015 to the first applicant as the chairperson of the Board under the heading "NOTICE OF INTENTION TO EXERCISE POWERS IN TERMS OF SECTION 5(5A) OF THE PAN SOUTH AFRICA LANGUAGE BOARD ACT, NO. 59 OF 1995 (PANSALB ACT") AND A REQUEST FOR WRITTEN REPRESENTATIONS":

> 1 I refer to our continuous engagement pertaining to the governance and administration of PanSALB as well as the PanSALB turnaround strategy that we adopted, which strategy has to date not yielded any positive results.
>
> 2 I note that subsequent to our meeting in April 2015, you have still failed to show leadership over PanSALB resulting in a lack of governance. You will

recall that the Acting Director-General also had a few meetings with yourself and further exchanged correspondence with you in order to address some of the challenges that were affecting the proper functioning of PanSALB.

3 After careful analysis of the situation and perusal of correspondence exchanged between my Department and the PanSALB, I have noticed the following:

(a) The unlawful dismissal of PanSALB employees without following the due process and in circumstances where there was no Court Order directing otherwise;

(b) The complete disregard of the principle of *sub judice* or *lis pendens* in that the issues alleged to be the basis for dismissal of PanSALB employees were still under judicial consideration and therefore prohibited from actioning elsewhere;

(c) Failure to abide by a Court decision in that , both Mr Feni and the Board were aware (or ought to have been aware) that the North Gauteng High Court had in fact ruled that the former Caretaker CEO and Accounting Officer, Mr Mxolisi Zwane was properly appointed as caretaker CEO and accounting authority of PanSALB (Contempt of court);

(d) Failure to ensure the payment of pension and other benefits due to PanSALB employees as well as honouring current payments on behalf of the employees with relevant institutions (Negligence);

(e) Failure by PanSALB to submit Quarter 3 and Quarter 4 reports during the 2014/2015 financial year; and

(f) Late submission by PanSALB of the Strategic Plan for 2015/2016-2019/2020 as well as the Annual Performance Plan) for 2015/2016 financial year which

put the approval of the Budget vote for the Department at risk.

4 In light thereof, I intend exercising powers in terms of section 5(5A) of the Pan South African Language Board Act No. 59 of 1995 (PanSALB Act") to dissolve the Board.

5 Before making a decision whether or not to dissolve the Board of PanSALB, I hereby give you an opportunity to make written representations to me on why I should not dissolve the Board. The representations must be delivered to the Office of the Minister attention Acting Director-General Mr Vuyo Jack on the 9th Floor at Kingsley Centre **within 7 (seven) days from date of this letter**.

6 In the interim and pending my decision on this matter, the Board should not take any decisions which are likely to have a material impact on the operations and functioning of PanSALB.[24]

55 The Minister's letter, read broadly, makes three charges against the Board as governing body: firstly, that the Board as institution had not advanced its performance under the present governing body, which had failed to provide adequate leadership despite continuous interaction between the Board and the DAC and the adoption of an agreed turnaround strategy; secondly, that the Board as governing body had failed to provide the Minister with certain information for which he had asked, thereby placing the budget vote of the DAC at

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24 Emphasis as in original

risk; and, thirdly, that the Board as governing body had taken an unlawful and unjustified decision to dismiss the staff members appointed by Zwane even though it knew that this court had found in terms that Zwane's appointment had been valid and that Zwane had been entitled to hire staff.

56 The first applicant received the Minister's letter and asked for an extension to provide submissions. On or before 4 December 2015, the first applicant copied the Minister's letter to the other members of the Board. Apart from the first applicant, one other Board member responded to the Minister's letter: the third respondent, who sent submissions dated 7 December 2015 to the Minister. The third respondent asked the Minister, if possible to consider dissolving the Board but instead removing the first applicant, the Deputy Chairperson and "their Co-group" who the third respondent felt were "those responsible for the mess".

57 The first applicant responded, on behalf of the Board, to the Minister in a 113 paragraph letter dated 14 December 2015. The first applicant's letter is simply too long to quote in full. I shall summarise the first applicant's responses to the three broad charges I have identified.

58 As to the charge that the Board as institution had not advanced its performance under the then governing body and that this governing body had failed to provide leadership, the first applicant wrote that they had inherited an organisation which was afflicted by problems which went to the heart of governance and by the abuse of financial resources by the previous management. There was no money to hold board meetings and were constantly told by management that the organisation did not have money. They found out that the cause of the bankruptcy of the Board was caused by the Zwane staff appointments. The result was that the Board could not hold meetings of its governing body and could not execute its mandate. No parliamentary approval had been obtained to justify the organisational structure. This could not be remedied because all the Board's money went to pay salaries. The structures required to be established by law such as national lexicography units and national language boards had collapsed due to lack of funding.

59 The solution which the Board as governing body devised for this problem was, after receiving the opinion of advising counsel, to act by terminating the employment of the 49 staff members.

60 Secondly, in response to the charge of not providing information and thereby placing the budget vote of the DAC at risk, the first applicant wrote that he admitted that quarterly reports had not been submitted and blamed the CEO for that shortcoming. But he said that the Act did not require the Board to send quarterly reports to the Minister. Because the Board is independent, the first applicant said, the failure by the Board to submit its strategic plan could not have put the budget of the DCA at risk. He implied that the because the funding of the Board is in a legal sense separate from the funding of the DAC, the failure to submit the strategic plan could not impact on the budget of the DAC.

61 The first applicant then went on[25] to refer the Minister to the provisions of ss 4(1)(to (3) of the Act which protect the impartiality and independence of the Board, its members and officers and prohibit interference with their functions. It was implicit in these statements that the first applicant, on behalf of the Board was admonishing the Minister for having the temerity for calling the Board to account in the manner in which the Minister did.

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25 Paragraphs 106-7 of the letter

62 On the decision to terminate the employment of the 49 staff members, the first applicant sought to justify the conduct of the Board by reference to advising counsel's opinion and asserted that the decision of the Board had the result that money was saved because the staff members were no longer on the payroll. It was implicit in the response that the first applicant saw nothing wrong in the way that the Board had acted toward the 49 staff members and would act in the same manner if a similar problem arose in the future.

63 The Minister responded in a letter dated 12 January 2016 headed "NOTICE OF DISSOLUTION OF THE BOARD OF THE PAN SOUTH AFRICAN LANGUAGE BOARD IN TERMS OF SECTION 5(5A) OF THE PAN SOUTH AFRICAN LANGUAGE BOARD ACT NO. 59 OF 1995 ("PANSALB ACT")

> I refer to the above matter and to your letter dated 14 December 2015, the contents of which have been noted. Your correspondence was helpful in clarifying the position of the Board and has facilitated decision-making to conclude the matter.
>
> I do not wish to deal with each and every allegation contained in your letter. That I have not done so should not be construed as agreement with the contents of your letter and I reserve my right to do so at an appropriate stage.
>
> It is clear from your response, which is largely from and operational and not strategic perspective, that

* There is not a common understanding between the DAC and the Board of what the strategic role of the Board should be.
* The understanding of the Board and its role and mandate is inconsistent with the legislative mandate provided by the PanSALB Act and the Public Finance Management Act (No 1 of 1999).
* The Board does not understand or align to the frameworks governing the relationship between the Executive Authority and the Board, which is clearly demonstrated in the statements regarding the strategic plan of PanSALB and parliamentary budget processes.
* The Board acted imprudently with regard to the dismissal of employees, the Board made PanSALB vulnerable to legal claim by being unresponsive, the Board did not comply with statutory requirements and sufficient leadership was not demonstrated throughout the term of the Board.
* In sum, the Board has not implemented the objects of the Board as outlined in the PanSALB Act which are, in the main, the creation of conditions for the preservation, development, promotion and respect for official and other languages in South Africa.

In view of the above, I hereby dissolve the Board of PanSALB with immediate effect.

I hereby thank you and all members for having served on the Board, and wish you all the best in your future endeavours.

64 The Minister amplified his reasons for acting as he had done in his formal reasons dated 11 March 2016, furnished under rule 53(1)(b) of the rules of the High Court. In this document the Minister emphasised the fact of the discord which existed between him and the Board.

65 Counsel for the first applicant argued that by addressing the notice calling for submissions only to the first applicant and not to all the Board members, the Minister had failed to honour the principle of *audi alteram partem*. In the first place, this argument elevates form over substance. The request for submissions did in fact reach the other members in good time because the first applicant copied it to the other members, none of whom (except for the third respondent) elected to make submissions to the Minister.

66 In the second place, s 2(2) of the Act constitutes the first applicant as chairperson the representative of the Board. By giving the notice to the chairperson, the Minister gave notice to the Board itself. It was then for the chairperson to inform the other Board members of the notice, as the first applicant indeed did. It might have been different if, as a matter of fact, the chairperson had neglected to communicate the notice to other Board members. But this is not what happened.

67 One may contrast the provisions of s 5(5A) with those of s 5(4) which empower the Minister to terminate the membership of an individual Board member. There, of course, the principles of administrative law, if applicable, would require that notice be given to the individual member. But when the dissolution of the Board, as distinct from the membership of a Board member, is contemplated, it will be sufficient to give notice to the representative of the Board.

68 There is therefore no substance in the *audi* point. There is reason to believe that the *audi* point is linked to the specious claim by the first applicant that other Board members joined with him in bringing the review application. The first applicant probably wanted to create the false impression that it was the other Board members, rather than the first applicant, who were raising the *audi* point.

69 The way is now clear for a consideration of the actual merits of the first applicant's case. As I have said, I shall treat the action by the Minister as an instance of administrative action. That being so, the legitimacy, or otherwise, of the action must be considered with regard to the notice calling for submissions (as it were, the charges which the Minister levelled at the Board) and the reasons he gave for his decision.

70 The Minister is given the power by s 5(5A) to dissolve the Board on any reasonable grounds. "Reasonable", in this sense does not require that this court agree that the Minister took the correct decision. The decision will, all other things being equal, pass muster if the decision is one to which a reasonable person could have resorted. Put conversely: was the decision so unreasonable that no reasonable person would have resorted to it? Was there a rational objective basis justifying the connection made by the decision-maker between the material made available and the conclusion arrived at? See *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 3 SA 346 SCA paras 20-21.

71 Counsel for the first applicant sought to make something of the fact that in the letter dissolving the Board, the Minister had reserved his rights to amplify his response to the submissions of the Board. I do not think that there is anything of substance in this point. On the first applicant's submission, the Minister must be judged on the reasons he gave. That he might have had other, unexpressed, reasons does not carry the matter further.

72 The first broad charge is that the Board as institution had not advanced its performance under the present governing body, which had failed to provide adequate leadership despite continuous

interaction between the Board and the DAC and the adoption of an agreed turnaround strategy. It is not in dispute that the institution had indeed not met its targets under the turnaround strategy. The defence is that the Board was not voted the money by Parliament that it needed to do its work.

73 A reasonable decision-maker might, as the Minister did, have pointed to the fact that the Board had had over a year to achieve the desired improvements in the performance of the institution. There is no suggestion that the Board as executive body ever approached the DAC with a concrete proposal for emergency funding to enable it to do its work. It effectively remained supine and responded when it was urged to achieve more that it did not have the money to do so and that it was labouring under the disabilities caused by maladministration in by its predecessors.

74 This is sometimes colloquially called passing the buck. A reasonable decision-maker might describe the conduct of the Board as failing to provide adequate leadership. The Minister rejected the defence of lack of funds raised by the Board and found that the Board itself as governing body had failed to implement the objects of the Board as set out in the Act. The conclusion of the Minister in relation to the first broad charge was therefore not unreasonable.

75 The second broad charge is that the Board as governing body had failed to provide the Minister with certain information for which he had asked, thereby placing the budget vote of the DAC at risk. The defence is that the budget vote of the DAC is something separate from that of the Board and that the Minister was impermissibly trespassing into an area in which the Act had declared the Board to be an independent decision-maker. In more blunt terms, the first applicant told the Minister to mind his own business.

76 But the achievement by the Board of its aims and ensuring that the Board spent money allocated to it prudently and constructively *was* the Minister's business. I have described in detail how the architecture of the Act requires the Minister and the DAC to justify the conduct of the Board, fiscally and therefore to some extent operationally, to the Minister of Finance and to Parliament. The Minister's obligations in this regard are reinforced by the provisions of the Public Finance Management Act, 1 of 1999 and s 195 of the Constitution.

77 A reasonable decision-maker would have been entitle to regard the response of the first applicant to this charge as both ignorant and arrogant. It was irresponsible of an organ which relies for its financing on the subvention of public funds to treat the concerns expressed by the Minister in this way. There was simply no appreciation in the first

applicant's response to the Minister that the Minister was the conduit between the Board and Parliament.

78 Viewed in this light, it must be seen that the response of the first applicant that the budget of the Board was legally different from the budget of the DAC was inappropriate. While in a technical sense correct, the response sought impermissibly to evade the thrust of the Minister's concern: that by failing to cooperate with the Minister and the DAC, the Board was making the constitutional task of the DAC to justify its actions to Parliament more difficult.

79 The second broad charge was thus proved against the Board. A reasonable decision-maker would thus have been entitled, as the Minister did, to conclude that he could not continue to work with a Board which showed such a lack of appreciation for its own fiscal responsibilities and for the role of the Minister in ensuring accountability on the part of the Board.

80 The third broad charge related to the summary dismissal of the 49 staff members. The defence was twofold, that the Board had acted pursuant to an opinion given by advising counsel and that the conduct of the Board had achieved the desired result of getting rid of the staff members.

81 I have shown how vital information was withheld from advising counsel. I therefore consider that even at the most superficial level, the conduct of the Board in acting in accordance with the opinion cannot be justified.

82 But even if I were to assume that the Board members thought they might lawfully dismiss the staff members summarily and without a hearing, that does not dispose of the issue. A prudent and considerate Board would consider other options as well. Its members knew, if for no other reason than that advising counsel had told them so in the opinion, that litigation would probably follow if they acted on the advice they had been given. There is no indication that they considered other options. Included in these would, self-evidently, have been to calculate the probable financial consequences of following the advice against the financial consequences of undertaking a process of consultation and retrenchment. There is no indication that they consulted the DAC before they implemented the decision. They got the final opinion on or after 27 November 2014. They implemented the advice they received on 1 December 2014.

83 Furthermore, the response of the Board was not merely that its decision had been lawful. It asserted too that its decision had been

wise. The Minister did not think that the decision had been prudent. The Minister cannot be faulted in his conclusion.

84 It is manifest that the decision of the Board summarily to terminate the employment of the staff members would bring not only the Board, but also the Minister, as the minister responsible for the administration of the Act, into disrepute. A failure by the Minister to act against the Board might very well have given rise to the public perception that he associated himself with the Board's conduct.

85 The third broad charge is therefore established. A reasonable decision-maker would thus have been entitled to regard the conduct of the Board as justifying its dismissal.

86 It was argued on behalf of the first applicant that under the *Oudekraal* principle, the Minister could not fault the Board for its decision summarily to dismiss because this decision had not been set aside by order of a competent court. I do not consider that it was necessary for the Minister to follow this route. That the decision was binding in its sphere until duly set aside is no bar to the Minister's saying, in effect: "I do not think it is proper for a Board which takes such a manifestly illegal, foolish and cruel decision *and which shows no sign of appreciating the error of its ways* to remain in office."

87 The application can therefore not succeed. It must be dismissed. I turn to costs.

88 This is constitutional litigation in the sense that this term is used in *Biowatch Trust v Registrar, Genetic Resources* 2009 6 SA 232 CC paras 21-25. The general rule is that a private citizen who brings constitutional proceedings against the state should not be ordered to pay costs, even if unsuccessful. But this rule is subject to exceptions, eg where there is conduct on the part of the litigant which deserves censure by the court or is "manifestly inappropriate".

89 There are two features of the conduct of the first applicant in this case which both deserve censure and are manifestly inappropriate. The first is the false attempt to present other Board members as co-applicants. The second is the concealment from advising counsel of the judgment of Mokgoatlheng J or the persistence in the position taken after the first applicant became aware of this judgment or both such concealment and such persistence. These acts, independently, justify an award of costs against the first applicant.

90 I make the following order:

1 The application is dismissed,

2 The first applicant must pay the costs of the first respondent on the basis that the employment of both senior and junior counsel was justified.

3 The court, in the exercise of its powers to control its own process, hereby directs the State Attorney, Pretoria, to provide the Pretoria Society of Advocates and the Law Society of the Northern Provinces with hard copies of this judgment to enable those bodies to consider such disciplinary action against Advocate Zixolisile Feni and attorneys Makhafola & Verster Inc as each of them may see fit.

NB Tuchten
Judge of the High Court
15 August 2017

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For the first respondent:
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