**OPINION**

**IN RE: PAN SOUTH AFRICAN LANGUAGE BOARD**

D Vetten

27 November 2014

# INTRODUCTION : THE ACT

1. The Pan South African Language Board (“the PanSALB” or "the Board) is a statutory body created in terms of the Pan South African Language Board Act, 59 of 1995 (as amended) (“the Act”). According to the Act's long title it is required –

“to provide for the recognition, implementation, furtherance of multi-linguism in the Republic of South Africa; and the development of previously marginalised languages; to establish a Pan South African language Board; and to provide for matters connected therewith.”

1. The Board is established as an independent entity subject only to the Constitution and to the Act.[[1]](#footnote-2) No organ of state and no member or employee of an organ of state or any other person is entitled to interfere with the Board or any member thereof or a person appointed under section 10 in the exercise, carrying out or performance of its, his or her powers, duties and functions.[[2]](#footnote-3) Organs of state are required to provide the Board with reasonable assistance for the protection of the Board’s independence, impartiality, dignity and effectiveness.[[3]](#footnote-4)
2. The Board is required to be composed of no fewer than 11 and no more than 15 persons. Members of the Board that meet the designated criteria[[4]](#footnote-5) are appointed by the Minister, after consultation with the Portfolio Committee.[[5]](#footnote-6)
3. Members of the Board are appointed for a period of five years and are subject to re-appointment for one further term only.[[6]](#footnote-7) The Minister may dissolve the Board on any reasonable grounds.[[7]](#footnote-8) Appointment as a member of the Board is required to be formally given in a notice in the Gazette, including the date of the appointment and the period for which a person may be appointed. The members of the Board elect a chairperson and deputy chairperson.[[8]](#footnote-9)
4. The Board is to meet in Pretoria not less than four times a year,[[9]](#footnote-10) and *“may establish such officers as it may consider necessary to enable it to exercise its powers, to carry out its duties and to perform its functions*”.[[10]](#footnote-11)
5. In addition to electing a chairperson and deputy chairperson, the Board is required to appoint a chief executive officer who:
	1. in consultation with the Minister, appoints such staff as may reasonably be necessary to assist him or her with the work arising from or otherwise connected with the performance of the functions of the Board; and
	2. is responsible for the management of and administrative control over the staff; and is for that purpose accountable to the Board; and
	3. is charged with the responsibility of an accounting officer in respect of funds and maintenance of records;
	4. exercises such powers and carries out such duties and performs such functions which the Board from time to time confers on or assigns to him or her.[[11]](#footnote-12)
6. The Minister may make regulations relating to the staff of the Board.[[12]](#footnote-13)

**THE REGULATIONS**

1. Regulations with regard to the terms and conditions of service for the staff of the Board have been published in Government Gazette No. 23404 under GNR671 of 10 May 2002.
2. Appointment of staff must meet the criteria that the appointee meets:-
	1. “the inherent requirements for appointment to the post concerned,”*[[13]](#footnote-14)*
	2. merit and appropriate qualifications or learning experience and ability;[[14]](#footnote-15) and
	3. “due regard to the need to establish a staff composition representative to the South African people”.[[15]](#footnote-16)
3. Save where there is an internal promotion, a detailed process of advertising vacancies for posts is stipulated in the regulations.[[16]](#footnote-17)
4. In addition, the Board has established a recruitment and selection policy whose objective is *“to recruit appropriately qualified and experienced employees for positions, through a fair and transparent procedure, both internally and externally while, at the same time ensuring equity, cost-effectiveness and legal compliance in the recruitment and selection process.”[[17]](#footnote-18)*
	1. The policy’s effective date is 1 September 2008, thereafter to be reviewed annually.
	2. Among the guiding principles are the requirements for fairness, consistency, promotion of existing employees where possible, transparency and confidentiality.
	3. Before recruiting, planning by line managers must occur to ensure that the process is efficient and budgeted.[[18]](#footnote-19)
	4. All vacancies must be approved by the chief executive officer after motivation by a line manager.[[19]](#footnote-20)
	5. All posts that become available are to be advertised in accordance with strict criteria (which do permit casual or walk-in applications subject to additional considerations being met).[[20]](#footnote-21)
	6. Employment of employees within the Board is to occur through interview by a selection panel.[[21]](#footnote-22)
	7. Shortlisted candidates may be subject to verification and qualifications, reference checks, competency exercises and security vetting.[[22]](#footnote-23)
	8. Secondment is permissible under limited circumstances, subject to final authorisation by the CEO in consultation with the HR manager.[[23]](#footnote-24)

**THE MASHATILE / ZWANE DISPENSATION**

1. During 2012, the Minister of Arts & Culture, Paul Mashitile, dissolved the Board apparently in accordance with the provisions of section 5(5A) of the Act. It was suggested that there had been allegations of mismanagement and financial impropriety on the part of the then incumbent Board that were the motivating reasons for the dissolution.
2. On 15 June 2012, the Minister appointed Mxolisi Zwane as a Deputy Director-General within the Department of Arts & Culture, and simultaneously seconded him to the Board as a *“caretaker CEO”*.
3. The Minister failed to reconstitute the Board as would be required in terms of section 5 of the Act; and in particular, failed to ensure that an independent and impartial Board was established. Zwane proceeded to entrench himself as the Board of the organisation and acted as if appointed by the Board and vested with both the roles of accounting authority and accounting officer.
4. Although it was initially envisaged that Zwane’s appointment would be for a period of six months, it appears that this was renewed during 2012, 2013 and into 2014.
5. During his tenure, pre-existing employees have complained, that *“[Zwane] has made the [Board] an employment bureau and is dispensing patronage using the resources of the [Board] and as a result thereof, the [Board’s] finances are depleted and [the employees] medical and provident fund contributions are not being met and are not paid regularly.”*
6. Zwane appointed 49 employees in the course of the two years that he ran the organisation.
	1. There are specified and substantiated accusations that most of these appointments occurred in breach of the PanSALB employment policy and the Regulations, in that:-
		1. The appointments did not follow the processes stipulated in the aforesaid documents including in relation to planning, advertising, interviewing and selecting:
			1. I have been instructed that only one instance of advertising for posts was conducted.
			2. This was for only seven posts.
			3. Individuals were appointed to some of these posts, but at salaries sometimes in excess of the advertised remuneration.
		2. the appointees were not suitable candidates;
			1. Many CV's do not display either the qualification or experience necessary for the position to which the person was appointed.
			2. Almost none of the appointees demonstrate possession of the inherent requirements for appointment to the post concerned, or the merit and appropriate qualifications or learning experience and ability; and

and

* + 1. the appointments happened in a haphazard fashion without being properly budgeted or planned, and without input from line managers.
	1. It has been demonstrated that several of the appointments were in favour of ex employees of an organisation known as FABCOS, with which Zwane had been previously connected; or have other undisclosed links to Zwane or the FABCOS organisation.
	2. It goes 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.
1. A summary of these appointments is set out in Appendix A hereto.
2. The net result is that the PanSALB is presently:-
	1. characterised by a bloated staff component that has doubled its salary bill and exhausted its budgeted funds (that arise primarily through allocations from the Treasury); and
	2. unable to execute its core mandate under Statute and the Constitution.
3. Complaints against Zwane fell on deaf ears and Zwane appears to have repeatedly retreated to the security of Ministerial direction and portfolio committee approval of his conduct. I have not seen any actual statements emanating from either of these state organs however.
4. At the start of 2014, prior employees at the PanSALB applied to Court seeking to review and set aside Zwane's appointment and the "hiring" of the numerous employees. They sought related declaratory and ancillary Orders. The Minster, the PanSALB and Zwane's employees were joined as respondents. The application has not been opposed by the Minster or by the PanSALB. It has been opposed by a limited number of the Zwane employees. The application is pending; I am not sure at what stage it presently is.
5. Zwane was eventually removed from office in June 2014. The Board was reconstituted during June 2014, shortly after the appointment of the new cabinet, and the removal of Mashatile from the Ministry of Arts and Culture.
6. A new CEO has only been recently appointed by the new Board

**UNRAVELLING THE ZWANE LEGACY**

1. My instructions come from the new chairperson of the Board, Professor Mbulungene Madiba, requesting me to provide an opinion on how best to approach the consequences of Zwane’s actions, in particular the bloated staff component of the PanSALB. The matter has some urgency on account of the fact that the Board does not have the resources necessary to continue to pay the Zwane employees and meet its expenses and liabilities.

**The appointments are unlawful**

1. The appointment of a caretaker CEO was *ultra vires* the powers of the Minister. When the Board was dissolved, it did not become a vassal of the Department of Arts and Culture (or an appointee from that Department), but was required to have been re-constituted within a reasonable time as an independent Board subject only to the Constitution and the Act. The Minister was not entitled to manage or conduct the affairs of the Board through Zwane; nor was Zwane entitled to act outside of the powers under the Act (which of course had not been vested upon him by virtue of the fact that he had not been appointed by the Board). He was not entitled to operate as a surrogate Board.
2. The Act provides that the CEO is to be appointed by the Board, rather than the Minister. The CEO (albeit after consultation with the Minister) is thereafter empowered to appoint an appropriate staff complement. Zwane, not being a duly appointed CEO, had no authority to appoint any staff. Regardless of whether or not the staff employment policy was followed, the "engagement" of new employees within the Board by Zwane was unlawful. As Zwane had no authority to make the appointments, they were not made on behalf of the Board; and Zwane’s actions, while purporting to create employment contracts, are invalid acts that have no force and effect.
3. Furthermore, in my opinion the Zwane "appointments" do not constitute administrative acts because Zwane was not exercising a public power or performing a public function in terms of an ­empowering provision.[[24]](#footnote-25) He was acting outside of the law and the stipulation of the Act. They are not required to be set aside by the Court first.
4. Since it is neither the Board, nor the CEO of the Board, that has acted, the employees cannot maintain that they have valid employment contracts with the Board. There has been no meeting of the minds between the employer on the one hand and the employee on the other. The Board appears to have been unlawfully commandeered by a politician's appointee; he was not an authorised agent of the Board.
5. If no valid employment contracts exist, the employees are not subject to retrenchment or any other form of termination of the "employment contracts". 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.

**Estoppel and Ratification**

1. Where an agent has acted without authority, those acts can be ratified, either expressly or tacitly (by conduct). Furthermore, if a person makes a false representation to another that causes that person to act to their prejudice, the person responsible for the representation is prevented (estopped) from raising the truth of the circumstance to avoid the consequence.
2. In this case, I have not been instructed with any facts that could establish that the Board or its duly appointed CEO made a representation to the affected "employees" that would entitle them to believe that they were being employed by the Board. This is on account of the fact that all persons knew that the Board had not been reconstituted, had not appointed a new CEO; and in any event, by that fact could not have made a representation to anyone. I do not believe that the Board will be estopped from contesting the validity of the "employees" appointments.
3. I have been instructed that the Board has met only once since its reconstitution; that they have not been aware of the facts surrounding the appointment of the Zwane appointees – and in fact may have had forces working actively against bringing the truth to light. And that this Opinion brings to the fore the facts that have begun to emerge since October 2014, and the appointment of the new CEO.
4. In the meantime, and since June 2014, the Zwane appointees have been paid their salaries out of the budget of the Board (as they have always been). This will no doubt form the basis of a claim that the appointments have been ratified.
5. In order to meet this argument, the truth is that the Board was not aware of the truth of the situation. Now that it is being presented with the facts, it is the first time that it can act in the face of this knowledge. It has accordingly not ratified the Zwane appointments. However the Board must now act decisively otherwise it will give fuel to the argument that the appointments have been ratified.

**Advised Course of Action.**

1. An appropriately drafted letter communicated the decision making process in the last 6 months since the Board's appointment will need to be given in order to ensure that it is not contended that the delay in acting is a ratification of the appointments. I have prepared such a letter and attach it as Appendix B.
	1. If the affected persons go to the CCMA complaining of a dismissal, they will have to prove that they are employees first. The onus will rest upon them to do so; and based on the information I have been instructed with, It is my opinion that they will not discharge this onus.
	2. If the affected persons go to the Department of Labour requiring payment of remuneration, the fact of their employment by the Board can similarly be disputed.
	3. If the affected employees apply for an interim mandamus to continue to be paid their salaries pending the outcome of an action to determine their status as employees, not only will they not be able to establish a prima facie right, but the balance of convenience (the bankruptcy of the PanSALB), and their illegitimate benefit over a time period, will also be able to be demonstrated to be against them.
2. As adverted to earlier, the Board is a respondent in an application brought by certain of the employees of the Board *inter alia* for declaratory relief as well as setting aside the employment of a number of individuals. This application has not been opposed by the Minister or the Board. It is my advise that an affidavit should be prepared by a duly authorised member of the Board explaining to the Court the events within PanSALB and supporting the application (although on slightly different terms).
3. Passively awaiting for the outcome of this litigation does not appear to be consistent with the Board's duty as a custodian and spender of public funds; and the Board's duty to prevent unnecessary waste and improper spending. Upon receipt of instructions from the Board, this affidavit should be prepared without further delay.
4. It is my opinion that having obtained this advice, the Board must act immediately to notify the Zwane employees that it does not recognise the employment contracts and will make no further payments under them: employees knew 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 that would result in a successful estoppel being raised against 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.
5. In preparation for the litigation that is likely to follow, further information on each employee (added to the table already prepared for ease of reference), to the extent that it is available, should be gathered, as follows:
	1. Details of recruitment process followed, if any, including:
		1. Processes for planning for the position and budgeting for its cost by line manager;
		2. "Approval process" of the position by Zwane and Mashatile;
		3. Advertising of post, and compliance or no compliance with the regulations and recruitment policy; and the respects in which there was no compliance;
		4. interview process, including identity of panel members; identity of contesting candidates and results of interviews;
		5. Any disqualifying criteria.
	2. Whether or not the candidate met the selection criteria with particular reference to:
		1. meeting “the inherent requirements for appointment to the post concerned”; and
		2. having merit and appropriate qualifications or learning experience and ability.
	3. Job description and tasks performed.
	4. Salary, and whether or not this was on a fair and appropriate scale.
	5. Any other specific information regarding why the appointment is objectionable.
6. The collation of this information will permit the Board to advance further grounds to resile from the "employment contracts" based on misrepresentation. I wish to make clear however, that regardless of the particular facts relating to any particular employee, all of the employment contracts are invalid because they have not been concluded with the employer.
7. I accordingly so advise.
1. See section 4(1). [↑](#footnote-ref-2)
2. See section 4(2). [↑](#footnote-ref-3)
3. See section 4(3). [↑](#footnote-ref-4)
4. See section 5(2). [↑](#footnote-ref-5)
5. See section 5(3). [↑](#footnote-ref-6)
6. See section 5(5). [↑](#footnote-ref-7)
7. See section 5(5A). [↑](#footnote-ref-8)
8. See section 6. [↑](#footnote-ref-9)
9. See section 7(1) and (2). [↑](#footnote-ref-10)
10. See section 7(3). [↑](#footnote-ref-11)
11. See section 10(1). [↑](#footnote-ref-12)
12. See section 10(7). [↑](#footnote-ref-13)
13. See regulation 2(1) and (4). [↑](#footnote-ref-14)
14. See regulation 2(2) and (5). [↑](#footnote-ref-15)
15. See regulation 2(2). [↑](#footnote-ref-16)
16. See regulation 2(7) – (11). [↑](#footnote-ref-17)
17. The policy attempts to articulate the legislative framework contained in:

	1. the Constitution of the Republic of South Africa, 1996;
	2. the Public Service Act, 1994;
	3. the Public Service Regulations, 2001;
	4. the Employment Equity Act, 1998;
	5. the Labour Relations Act, 1995;
	6. the Basic Conditions of Employment Act, 1997;
	7. the Skills Development Act, 1998;
	8. applicable collective agreements;
	9. the South African Qualifications Authorities Act (Act 58 of 1995);
	10. and various white papers on human resource management and affirmative action in the public service. [↑](#footnote-ref-18)
18. See para 7. [↑](#footnote-ref-19)
19. See para 8. [↑](#footnote-ref-20)
20. See para 9. [↑](#footnote-ref-21)
21. See para 10. [↑](#footnote-ref-22)
22. See paras 11 and 12. [↑](#footnote-ref-23)
23. See para 15. [↑](#footnote-ref-24)
24. See definition of "administrative action" in section 1 of the Promotion of Administrative Justice Act, 3 of 2000. [↑](#footnote-ref-25)