

COPY

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: J564/21

In the matter between:

UNITED NATIONAL TRANSPORT UNION
OBO MEMBERS



Applicant

and

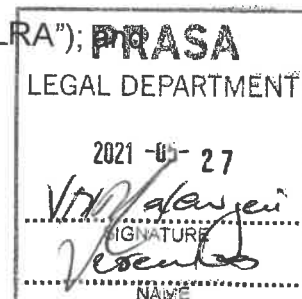
PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

NOTICE OF MOTION

TAKE NOTICE that application will be made on behalf of the Applicant on Tuesday, 8 June 2021 at 10h00 at the Labour Court (Johannesburg) or so soon thereafter as the matter may be heard for an order in the following terms:

1. **ORDERING** that the rules of this Honourable Court relating to notice, time periods and service are dispensed with and this application is heard as an urgent application.
2. **DECLARING** that the 2020 – 2023 Wage Agreement (“the Wage Agreement”) (attached to the Founding Affidavit as annexure “NH1”) is:
 - 2.1 a collective agreement, as defined in section 213 of the Labour Relations Act 66 of 1995 as amended (“the LRA”);
 - 2.2 valid and binding on the Respondent.



3. **DIRECTING** the Respondent to give effect to its obligations in terms of the Wage Agreement, and in particular:
 - 3.1 by implementing the wage increase as contained in paragraph 2 of the Wage Agreement, within 10 days of this Order; and
 - 3.2 by paying the retrospective portion of the wage increase, which applies with effect from 1 April 2021, within 10 days of this Order.
4. In the alternative to prayer 3 above:
 - 4.1 **ORDERING** the Respondent to pay each of the Applicant's members who fall within the "bargaining unit", as per clause 2.1 of the Wage Agreement, the agreed wage increases due in terms of the Wage Agreement, within 10 days of this Order.
5. Ordering the Respondent to pay the costs of this application, including the costs of counsel.
6. Further or alternative relief.

TAKE NOTICE FURTHER that the affidavit of **CORNELIUS HAASBROEK** and annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER that if the Respondent intends opposing this application, it must serve and file its notice of intention to oppose and answering affidavit (if any) by no later than 14h00 on Thursday 3 June 2021, failing which this application may be heard in the Respondent's absence.

TAKE NOTICE FURTHER that the Applicants have appointed Fluxmans Incorporated, at the address stated below, as its attorneys of record at which address, email and fax it will accept service of all process in this application.

KINDLY ENROL THIS MATTER FOR HEARING ACCORDINGLY.

Dated at **JOHANNESBURG** on this the 26th day of **MAY 2021**.



FLUXMANS INC.

Applicant's Attorneys

30 Jellicoe Avenue, Rosebank

Johannesburg, 2196

Private Bag X41, Saxonwold, 2132

Tel: (011) 328 1823

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E-mail: bmarques@Fluxmans.com;

and dmer@fluxmans.com

Ref: D Mer / B Marques / 00145794

TO:

**THE REGISTRAR OF THE LABOUR COURT
JOHANNESBURG**

FILING BY HAND

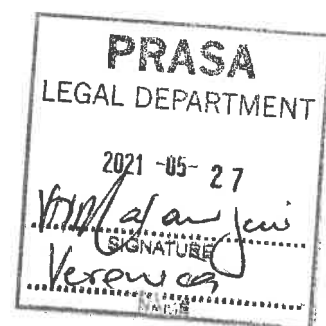
AND TO:

PASSENGER RAIL AGENCY OF SOUTH AFRICA

The Respondent

Umjantshi House

Fluxmans



30 Wolmarans Street

Braamfontein, Johannesburg

Tel: (012) 748 7000

E-mail: tandeka.mabija@prasa.com; dlroux@prasa.com

FOR ATTENTION: MS TANDEKA MABITJA

SERVICE BY EMAIL & BY HAND

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: J564/21

In the matter between:

**UNITED NATIONAL TRANSPORT UNION
OBO MEMBERS**



Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

CORNELIUS HAASBROEK

do hereby make oath and state as follows:

1. I am an adult male Deputy General Secretary of the Applicant. I am duly authorised to depose to this founding affidavit and to launch this urgent application on behalf of the Applicant.
2. The facts contained in this founding affidavit are true and correct and, save where otherwise stated or where the converse appears from the context, within my personal knowledge.

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3. PARTIES

3.1 The Applicant is the **UNITED NATIONAL TRANSPORT UNION** (“**UNTU**”), a trade union registered in accordance with the provisions of section 95 and 96 of the Labour Relations Act 66 of 1995 as amended (“**the LRA**”), with its head office situated at **UNTU House**, 182 Louis Botha Avenue, Houghton Estate.

3.2 **UNTU** brings this application on behalf of its members who are employed by the Respondent in the below-mentioned bargaining unit, on its own behalf, and in the interests of its members generally.

3.3 The Respondent is the **PASSENGER RAIL AGENCY OF SOUTH AFRICA** (“**PRASA**”), a state-owned rail and transport utility established in terms of section 2 of the Legal Succession to the South African Transport Services Act 9 of 1989 (“**the SATS Act**”), with its principal place of business at Umjantshi House, 30 Wolmarans Street, Braamfontein, Johannesburg.

4. PURPOSE OF THIS APPLICATION

4.1 The purpose of this application is to:

4.1.1 declare that the wage agreement concluded between **UNTU** and **PRASA** for the period 2020 to 2023 (“**the Wage Agreement**”) is valid and binding on **PRASA** as a collective agreement. A copy of the **Wage Agreement** is attached as annexure “**NH1**”; and

4.1.2 seek enforcement of the **Wage Agreement** – in other words, to seek an order compelling **PRASA** to comply with the **Wage Agreement**, by honouring its obligations to pay the agreed wage increase (particularly the increase that became due in April 2021).



4.2 The claims listed above are the primary claims, which are advanced in terms of section 158(1)(a)(ii), (iii) and (iv) of the LRA.

4.3 In the alternative, this application seeks to enforce the contractual rights of those UNTU members who fall within the scope of the Wage Agreement, to the payments due to them in terms of the Wage Agreement. This claim is brought in terms of Section 77 of the Basic Conditions of Employment Act (“the BCEA”), read with section 158(1)(b) of the LRA.

5. JURISDICTION

5.1 The applicant asserts that the Labour Court has jurisdiction to determine the main claims, in terms of section 157(1) and (2) of the LRA, in that the claim is for the enforcement a collective agreement, where no dispute exists as to the application or interpretation thereof, and where the failure by PRASA to comply with the terms of the collective agreement has a direct impact on the fundamental rights of UNTU and its affected members, to engage in collective bargaining, and to strike.

5.2 UNTU asserts that the Labour Court has jurisdiction to determine the alternative claim, in terms of section 157(1) of the LRA, read with section 77 of the BCEA.

6. BACKGROUND

6.1 PRASA, the Unions and the Board

6.1.1 PRASA employs approximately 14 000 employees countrywide. UNTU is the majority union at PRASA and has 48%

membership of employees within the bargaining unit. The South African Transport and Allied Workers Union ("SATAWU") has approximately 36% membership within the bargaining unit. The "bargaining unit" comprises of all employees below level 610.

6.1.2 As the majority union, UNTU has concluded a recognition agreement with PRASA. Also, during 2015, PRASA, UNTU and SATAWU established a bargaining forum, called the PRASA Bargaining Forum, to *inter alia* manage collective bargaining processes.

6.1.3 For the purposes of this application, it is necessary to briefly set out, the recent history pertaining to the PRASA Board of Control ("the Board"). In this regard:

6.1.3.1 during or about December 2019, Transport Minister Fikile Mbalula ("Mbalula"), dissolved PRASA's then interim Board and appointed Mr Bongisizwa Mpondo ("Mpondo") as the administrator of PRASA;

6.1.3.2 however, during August 2020, the Western Cape High Court handed down judgment in a matter¹ where it held that Mpondo's appointment was unlawful.

6.1.3.3 as a result of this judgment, National Treasury appointed Mr Badisa Matshego ("Matshego") to serve as PRASA's interim Accounting Authority with effect from 1 September 2020, pending the appointment of a new Board; and

6.1.3.4 a new Board was approved by Cabinet during or about October 2020 and Badisa's tenure came to an end on or

¹ #Unitebehind v Minister of Transport and Others (2058/2020) [2020] ZAWCHC 85; [2020] 4 All SA 593 (WCC) (25 August 2020), available on www.saflii.org.

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about 27 October 2020. Mr Leonard Ramatlakane (“Ramatlakane”) was appointed as the Board Chairperson, and Ms Thandeka Mabija (“Mabija”) was appointed as the Acting Group Chief Executive Officer (“AGCEO”); and

6.1.3.5 a copy of a PRASA Internal Communique dated 27 October 2020 regarding the meeting of the new Board and the appointment of the AGCEO is attached as annexure “NH2”.

6.1.4 As PRASA’s interim Accounting Authority, Matshego had the authority to mandate and approve wage increases. Matshego was appointed by Treasury and during his tenure, acted as the Board.

6.1.5 Also, during the course of wage negotiations at the PRASA Bargaining Forum (as set out below), at numerous meetings that took place, it was confirmed by the PRASA Negotiating Team that it had the requisite authority to negotiate and the requisite mandate to conclude a wage agreement. The PRASA Negotiating Team was headed by PRASA’s head negotiator, Advocate Des Le Roux, PRASA’s Executive Employee Relations Manager (“Le Roux”).

6.2 The Wage Negotiations – General Process

6.2.1 The normal manner in which PRASA negotiates wage agreements and other collective agreements with trade unions, is to appoint a negotiating team, which presents offers and negotiates on behalf of PRASA. The trade unions in turn also appoint a negotiating team to put forward and negotiate their members’ demands.

6.2.2 Once negotiations have reached the stage of in-principle agreement, both teams revert to their principals or constituents for final instructions and a mandate to conclude the collective agreement. If mandates are received, the collective agreement is signed on behalf of both parties, and is of immediate binding effect on all signatories.

6.2.3 This is the manner in which PRASA and UNTU have engaged in collective bargaining for many years. I have headed up UNTU's negotiating team for four years, and I have previously negotiated with Le Roux, as head of PRASA's Negotiating team, and her predecessor, Mr Bhekisisa Mchunu. We have always, within the constraints of collective bargaining, enjoyed an open and constructive working relationship. Le Roux would have informed me if there were any conditions attached to PRASA's final settlement proposal, which was embodied in the draft wage agreement prepared by PRASA. She did not inform me that the agreement was subject to any kind of "ratification" or other authorisation process within PRASA.

6.3 The Wage Negotiations Culminating in the Wage Agreement

6.3.1 During or about February 2020, PRASA commenced wage negotiations with UNTU and SATAWU. A lengthy negotiation process, interspersed by the COVID-19 lockdown, followed. I do not set out the detailed sequence of the negotiation process, but I highlight the more significant events below.

6.3.2 During early August 2020 UNTU and SATAWU made a consolidated wage demand to PRASA. This was followed by counter and revised counteroffers by PRASA, and by revised wage demands by UNTU and SATAWU during August 2020.

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- 6.3.3 On 26 August 2020, PRASA made a final offer to UNTU and SATAWU. A copy of the Final Wage Offer (of August 2020) is attached as annexure "NH3". According to the Final Wage Offer (of August 2020), "*the Management Team of the PRASA Bargaining Forum*" was mandated to make the offer as set out in the Final Wage Offer (of August 2020).
- 6.3.4 Neither UNTU nor SATAWU agreed to the Final Wage Offer (of August 2020), and a mutual interest dispute was referred to the Commission for Conciliation, Mediation and Arbitration ("the CCMA"). A copy of the LRA Form 7.11 is attached as annexure "NH4".
- 6.3.5 Despite further negotiations, the dispute remained unresolved and a Certificate of Non-resolution dated 28 September 2020 was issued. A copy of the Certificate of Non-resolution is attached as annexure "NH5". Failing agreement, UNTU and SATAWU were entitled to engage in protected strike action in support of their wage and related demands.
- 6.3.6 On 9 October 2020, PRASA presented a revised final offer to UNTU and SATAWU. A copy of the revised final wage offer is attached as annexure "NH6."
- 6.3.7 UNTU engaged with its members on PRASA's revised final offer. One reason why members were keen to conclude an agreement was because the revised final offer accepted that there would be no retrenchment of employees in the bargaining unit for the duration of the agreement. Another reason why members were particularly keen to conclude an agreement, rather than embark on strike action, is because PRASA's revised final offer would have the effect that the members would receive payment of a wage increase, backdated to April 2020,

within a short period of time after concluding an agreement.

6.3.8 This was an extremely important factor for members during our deliberations with them, as it meant that, instead of engaging in strike action for an unknown length of time, and losing income as a result of the inevitable application of the no work, no pay rule, they would now be able to take home extra money before the December holidays. In a year of severe economic hardship, where many members have lost income due to reduced train services, the promise of quick payment of arrear increases played a substantial and critical role in the ultimate decision of members to compromise their fundamental right to strike for the following three years.

6.3.9 During the final negotiations preceding the conclusion of the Wage Agreement, I interacted with Le Roux extensively on the timing of the payment of accrued increases. We agreed that the arrear increases would be paid once off, in a separate pay run from the normal salary pay run. Practically, what this meant was that PRASA would have to load the arrear increase payments on the payroll system, and execute them as a one-off pay run. The timing of this pay run was of great interest to UNTU members, for the reasons set out above.

6.4 The Wage Agreement

6.4.1 On 23 October 2020, UNTU and PRASA concluded the Wage Agreement, but SATAWU refused to sign same. In summary, the Wage Agreement is multi-year wage agreement, which covers the 2020/12, 2021/22 and 2022/23 financial years, with a 5% salary increase for bargaining unit employees in each of the three financial years.

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6.4.2 More specifically, in terms of the Wage Agreement, it was agreed between the parties *inter alia* that:

"1. YEAR 1: ANNUAL SALARY INCREASE 2020 – 2021

1.1. *PRASA shall effect a 5% increase on Total Guaranteed Package, across the board, for permanent and fixed term contract bargaining unit employees, who are employed in its Corporate Office, PRASA Rail, PRASA Technical and PRASA CRES, with effect from 1 April 2020..."*

"2. YEAR 2: ANNUAL SALARY INCREASE 2021-2022

2.1 *PRASA shall effect a 5% increase on Total Guaranteed Package, across the board, for permanent and fixed term contract bargaining unit employees, who are employed in its Corporate Office, PRASA Technical and PRASA CRES, with effect from 1 April 2021..."*


"5. GENERAL

5.1. *This salary increase will be effective from 1 April 2020, retrospectively.*

5.2 *This agreement constitutes the entire agreement between the parties regarding the annual wage negotiations for the three (3) financial years from 1 April 2020, ending 31 March 2023."*

6.5 **Application under Case Number: J1367/20**

6.5.1 On account of the fact that PRASA did not initially honour the payment of the back dated increase for the Applicant's members, the Applicant had no alternative but to file an

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application in the Labour Court to, *inter alia*, seek to obtain an order directing PRASA to comply with its obligations in terms of the Wage Agreement and in particular to order them to pay the retrospective portion of the wage increase with effect from 1 April 2020.

6.5.2 Following the hearing of the opposed application on 27 November 2020, PRASA complied with its undertakings to pay the Applicants members the salary increase with effect from 1 April 2020 retrospectively.

6.5.3 On 9 December 2020, Justice Nkontwana rendered a Judgment which is attached hereto marked "NH7".

6.6 The reasoning of the Court was that the enforcement of Collective Agreements was not a novel issue and that the Court could not come to the assistance of the Applicant to enforce the Wage Agreement on an urgent basis.

6.7 What is important however is that prior to judgment being rendered, PRASA in fact recognised its obligations in terms of the Wage Agreement and paid the Applicant's members their retrospective portion of their increase backdated to April 2020.

6.8 This is an important consideration which will be not only advanced in this affidavit but also in legal argument when this application is heard.

6.9 2021 Increase

6.9.1 PRASA has not paid the Applicants members the 2021 increase that was due to be paid before the end of April 2021.

6.9.2 On 23 April 2021, the Applicants attorneys of record, Fluxmans

Incorporated ("Fluxmans") addressed correspondence to PRASA indicating, inter alia, that unless the Applicants members were paid the 5 percent increase, the Applicants rights remain reserved to take further action including, inter alia, filing proceedings in the Labour Court. A copy of this correspondence is attached hereto as Annexure "NH8".

6.9.3 Management of PRASA requested time until Friday 7 May 2021 to engage with the Director General of Labour and Treasury and undertook to provide feedback by no later than close of business on 7 May 2021.

6.9.4 As a show of good faith UNTU was prepared to hold the matter in abeyance until 7 May 2021.

6.9.5 On 7 May 2021, the Applicant received communication that following meetings between PRASA and the Department of Transport it was agreed that PRASA would, through the Department of Transport, apply to the Treasury for the necessary financial assistance. PRASA's correspondence is attached as "NH9"

6.9.6 Following this communication, the Applicant received no formal feedback or input from PRASA.

6.9.7 After considering its position and taking into account the interest of its members, UNTU instructed its attorneys to address correspondence to PRASA on 19 May 2021 placing PRASA on terms to comply with its undertakings as contained in the Wage Agreement. PRASA was furnished until close of business on Friday 21 May 2021, to pay the 5% increase to UNTU members that would have become due at the end of April 2021. A copy of this correspondence is attached as "NH10".

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6.9.8 PRASA has not responded to this communication at all.

7. **LEGAL SUBMISSIONS**

7.1 **A Clear Right**

7.1.1 UNTU seeks relief aimed at enforcing rights contained in a collective agreement – the Wage Agreement.

7.1.2 There is no dispute between UNTU and PRASA as to whether the Wage Agreement applies here – it clearly does.


7.1.3 There is no dispute between UNTU and PRASA as to how to interpret the Wage Agreement in these circumstances.

7.1.4 I am advised that, in the circumstances, the appropriate remedy is to approach the Labour Court for appropriate relief.

7.1.5 UNTU seeks a declaratory order that the Wage Agreement is valid and immediately binding on the Respondent. The granting of the declaratory order would ensure certainty and promote orderly collective bargaining, and I submit that UNTU has a clear right to this relief.

7.1.6 UNTU also seeks to enforce the terms of the Wage Agreement, in circumstances where PRASA have not honoured its terms, and no valid legal reason exists to justify PRASA's non-performance.

7.1.7 As set out in the factual background above, PRASA has failed to implement the Wage Agreement, and has alleged that the Wage Agreement still needs to be approved by National Treasury.

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7.1.8 The Wage Agreement has been ratified and approved. In this regard it is submitted that:

7.1.8.1 the Wage Agreement was signed on behalf of PRASA by Advocate Des Le Roux, PRASA's Senior Employee Relations Manager and a member of PRASA's Management / Negotiating Team;

7.1.8.2 PRASA's Management / Negotiating Team were duly authorised to conclude the Wage Agreement on behalf of PRASA;

7.1.8.3 the Accounting Authority has the requisite authority to approve wage increases;

7.1.8.4 the Wage Agreement was concluded by the parties without any requirement, understanding or agreement whatsoever that the validity / binding nature / implementation thereof would be subject to ratification by the new Board;

7.1.8.5 the Wage Agreement was concluded by the parties without any requirement, understanding or agreement whatsoever that the validity / binding nature / implementation thereof would be contingent upon some form of "update" or input from National Treasury.

7.1.9 In light of the above, it is submitted that the Wage Agreement is a valid and immediately binding collective agreement. Ratification by the Board and/or a response / "update" from Treasury is simply not required. In concluding the Wage Agreement, PRASA immediately acquired the obligations contained therein (and the acquisition of such rights is not

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subject to ratification).

7.1.10 The Wage Agreement is evidently the product of extensive collective bargaining. PRASA's failure to comply with its terms is inimical to the principle of orderly and productive collective bargaining. It should be borne in mind, as set out above, that:

7.1.11 By agreeing to the terms of the Wage Agreement, UNTU's members effectively waived their fundamental right to engage in strike action in support of demands on matters of mutual interest.

7.1.12 The stance of PRASA regarding the payment of the backdated increases in 2020 and the failure in 2021 to pay the yearly increase of 5% is concerning. It appears as if PRASA is delaying the payment of the 5% yearly increase that is due to UNTU members.

7.1.13 The Constitutional Court² has held that:

"[55] The right of every trade union and every employers' organisation and employer to engage in collective bargaining is entrenched in section 23(5) of the Constitution. The concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process.

[56] Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreement. The right to engage in collective bargaining and to enforce the provisions of

² In *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC)

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the collective agreement is an especially important right for the workers who are powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law.

[57] And what is more, this case concerns a claim brought on behalf of 250 of about 300 workers who are complaining that their employer has failed to comply with a binding collective agreement. ..."

(Emphasis added)


7.1.14 It is these principles that guide the present application. The Wage Agreement affects the rights of 6302 UNTU members and approximately 1948 non-unionised employees.

7.1.15 I am advised and submit that the Applicant has a clear right to approach the Labour Court for urgent relief aimed at enforcing the specific terms of a collective agreement, where no other suitable legal remedy exists, and where the rights in question are of a time-sensitive nature, and affect constitutional rights. This is the primary claim.

7.1.16 In the alternative, UNTU asserts, on behalf of its members in the bargaining unit, that:

7.1.16.1 the terms of the Wage Agreement are incorporated by operation of law into the employees' employment contracts, where applicable;

7.1.16.2 the right of employees to the 5% increment to their wages

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and to prompt payment thereof are terms incorporated into their employment contracts;

7.1.16.3 these employees are therefore entitled to sue for payment of monies due to them in terms of their employment contracts, in terms of section 77(3) of the BCEA.

7.2 Breach of the Clear Right

7.2.1 By failing to implement the Wage Agreement, PRASA has breached the rights of the other parties to the collective agreement i.e. UNTU, its members and non-members to whom the Wage Agreement was extended.

7.2.2 UNTU does not accept the above-mentioned breach and requires specific performance by PRASA of the Wage Agreement. In this regard, UNTU seeks enforcement of the Wage Agreement.

7.2.3 Given that National Treasury has interfered in the compliance by other Organs of State with obligations incurred in collective agreements, UNTU is concerned that PRASA's failure to comply with its obligations is not going to be remedied any time soon.

7.3 No Alternative Remedy

7.3.1 UNTU and the employees have no alternative effective remedy but to seek a declaratory order and enforcement of the collective agreement. In amplification, it is the Labour Court that has the power, in terms of section 158(1)(a)(i),(ii),(iii) and (b) of the LRA, to grant appropriate relief, including declaratory and interdictory

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relief, aimed at righting a wrong and giving effect to the primary objects of the LRA; and ordering compliance with any employment law, including the BCEA.

7.3.2 One of the primary objects of the LRA is the promotion of orderly collective bargaining. This is in effect what the application seeks to do.

8. URGENCY


8.1 PRASA undertook to implement the Wage Agreement during November 2020. This undertaking played a significant role in the decision of UNTU and its members not to embark on strike action, but rather to accept the employer's offer and conclude the Wage Agreement.

8.2 Should this application be heard in the ordinary course, PRASA's delay in complying with its obligations under the Wage Agreement will effectively be condoned.

8.3 It is highly likely (if not inevitable) that as has been shown through PRASA 's conduct they do not intend to implement the terms of the Wage Agreement.

8.4 It is submitted that failure to grant the relief sought will have serious financial and social consequences – in an already strained economic environment (taking *inter alia* the COVID-19 pandemic into account).

8.5 More importantly, and as set out above there are fundamental constitutional rights affected by PRASA's failure to perform, which require the urgent intervention of this Court. This is not simply a claim for money. UNTU's members contracted out of their right to strike for the next three years, based on PRASA's wage offer, part of which was

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to implement the salary increases.

- 8.6 If UNTU were to call a strike in support of a demand for immediate payment of backdated increases, PRASA would be entitled to approach this Court for urgent interdictory relief, as the strike would contravene the peace clause contained in the Wage Agreement. Similarly, UNTU should be able to approach this Court to enforce time-sensitive obligations in the Wage Agreement. A finding that the matter is not urgent, would have Constitutional implications, as the effect would be to damage the sanctity of collective agreements, and to unfairly skew the balance of power in collective bargaining in favour of the employer. This point was argued in the urgent application filed to enforce PRASA's obligation to pay the 2020 increases backdated to April 2020.
- 8.7 The current and prevailing facts and circumstances make this application urgent.
- 8.8 PRASA accepted its responsibility to pay the Applicant's members their salary increase backdated to April 2020 following the hearing of the urgent application in November 2020.
- 8.9 Once again and now that the second yearly increase has fallen due, PRASA has again failed to comply with its obligations as recorded in the Wage Agreement and relied on the explanation that it needs to approach the National Treasury for the appropriate funds.
- 8.10 It is therefore to be expected that every time the Applicant's members are due their 5% increase, PRASA would adopt the same approach and contend that they seek assistance from a funding perspective.
- 8.11 An important precedent needs to be made that Organs of the State of the Republic of South Africa need to comply with Collective Agreements concluded in good faith with organised labour failure to do

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so should have detrimental and far reaching ramifications for collective bargaining.

8.12 The Applicant's members have reasonably budgeted for their increase in remuneration for the years that the Wage Agreement relates to and the non-payment of the increase has a severely prejudicial effect on the Applicant's members.

8.13 Even though the Courts have shown the reluctance to urgently enforce Collective Agreements, one is dealing in this instance with a multi year Collective Agreement which provides for yearly increases to the Applicant's members remuneration.


8.14 In the event that this Court does not deem the application urgent, it is highly unlikely that the Applicant's members would be able to successfully enforce their rights in an alternative forum before the 2022 increase would fall due.

8.15 This would clearly be an untenable situation for the Applicant's members and the conduct of PRASA should not be condoned.

WHEREFORE I pray that an order in terms of the Notice of Motion to which this Founding Affidavit is attached is granted.



CORNELIUS HAASBROEK


I CERTIFY that this affidavit was SIGNED and SWORN TO before me at Hercules on this the 26 day of **MAY** 2021, the Deponent having acknowledged that he knows and understands the content of this affidavit, the Regulations contained in Government Notice No 1258 of 21 July 1972 and R1648 of

19 August 1977, having been complied with.

2001-05-26
SUPPORT SERVICES
COURT HOUSE 400 W. 10TH ST. S.W. OKLAHOMA CITY, OKLA. 73102

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[Signature]
COMMISSIONER OF OATHS

"NHI" 22

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PASSENGER RAIL AGENCY
OF SOUTH AFRICA

2020 – 2023 WAGE AGREEMENT

Made and entered into by and between:

**Passenger Rail Agency of South Africa
(Herein referred to as the "PRASA")**

And

**UNITED NATIONAL TRANSPORT UNION (UNTU)
(Herein referred to as the "Trade Union")**

**(PRASA and UNTU herein collectively referred to as
"the parties")**



Page 1 of 4

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The parties hereby agree as follows:

1. YEAR 1: ANNUAL SALARY INCREASE 2020-2021

- 1.1 PRASA shall effect a 5% increase on Total Guaranteed Package, across the board, for permanent and fixed term contract bargaining unit employees, who are employed in its Corporate Office, PRASA Rail, PRASA Technical and PRASA CRES, with effect from 1 April 2020.
- 1.2 The parties will ensure the conclusion of performance management contracting for bargaining unit employees.
- 1.3 There will be no retrenchments of employees in the bargaining unit in the Corporate Office, PRASA Rail, PRASA Technical and PRASA CRES, for the duration of this agreement.
- 1.4 There will be no strikes pertaining to this agreement, in particular on salaries during the period of the wage agreement.

2. YEAR 2: ANNUAL SALARY INCREASE 2021-2022

- 2.1 PRASA shall effect a 5% increase on Total Guaranteed Package, across the board, for permanent and fixed term contract bargaining unit employees, who are employed in its Corporate Office, PRASA Rail, PRASA Technical and PRASA CRES, with effect from 1 April 2021.
- 2.2 There will be no retrenchments of employees in the bargaining unit in the Corporate Office, PRASA Rail, PRASA Technical and PRASA CRES, for the duration of this agreement.
- 2.3 There will be no strikes pertaining to this agreement, in particular on salaries during the period of the wage agreement.

(Handwritten signatures and initials in blue ink)

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PE ...



3. YEAR 3: ANNUAL SALARY INCREASE 2022-2023

- 3.1 PRASA shall effect a 5% increase on Total Guaranteed Package, across the board, for permanent and fixed term contract bargaining unit employees, who are employed in its Corporate Office, PRASA Rail, PRASA Technical and PRASA CRES, with effect from 1 April 2022.
- 3.2 There will be no retrenchments of employees in the bargaining unit in the Corporate Office, PRASA Rail, PRASA Technical and PRASA CRES, for the duration of this agreement.
- 3.3 There will be no strikes pertaining to this agreement, in particular on salaries during the period of the wage agreement.

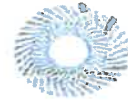
4. APPLICABILITY AND CONDITIONS

- 4.1 This agreement will be applicable only to active, eligible employees in the bargaining unit, as at the date of signing of this agreement.
- 4.2 All employees in the risk pool are excluded from this agreement.
- 4.3 This agreement is also applicable to all non-unionised employees within the bargaining unit.
- 4.4 This agreement is valid for a period of three (3) years from 1 April 2020 to 31 March 2023.

5. GENERAL

- 5.1 This salary increase will be effective from 1 April 2020, retrospectively.

(Handwritten signatures and initials)
 A large blue circular stamp is visible at the top of the signature area. Below it, there are several handwritten signatures and initials in black ink, including what appears to be 'C/P', 'D/R', and 'P/E'.



5.2 This agreement constitutes the entire agreement between the parties regarding the annual wage negotiations for the three (3) financial years from 1 April 2020, ending 31 March 2023.

5.3 This agreement replaces any previous wage agreement(s) entered into by the parties.

6. DISPUTE RESOLUTION

6.1 Any dispute relating to the validity, interpretation and application of this wage agreement or on any matter relating to this agreement, shall be determined or resolved through a dispute resolution process as determined by the Labour Relations Act of 1995, or any other labour dispute resolution settlement services agreed to and appointed by the parties.

This agreement was concluded and signed by the parties in Kempton Park, on this 23 day of October 2020 2020, in the presence of the undersigned witnesses:

DULY AUTHORISED SIGNATORIES

Desiree Lebloux

Name of PRASA Representative

MHO SHERA

Name of PRASA Witness

CJ HANSEN

Name of UNTU Representative

C. BOTHA

Name of UNTU Witness

[Signature]

Signed for and on behalf of PRASA

[Signature]

Signature of PRASA Witness

[Signature]

Signed for and on behalf of UNTU

[Signature]

Signature of UNTU Witness

[Handwritten initials]
[Handwritten initials]
[Handwritten initials]



NEW PRASA BOARD MEETS, APPOINTS ACTING GCEO

Dear Colleagues,

The newly appointed Board of Control of the Passenger Rail Agency of SA (PRASA) has met virtually for the first order of business today.

The meeting took a number of resolutions in line with the project of stabilising PRASA and turning the agency around. Today also marked the end of the tenure of the Accounting Authority Mr. Badisa Matshego, who had been seconded to the position for a limited period, as per the ruling of the Western Cape High Court.

The Board took the following resolutions:

1. Group Executive for Human Capital Management (HCM) Ms. Thandeka Mabija has been appointed Acting Group Chief Executive Officer (AGCEO) with immediate effect. Ms. Mabija will act in the role for a period not exceeding three months. The process to recruit a permanent GCEO will begin immediately and will run concurrently with the headhunting process.
2. The Board will meet again on the 30th October 2020 to consider the agency's Annual Report and the Annual Financial Statement.
3. The outgoing Accounting Authority will later make a formal handover to the Board of Control. The Board further thanked Mr. Matshego for holding the fort for the past few weeks since taking over from the erstwhile Administrator Mr. Bongisizwe Mpondo.
4. Only permanent officials may hold acting positions. The AGCEO has been further mandated to appoint suitable officials to act in vacant executive positions.

Said Mr. Ramatlakane of the Board decisions, "the turnaround and stabilisation of PRASA is continuing and being expedited. PRASA is a very important cog in the engine of the South African economy and the passenger rail agency serves the vulnerable in our society, which are low-income earners, job-seekers and poor people.

"PRASA is too big and too important to fail. As the Board we will ensure that all that needs to be done is done to bring the agency back to full functionality," concluded Mr. Ramatlakane.

Issued by
The Chairperson of the PRASA Board of Control
Mr Leonard Ramatlakane.



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prasa

PASSENGER RAIL, AIRCRAFT
OF SOUTH AFRICA

PRASA HOUSE
1040 Barnard Street
Midrand
Pretoria

Private Bag 5101
Dunfermline, 2017
T: +27 12 349 7818

Ms Miriam Mofokeng
Secretary
PRASA Bargaining Forum

PRASA WAGE OFFER

1. INTRODUCTION

The Management Team of the PRASA Bargaining Forum is mandated as follows for the current wage negotiations.

2. WAGE NEGOTIATIONS MANDATE

2.1 A three (3) year Wage Agreement, with effect from 1 April of each year.

2.2 YEAR 1: 2020/21

- **3% increase:** The basic pensionable salary (including 13th cheque, overtime, fringe benefits and allowances) of permanent and fixed term contract bargaining unit employees at PRASA, across the board.
- Conclude performance management contracting for bargaining unit employees
- Develop and implement new shift pattern in line with approved shift pattern guidelines.
- Develop Productivity Measures

2.3 YEAR 2: 2021/22

- **3% increase:** The basic pensionable salary (including 13th cheque, overtime, fringe benefits and allowances) of permanent and fixed term contract bargaining unit employees at PRASA, across the board.

Administrator
B. Mpondo

Group Company Secretary
S. Dlamini



- Consolidated Conditions of Service - serve notice on all previous agreements on conditions of service and consolidate into one document on PRASA conditions of service for bargaining unit employees

2.4 YEAR 3: 2020/23

- 2.5% increase: The basic pensionable salary (including 13th cheque, overtime, fringe benefits and allowances) of permanent and fixed term contract bargaining unit employees at PRASA, across the board.

2.5 PRASA will not retrench bargaining unit employees for the duration of the 3 year wage agreement.

2.6 There should be no strikes pertaining to this agreement, in particular on salaries during the period of the three year wage agreement.

Thank you

**ADV. DES LE ROUX
SENIOR MANAGER: GROUP EMPLOYEE RELATIONS
DATE: 25 AUGUST 2020**

2 M

PK

FURTHER INSTRUCTIONS:

A copy of this form must be served on the other party.

Proof that a copy of this form has been served on the other party must be supplied by attaching any of the following:

- A copy of a registered slip from the Post Office, or
- A copy of a signed receipt if hand delivered, or
- A signed statement confirming service by the person delivering the form, or
- A copy of a fax confirmation slip, or
- A copy of an email confirmation slip, or

Any other satisfactory proof of service.

Attach relevant documents such as Collective Agreements, etc.

The CCMA may be requested to assist with service.

UNFAIR LABOUR PRACTICE

If the dispute(s) concerns an unfair labour practice the dispute must be referred (i.e. received by the CCMA) within 90 days of the act or omission which gave rise to the unfair labour practice. If more than 90 days has lapsed you are required to apply for condonation.

2. DETAILS OF THE OTHER PARTY (PARTY WITH WHOM YOU ARE IN DISPUTE)

The other party is:

- An employer An employer's organisation
- An employee A trade union

Name: PRASA HEAD QUARTERS

(If company or close corporation, the name of the company or close corporation) DESIREE

Surname (if applicable): LE ROUX

Postal Address: PRASA HOUSE

PRIVATE BAG X101

BRAAMFONTEIN

Code: 2017

Physical Address: PRASA HOUSE

1040 BURNETT STREET

HATFIELD

PRETORIA

Code: 4023

Tel: 012 748 7000

Cell:

Fax:

Email: Dleroux@prasa.com

Company or close corporation registration number:.....

If it is an organisational rights dispute, the name of the owner of and/or the person who controls access to the premises where the employees work

If a Temporary Employment Service (TES) is involved, the name of the TES:

Number of employees employed by the employer:.....

3. NATURE OF THE DISPUTE

What is the dispute about (tick only one box)?

- Refusal to Bargain Mutual Interest
- Severance Pay Organisational Rights
- Unfair Labour Practice Disclosure of Information
- Freedom of Association S80 BCEA
- Unfair Discrimination - S10 EEA S19 SDA
- Interpretation/Application of Collective Agreement
- Unilateral Changes to Terms and Conditions of Employment
- Dismissal S198 LRA
- S198A LRA (Labour Broker) S198B (Fixed Term Contract)
- S198C (Part-time Employment)
- Other.

UT/B963

Please turn over

Handwritten signatures and initials: pt, m, A

4C

If it is an unfair dismissal dispute, state whether it relates to probation.

If it is an unfair dismissal dispute, tick the relevant box

- Misconduct
- Incapacity
- Unknown Reasons
- Constructive Dismissal
- Poor Work Performance
- Dismissal relates to Probation
- Operational Requirements (Retrenchments)
- where I was the only employee dismissed
- where the employer employs less than ten (10) employees
- Other

4. SUMMARISE THE FACTS OF THE DISPUTE (Use additional paper if necessary)

Applicants SATAWU AND UNTU are in deadlock over wages and substantive issues with PRASA for 2020/2021

5. DATE AND WHERE DISPUTE AROSE:

The dispute arose on: 28/08 2020

(give the date, day, month and year)

The dispute arose where: PRASA HEAD QUARTERS - HATFIELD

(give the city/town in which the dispute arose)

6. DATE OF DISMISSAL (if applicable)

7. FAIRNESS/UNFAIRNESS OF DISMISSAL (if applicable)

(a) Procedural Issues

Was the dismissal procedurally unfair? Yes No
If yes, why?

.....
.....

(b) Substantive Issues

Was the reason for the dismissal unfair? Yes No
If yes, why?

.....
.....

8. RESULT REQUIRED

For the Company to comply with the Agreement

9. SECTOR

Indicate the sector or service in which the dispute arose.

- Retail
- Safety/Security (Private)
- Mining
- Domestic
- Building & Construction
- Food & Beverage
- Business/Professional Services
- Transport (Private)
- Agriculture/Farming
- Other: Different grades.

This section must be completed
If necessary write the details on a separate page and attach to this form.

REF. UT/B963

Please turn over →

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Parties may, at their own cost, bring interpreters for languages other than the official South African languages. Please indicate this under 'other'.

The con-arb process involves arbitration being held immediately after the conciliation. If the dispute remains unresolved, the arbitration process commences immediately after the conciliation.

If the employer objects to the arbitration commencing immediately after the conciliation, the employer must submit a written notice in terms of CCMA Rule 17(2) at least 7 days prior to the scheduled date of the conciliation. The employer must attend the conciliation regardless of whether it makes this objection.

10. INTERPRETER SERVICES

Is an interpreter required? Yes/No

- | | | |
|--|-------------------------------------|-----------------------------------|
| <input type="checkbox"/> Afrikaans | <input type="checkbox"/> IsiNdebele | <input type="checkbox"/> IsiZulu |
| <input type="checkbox"/> IsiXosa | <input type="checkbox"/> Sepedi | <input type="checkbox"/> Sotho |
| <input type="checkbox"/> Setswana | <input type="checkbox"/> IsiSwati | <input type="checkbox"/> Xitsonga |
| <input type="checkbox"/> Sign Language | <input type="checkbox"/> Tshivenda | |
| <input type="checkbox"/> Other | | |

11. DISCRIMINATION MATTER

If it is a discrimination dispute, have you attempted to resolve the dispute?

Yes	No
-----	----

(If written confirmation is available, please attach)

12. OBJECTION TO CON-ARB PROCESS (Only complete this part if you object to the arbitration commencing immediately after conciliation).


I/we object to the arbitration commencing immediately after the conciliation in terms of Section 191(5A)(c).

Signature of person objecting to con-arb

The parties must attend the conciliation regardless of whether there is an objection.

13. CONFIRMATION OF ABOVE DETAILS

Form submitted by:
Natalie A.D. Zacharias-Sahib
(please print name)
Signature:



Position: ADMINISTRATOR

Date: 28 August 2020

Place: HOUGHTON ESTATES - JOHANNESBURG



"NH5" 43

LRA Form 7.12
Labour Relations Act, 1995
Sections 64(1)(g), 156(5)(e), 156(1)(g)

CERTIFICATE OF OUTCOME OF DISPUTE REFERRED TO CONCILIATION

Case Number: HO1614-20

I certify that the dispute between:

UNTU and SATAWU

PRASA Corporate

and

(releasing party)

(other party/parties)

Referred to conciliation on

28 August 2020
(give date)

Concerning

MATTERS OF MUTUAL INTEREST

Was resolved on:

or

Remains unresolved as at:

(give date)

28-08-20
(give date)

Condonation:

Granted

Not Applicable

If this dispute remains unresolved, the following steps may be taken:

Refer to Arbitration	Refer to Interest/Advisory Arbitration	Strike/Lockout <input checked="" type="checkbox"/>	Refer to Labour Court
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CCMA

Official stamp of the CCMA (or Enquiring Council or Accredited Agency)

M.DALLY

Name of Commissioner

Signature of Commissioner

JOHANNESBURG

Place

28-08-20

Date

Handwritten initials and marks at the bottom right of the page.

"NH6" 44



prasa

PASSENGER RAIL AGENCY
OF SOUTH AFRICA

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1600 Burnett Street
Midrand
Pretoria

Private Bag 1101
Brandsburg, 2017
T: +27 12 780 7800

www.prasa.co.za

TO:	MR. NEELS HAASBROEK, UNTU MR. TINZI LUBABALO, SATAWU
FROM:	ADV. DES LE ROUX, SENIOR MANAGER: GROUP EMPLOYEE RELATIONS
DATE:	9 OCTOBER 2020
SUBJECT:	REVISED FINAL WAGE OFFER

1. PRASA'S WAGE OFFER

1.1 Three (3) year Wage Agreement, with effect from 1 April of each year.

1.2 YEAR 1: 2020/21

- 5% increase on TGP for permanent and fixed term contract bargaining unit employees at PRASA, across the board.
- Conclude performance management contracting for bargaining unit employees

1.3 YEAR 2: 2021/22

- 5% increase increase on TGP for permanent and fixed term contract bargaining unit employees at PRASA, across the board.

1.4 YEAR 3: 2022/23

- 5% increase on TGP for permanent and fixed term contract bargaining unit employees at PRASA, across the board.

1.5 PRASA will not retrench bargaining unit employees for the duration of the 3 year wage agreement.

1.6 There should be no strikes pertaining to this agreement, in particular on salaries during the period of the three year wage agreement.

Thank you

ADV. DES LE ROUX
SENIOR MANAGER: EMPLOYEE RELATIONS

NH 7

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

09/12/2020

DATE

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no. J1367/20

In the matter between:

**UNITED NATIONAL TRANSPORT UNION
OBO MEMBERS**

Applicant

and

PASSENGER RAIL AGENCY

First Respondent

Heard: 24 and 27 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 09 December 2020.

Summary: Urgent application to enforce a wage agreement – claim hinged on section 23(5) of the Constitution directly is only permissible where the factual situation is complex and the legal position uncertain. Declaratory relief is inappropriate when there are alternative remedies.

Enforcement of a collective agreement in terms of section 77(3) of the BCEA – no case made out for the grant of urgent relief.

JUDGMENT

PK

NKUTHA-NKONTWANA, J

Introduction

- [1] This is an urgent application which stems from the respondent's, Passenger Rail Agency of South Africa (PRASA), failure to enforce the material provisions of the Wage Agreement it concluded with the applicant, United National Transport Union (UNTU), on behalf of its members. UNTU seeks an order, *inter alia*, declaring that the Wage Agreement is a collective agreement in terms of section 213 of Labour Relations Act¹ (LRA) and directing PRASA to give effect to the Wage Agreement by implementing it within 10 days of this judgment.
- [2] PRASA is opposing the application but only on the points of law, which it contends are fatal to the application. However, its counsel belatedly submitted that if the court is not with PRASA in the legal point it taken, it seeks indulgence to supplement its papers in order to deal with factual allegations in UNTU's founding affidavit.

Pertinent facts

- [3] On 23 October 2020, the parties concluded a Wage Agreement, which regulates salary increases for categories of employees that fall within the bargaining unit, for the period 1 April 2020 to 31 March 2023.
- [4] The wage agreement was pursuant to the wage negotiations between PRASA and UNTU and South African Transport and Allied Workers Union (SATAWU) that deadlocked and gave rise to a referral of a mutual interest dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) on 28 August 2020. The CCMA conciliation was unsuccessful and the certificate of non-resolution was accordingly issued on 28 September 2020. That meant that the unions could have commenced with a protected a strike subject to the requisite notice in terms of section 64 of the LRA.
- [5] I pause to mention that on 25 August 2020, prior to the CCMA referral, PRASA made, *inter alia*, a three-year (2020-2023) wage offer of 3% wage increase in

¹ Act 66 of 1995, as amended.

PK

the first and second years and 2.5% for the last year. On 9 October 2020, PRASA communicated its revised wage offer to UNTU and SATAWU, proposing a three-year wage agreement of, *inter alia*, 5% salary increase for duration of the agreement, with an undertaking not to retrench the braining unit employees and that there would be a strike pertaining to the wage agreement, particularly on salaries during the currency of the Wage Agreement.

- [6] UNTU accepted the offer and on 23 October the parties concluded the 2020-2023 Wage Agreement. UNTU contends that, by signing the Wage Agreement, it accepted that its members would receive a 5% annual salary increases retrospective to 1 April 2020. In exchange its members relinquished the right to strike over their wage demands for the entire period of the wage agreement. Additionally, UNTU contends that the acceptance of the offer was informed by PRASA's express undertaking, per Ms Des Le Roux, PRASA's Executive Employee Relations Manager (Ms Le Roux) who is PRASA's lead negotiator, that the increases for the period 1 April 2020 to October 2020 would all be paid speedily (i.e. within a week or two) upon conclusion of the wage agreement. According to UNTU, the prospect of receiving backdated wage increases before the December holidays was a material factor in persuading UNTU's members not to engage in strike action on wage demands, but rather to accept PRASA's proposed wage increases.
- [7] It is common cause that PRASA is yet to honour its undertaking to implement and pay the backdated wage increases with necessary speed. In the statements issued by PRASA addressed to affected employees on 2 November 2020 and 09 November 2020, it acknowledged the employees' expectation to be paid during the month of November 2020. Yet, it requested an indulgence whilst the wage agreement is being subjected to its governing structures. Even though there is no clarity as to when PRASA will implement the agreed wage increases, it unequivocally expressed its commitment to honour the agreement.
- [8] UNTU contends that PRASA is in breach of its material obligations under the Wage Agreement. Hence it elected to enforce the Wage Agreement and seeks specific performance of PRASA's overdue obligations.



- [9] PRASA's opposition is limited to two points *in limine*. Firstly, PRASA contends that this Court lacks jurisdiction to decide the matter as it is a dispute regarding the interpretation or application of a collective agreement, which, in terms of section 24 of the LRA, lies within the exclusive domain of the CCMA to determine. Secondly, PRASA contends that the matter is not urgent as the applicant has a substantial redress at the hearing in due course.

Lack of jurisdiction

- [10] PRASA contends that section 24 of the LRA provides a process to deal with disputes of interpretation and application of collective agreements and as such this court lacks jurisdiction. On the other hand, UNTU contends that the Wage Agreement as it stands does not exhibit any contentious issues nor do the parties disagree on the contents thereof. Therefore, section 24 of the LRA is not applicable, so it was further contended. In this regard, UNTU relies on the Labour Appeal Court(LAC) decision in *Hospers obo Tshambi v Department of Health, KwaZulu-Natal*² where it was stated that:

[17] What is a "dispute" per se, and how one is to recognise it, demands scrutiny. Logically, a dispute requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked.

- [19] The idea that the breach of a right that derives from a collective agreement is automatically a dispute contemplated by section 24 is wrong. Section 23, which provides for the enforceability of

² *Hospers obo Tshambi v Department of Health, KwaZulu-Natal* [2016] ZALAC 10; [2016] 7 BLLR 649 (LAC); (2016) 37 (ILJ) 1839 (LAC)

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collective agreements and section 24 need to be read together. Together they create the legal edifice for the legal effect of collective agreements and certain disputes which take place about them.

[25] In my view, the phrase "interpretation or application" are not disjunctive terms, and ought to be read as being related, ie, disputes about what the agreement means and what it is applicable to. This fits appropriately with an understanding of the section as a device which is ancillary to collective bargaining.

[30] There is, accordingly, no need for any justification to understand section 24 in a sense so broad that any alleged breach of a term of a collective agreement means the dispute automatically falls within section 24. (Emphasis added)

[11] I have no qualms with the correct exposition of the legal principles by UNTU as expounded in *Hospersa*. It is also well accepted that where the interpretation of a collective agreement is an ancillary issue to be considered in the main dispute, section 24 of the LRA does not oust the jurisdiction of the Labour Court to determine the main dispute.³

[12] At heart in this matter is whether UNTU has made out a case for the grant in the relief sought. The main claims are pegged on section 23(1), read with sections 3, 157 and 158(1) of the LRA; while the alternative claim lies in section 77 of the BCEA.

[13] It is not in dispute that PRASA is bound by the Wage Agreement which is in essence a collective agreement. It is clear from the founding papers that UNTU

³ See: *Johannesburg City Parks v Mphahlanjani NO & others* [2010] 6 BLLR 585 (LAC) at paras 14 -15; *Metro Bus (Pty) Ltd v SAMWU obo Members* [2009] 9 BLLR 905 (LC) at para 18.

PK

impugns PRASA's delay in effecting the Wage Agreement notwithstanding its undertakings to do so by 1 November 2020. In fact, this was conceded by its counsel during oral submissions. In doing so, UNTU contends primarily that PRASA's conduct is sailable as it offends its constitutional right to fair labour practice in terms of section 23 of the Constitution. In this regard reliance is placed on the Constitutional Court majority judgment, per Ngcobo J, in *CUSA v Tao Ying Metal Industries and Others*,⁴ where it was held that:

[55] The issues raised in this case are matters of public interest. This case also concerns the enforcement of a bargaining council agreement which sets out minimum wages and other conditions of employment and requires us to apply the provisions of the LRA. The right of every trade union and every employers' organisation and employer to engage in collective bargaining is entrenched in s 23(5) of the Constitution. The concomitant of the right to engage in collective bargaining is the right to insist on compliance with the provisions of the collective agreement which is the product of the collective bargaining process.

[56] Compliance with a collective bargaining agreement is crucial not only to the right to bargain collectively through the forum constituted by the bargaining council, but it is also crucial to the sanctity of collective bargaining agreements. The right to engage in collective bargaining and to enforce the provisions of a collective agreement is an especially important right for the workers who are generally powerless to bargain individually over wages and conditions of employment. The enforcement of collective agreements is vital to industrial peace and it is indeed crucial to the achievement of fair labour practices which is constitutionally entrenched. The enforcement of these agreements is indeed crucial to a society which, like ours, is founded on the rule of law.'

[14] Notably, in *Tao Ying*, what served before the Constitutional Court was an appeal against the Supreme Court of appeal's (SCA) judgment that pertains to the interpretation and application of the main collective agreement of the

⁴ (*Tao Ying*) [2008] ZACC 15; 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC); 2009 (1) BCLR 1 (CC); [2009] 1 BLLR 1 (CC).

PK

Bargaining Council that exempted the respondent employer from its application. It is within that context that the Constitutional Court accepted its jurisdiction to intervene as the applicant trade union impugned the exemption on the basis that it violated its right in terms of section 23(5) of the Constitution. The genesis of that litigation was a dispute over interpretation and application of the collective agreement in terms of section 24 of the LRA and the consequent arbitration award.

[15] *Tao Ying* is, therefore, authority for the proposition that the enforcement of collective agreements is imperative to industrial peace and accomplishment of fair labour practices which is rooted in the constitution.⁵ For this reason, UNTU submits that this matter turns on the violation of constitutional rights, particularly, the right to engage in collective bargaining and the right to strike.

[16] There are two impediments that face UNTU. First, the direct reliance on the Constitution rather than on the provisions of the LRA relating to unfair labour practices undermined the principle of subsidiarity.⁶ Even though a fair labour practice claimant may be entitled to rely on the Constitution directly without having to show that the LRA is deficient,⁷ that is only permissible where the 'factual situation is complex and the legal position uncertain.'⁸ In the present case, the facts are crisp and predictable.

[17] Second, Clause 6 of the Wage Agreement provides that:

'Any dispute relating to validity, interpretation and application of this wage agreement or any other matter relating to this agreement shall be determined or resolved through a dispute resolution process as determined by the LRA or any other labour dispute resolution settlement services agreed to and appointed by the parties'

⁵ *Ibid.*

⁶ *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 2015 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts*) at paras 44-74.

⁷ *Pretorius and another v Transport Pension Fund and Others* [2018] ZACC 10; [2018] 7 BLLR 633 (CC); 2018 (7) BCLR 838 (CC); (2018) 39 ILJ 1937 (CC); 2019 (2) SA 37 (CC) at para 51-53.

⁸ *Ibid.*; see also: *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) SA 193 (CC); 2015 (5) BCLR 127 (CC) (*Fetal Assessment Centre*) at para 11-12.

[18] *Tao Ying* is, in view, patently distinguishable. While the rule of law of course requires that all binding obligations be enforced, the LRA 'carefully provides procedures to ensure that collective agreements are enforced' and they cannot be circumvented by direct reliance on the Constitution.⁹ Moreover, in the present case the parties bound themselves to dispute resolution procedure in terms of the LRA.

[19] In the same way, UNTU's reliance on section 158(1)(iii) and (iv) of the LRA is untenable. It is trite that a declaratory order is inappropriate when there are alternative remedies.¹⁰ In any event, to the extent that the UNTU contends that there is no dispute pertaining to the provisions of the Wage Agreement, the claim for a declaratory relief is misplaced. UNTU must avail itself to alternative remedies.

Section 77(3) of BCEA

[20] I now turn to the alternative claim in terms of section 77(3) of the BCEA. It is clear from the recent judgment of the Constitutional Court in *Amalungelo Workers' Union and Others v Philip Morris South Africa (Pty) Limited and Another*¹¹ that, in terms of section 77(3) of the BCEA, the Labour Court has a wide jurisdiction to deal with disputes arising from employment contracts even those that fall outside the BCEA, if they are not regulated by the Act. It was stated that:

[23] But what is important is the point that section 77(1) confers jurisdiction on the Labour Court in the widest of terms. It declares that the Labour Court has jurisdiction "in respect of all matters" arising from the Basic Conditions Act. Section 77(3) expands the Labour Court's jurisdiction to cover disputes arising from contracts of employment even if they are not regulated by the Act. But in that event, the jurisdiction is not exclusive. It is shared with the civil courts.

⁹ See: *Tao Ying supra* n 4 at para 126 - 128.

¹⁰ See: *Member of the Executive Council for Education, North West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC) at para 46.

¹¹ 2020) 41 ILJ 863 (CC) at paras 23 - 25.

KE

- [24] What locates a matter within the jurisdiction of the Labour Court is the application of the Basic Conditions Act to it. All claims to which this Act applies fall within the exclusive jurisdiction of the Labour Court. In addition, section 77(1A) grants the Labour Court exclusive jurisdiction to award civil relief arising from a breach of certain provisions of the Act. And if a matter that falls within the exclusive jurisdiction of the Labour Court is brought before another court, section 77(5) mandates the transfer of that matter to the Labour Court, regardless of the stage at which the transfer is effected.
- [25] The scheme that emerges from the reading of section 77 as a whole is that the Labour Court, subject to few specified exceptions, enjoys exclusive jurisdiction over all disputes and claims arising from the provisions of the Basic Conditions Act. This means that on a proper reading of section 77, as soon as a dispute is ripe for litigation, the claimant is entitled to refer it to the Labour Court.
- [21] It is also well-accepted that in terms of section 23(3) of the BCEA, a collective agreement varies any contract of employment between an employee and an employer who are both bound by the collective agreement as typified in the present case. Since there is no dispute on the validity and effect of the Wage Agreement, the only issue that is lingering is its enforcement. UNTU contends that its members are entitled to a prompt payment salary increase as promised by PRASA in exchange for its members contracting out of the fundamental right to strike.
- [22] This takes me to the issue of urgency. UNTU main contention is this regard that since the matter pertains to the breach of fundamental rights, that justifies this Court's intervention on an urgent basis. This contention is obviously still born in light of the finds I have arrived above. Additionally, there is no merit in UNTU's submission that should this Court fail to intervene on urgent basis and the matter be heard in the ordinary course, PRASA's delay on complying with its obligation under the Wage Agreement will effectively be condoned.
- [23] In essence UNTU seeks urgent December pay for its members on the basis that they cannot not exercise their right to strike since they are bound by the

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peace clause in the Wage Agreement, a right PRASA can be enforced on an urgent basis should they embark in a strike. As such, it argues that the *quid pro quo* should apply, and that the agreed terms that resulted in the employees contracting out of the right to strike, should be enforced on an urgent basis.

[24] While this argument is well-designed, it is unmeritorious. It is not its case that the right to salary increases in terms of the Wage Agreement is threatened by any irreparable harm even if PRASA fails speedily to make good its promise. The delay in enforcing collective agreements is not a novel issue. True, though, is that the implementation of collective agreements is normally effected retrospectively. Given the number of collective agreements that are concluded in the ordinary course of the wage negotiation season, their urgent enforcement would open a flood gate of urgent applications, a situation this Court cannot countenance.

[25] I am therefore not convinced that UNITU has made out a case for this Courts' intervention of urgent basis in this regard.

Conclusion

[26] In all the circumstances, the main claims in terms of section 157(1) and (2) of the LRA stand to be dismissed. While the second and alternative claim in terms of section 77(3) of the BCEA stands to be struck off the roll for lack of urgency.

Costs

[27] The circumstances of this matter dictate that each party pay its own costs, particularly, since they have a persisting collective bargaining relationship.

[28] In the circumstances, I make the following order.

Order

1. UNTU primary claims in terms of section 157(1) and (2) of the LRA are dismissed.

PE

2. The alternative claim in terms of section 77(3) of the LRA is struck off the roll for lack of urgency.
3. There is no order as to costs.



P Nkutha-Nkomo

Judge of the Labour Court of South Africa

LABOUR COURT

YE 

Appearances:

For the Applicant: Advocate G Fourie SC with Advocate S Zolot

Instructed by: Fluxmans Inc.

For the Respondent: Advocate Mathibedi SC with Advocate TK
Khanyaga

Instructed by: Lukcy Thekiso Attorneys

LABOUR COURT

PE 

NH8

Tandi Beech

From: Tandi Beech
Sent: 23 April 2021 11:24 AM
To: 'Zolani.Matthews@prasa.com'; 'Desiree.Leroux@prasa.com';
'Thandeka.Mabija@prasa.com'
Subject: RE: OUR REF: 00146742 - 2021 WAGE AGREEMENT
Attachments: 4185523_1.pdf

Fluxmans

Tandi Beech
Sending on behalf of
Darryn Mer

T +27 11 328 9323 M F +27 11 880 2261
E tbeech@fluxmans.com
30 Jellicoe Avenue, Rosebank, Johannesburg 2196, South Africa
Docex No 54, Johannesburg, Private Bag X41, Saxonwold 2132, South Africa



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PK



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Fluxmans Inc. Registration No 2000/024775/21
www.fluxmans.com

Our Ref : DM/tb/00146742/4185523_1
Your Ref :
Date : 23 April 2021

Writer's Direct Line: 011 328 1713
Email: dmer@fluxmans.com
Fax: 011 880 2261

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Att: Thandeka Mabija

Email: Thandeka.Mabija@prasa.com

Att: Desiree Le Roux

Email: Desiree.Leroux@prasa.com

Att: Zolani Matthews

Email: Zolani.Matthews@prasa.com

Dear Sirs,

RE: UNITED NATION TRANSPORT UNION

1. We write to you on behalf of and at the instance of our client, the United National Transport Union ("UNTU").
2. UNTU represents the majority of employees employed by Passenger Rail Agency of South Africa ("PRASA") who are employed in the bargaining unit.
3. UNTU was a party to a Multi Year Wage Agreement which was concluded in March 2020 which provided for a year on year 5% increase in the remuneration of employees of PRASA employed in the bargaining unit.

Directors: CJ Strime (Joint Chief Executive Officer), IS Epstein (Joint Chief Executive Officer and Managing Director), DO Pretorius (Exco), JH Phalane (Exco) CP Ancer, G Bloch, L dos Passos, BE Duma, SR Fisher, KM Fuchs, J Fung, D Furman, PL Kemp, LA King, AC Kruger, J Levitz, RP Lisinski, SK Mantangu, BF Marques, DS Mer, AH Peral, B Seleke, J Shafir, CB Shapiro, SP Shoba, SA Shoot, TA Simon, S Stom, EB Tonini, KJ Van Huysteen Executive Consultants: C Carides, CD Stein, P Vallet
Chief Financial Officer: VD Rubin C.A. (S.A.), M.B.A. Senior Associates: C Blumenthal, L Donaldson, JS Kadish Associates: DR Hirschowitz, MS Mer, FN Sithole, J Vaughan Office Manageress: H Smit

pt

4. As you are aware, UNTU was compelled to file proceedings in the Labour Court of South Africa in and around November 2020 due to the fact that the 2020 increase which was to have been backdated had not been paid to employees in the bargaining unit.
5. It has now been brought to our attention that the increases which would come into effect in April 2021 have not been loaded onto the payroll system which may result in UNTU members not receiving their 5% increase which is effective from April 2021.
6. We are therefore instructed that you respond to this correspondence by no later than close of business on Monday, 26 April 2021 that PRASA will honour and comply with the wage agreement and ensure that all employees who are due to receive a 5% increase to their remuneration be afforded this benefit and paid accordingly.
7. UNTU's rights remain reserved to take further action on their members' behalf to, *inter alia*, file proceedings in the Labour Court for PRASA to comply with its undertakings as recorded in the wage agreement.
8. As our offices are mandated to receive all further correspondence in this matter, we await to hear from you accordingly.

Yours faithfully

DARRYN MER
FLUXMANS INC

TRANSMITTED ELECTRONICALLY, THEREFORE SENT UNSIGNED.

pe


NH9

Tandi Beech

From: Neels Haasbroek <neels@untu.co.za>
Sent: 07 May 2021 05:28 PM
To: Darryn Mer; Tandi Beech; secretaryw@tbc.co.za
Subject: FW: Salary Increase for Bargaining Grades

Importance: High

From: Desiree Le Roux <Desiree.Leroux@prasa.com>
Sent: Friday, 07 May 2021 16:54
To: Neels Haasbroek <neels@untu.co.za>
Cc: Thami Kwintshi [CT] <TKwintshi@prasa.com>; peet@untu.co.za; Hardhaw Tikum (DBN) <Hardhaw.Tikum@prasa.com>
Subject: Salary Increase for Bargaining Grades
Importance: High

Good afternoon Neels

The Group CEO met with the Director-General of the Department of Transport (DoT) this week, in respect of the funding that PRASA requires to pay bargaining grade employees the 2021/2022 salary increase of 5%.

In that meeting it was agreed that PRASA would, through the DoT, apply to the Treasury for the necessary financial assistance to meet its obligation in respect of the said increase.

We will keep you informed of developments in this regard.

Thank you
Des

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pt 

NH10

Carmen Rajcuar

From: Carmen Rajcuar
Sent: 19 May 2021 10:06 AM
To: 'Thandeka.Mabija@prasa.com'; 'Desiree.Leroux@prasa.com';
'Zolani.Mattews@prasa.com'
Subject: UNITED NATIONAL TRANSPORT UNION / PASSENGER RAIL AGENCY
Attachments: Sprinter721051910110.pdf
Importance: High



Dear Sirs

The above matter refers.

Kindly find the attached correspondence for your urgent attention and reply.

Kindly acknowledge receipt hereof.

Kind Regards

Fluxmans

Carmen Rajcuar
Secretary

T +27 11 328 1755 F +27 11 880 2261

E crajcuar@fluxmans.com

30 Jellicoe Avenue, Rosebank, Johannesburg 2196, South Africa

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Handwritten signature and initials in the bottom right corner of the page.



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Our Ref : BM/cr/00146742/4045541_1

Your Ref .

Date : 19 May 2021

Writer's Direct Line: 011 328 1823

Email: bmarques@fluxmans.com

Fax: 011 880 2261

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Att: Thandeka Mabija

Email: Thandeka.Mabija@prasa.com

Att: Desiree Le Roux

Email: Desiree.Leroux@prasa.com

Att: Zolani Matthews

Email: Zolani.Matthews@prasa.com

Dear Sirs

RE: UNITED NATION TRANSPORT UNION

1. We represent the United National Transport Union (UNTU).
2. As previously reflected in correspondence our client represents the majority of employees employed by Passenger Rail Agency of South Africa (PRASA).
3. A multiyear wage agreement was concluded in March 2020 which provided for a 5% yearly increase.
4. The 5% increase which our client's members were due to receive at the end of April 2021 has not to date been paid.
5. Our instructions are that unless these amounts are paid to our client's members by close of business on Friday 21 May 2021 we are to approach the Labour Court for urgent relief.
6. Our client's rights remain reserved.

Directors: CJ Strine (Joint Chief Executive Officer), IS Epstein (Joint Chief Executive Officer and Managing Director), DO Pretorius (Exco), JH Phalane (Exco) CP Ancer, G Bloch, L dos Passos, BE Duma, SR Fleher, KM Fuchs, J Fung, D Furman, PL Kemp, LA King, AC Kruger, J Levitz, RP Lisinski, SK Mantengu; BF Marques, DS Mer, AH Peral, B Seleke, J Shafir, CB Shapiro, SP Shoba, SA Shoot, TA Simon, S Slom, EB Tonini, KJ Van Huyssteen Executive Consultants: C Carides, CD Stein, P Vallet
Chief Financial Officer: VD Rubin C.A. (S.A.), M.B.A. Senior Associates: C Blumenthal, L Donaldson Associates: J Beard, DR Hirschowitz
MS Mer, FN Sithole, J Vaughan Office Manageress: H Smit

Fluxmans

4016541_1

Page 2 of 2

Yours faithfully

**DARRYN MER
FLUXMANS INC**

TRANSMITTED ELECTRONICALLY, THEREFORE SENT UNSIGNED.

rk 

Tandi Beech

From: Tandi Beech
Sent: 26 May 2021 02:52 PM
To: 'tandeka.mabija@prasa.com'; 'Dleroux@prasa.com'
Subject: RE: 00146742 - UNITED NATIONAL TRANSPORT UNION obo MEMBERS// PASSENGER RAIL AGENCY OF SOUTH AFRICA [FLUXMANS-OPENACTIVE.FID194527]
Attachments: Sprinter1221052615120.pdf



Dear Sirs,

We serve herewith the urgent application that is set down before the Labour Court on 8 June 2021.

Kindly acknowledge receipt hereof.

Yours faithfully,

DARRYN MER

Fluxmans

Tandi Beech

Sending on behalf of
Darryn Mer

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