

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 1274/2022

In the matter between:

BUHLE TONISE

First Applicant

ZAMA XALISA

Second Applicant

MXOLISI JOE SIKHOSANA

Third Applicant

TABISA WANA

Fourth Applicant

NKOSAZANA NOMAXHOSA JONGILANGA

Fifth Applicant

And

MINISTER OF WATER AND SANITATION

First Respondent

AMATOLA WATER BOARD

Second Respondent

MOSIDI MAKGAE

Third Respondent

LEBO LETSOALO

Fourth Respondent

MOKGOBI RAMUSHU

Fifth Respondent

GAATHIER MAHED

Sixth Respondent

ABRAHAM LE ROUX

Seventh Respondent

JUDGMENT

BESHE J:

[1] The applicants in this matter are seeking the reviewal and setting aside of first respondent's (henceforth referred to as the Minister) decision to remove them as members of the second respondent on the basis that the said decision was unlawful. The abovementioned decision is not the only decision taken by the Minister applicants seek to have reviewed and set aside. Applicants also seek the reviewal of the following:

The decision to dissolve the Amatola Water Board;

His decision to appoint an interim Amatola Water Board;

Also sought is the re-instatement of the applicants as members of second respondent with retrospective effect;

As well as a cost order against the first respondent and any other party who opposes the application.

The application is only opposed by the Minister. Second respondent as is apparent from the heading, is the Amatola Water Board, henceforth to be referred to as the Board. Third to seventh respondents are former members of the Board. Second respondent filed a notice of intention to abide by the decision of this court in respect of the relief sought in the notice of motion.

[2] The application is comprised of two parts, Part A and B. Part A of the application was disposed of by agreement between the parties on 31 May 2022 to an order in the following terms being issued:

1. The First Respondent be and is hereby interdicted against the appointment of any permanent Board members to the Amatola Water Board

in terms of Section 35(1) of the Water Services Act 108 of 1997 pending the final resolution of Part B of this application.

2. This order does not prevent the Minister from taking such steps to identify suitable candidates to be appointed as Board Members should the Review Application be unsuccessful.

3. The parties shall approach the Court for an expedited date for the hearing of Part B of this application.

4. In order to facilitate the expedited resolution of Part B of this application:

4.1 the First Respondent shall dispatch to the Registrar the record of his decisions and any documents relied on in reaching those decisions by no later than 31st May 2022;

4.2 The Applicants shall deliver their amended notice of motion and supplementary founding affidavit, if any, by 14th June 2022;

4.3 The Respondents shall deliver their answering affidavits, if any, by no later than 28th June 2022;

4.4 The Applicants shall delivery their replying affidavit, if any, by no later than 5th July 2022;

4.5 The Applicants shall deliver their heads of argument by 12th July 2022;

4.6 The Respondents shall deliver their heads or argument by 19th July 2022.

5. Costs be and are hereby reserved.”

For completeness, the following relief was sought in PART B of the application:

“1. Reviewing and setting aside the following decisions taken by the first respondent on or about 25 March 2022:

1.1 The decisions to terminate the applicants’ appointment to the Amatola Water Board in terms of section 35(5) of the Water Services Act 108 of 1997;

1.2 The decision to dissolve the Amatola Water Board; and

1.3 The decision to appoint an interim Amatola Water Board;

2. Reinstating the applicants as members of the Amatola Water Board with retrospective effect;

3. Ordering the first respondent, and any other party who opposes this application, to pay the costs thereof;

4. Further and/or alternative relief.”

[3] The following background facts appear to be common cause:

The applicants together with third to seventh respondents were appointed to the Board as members thereof during March 2021. With third respondent being appointed the chairperson of the Board. Second applicant was designated deputy chairperson of the Board.

[4] They were appointed by the erstwhile Minister of Water and Sanitation, **Ms L N Sisulu**. The appointments were for a 4-year period.

[5] On 8 March 2022 members of the Board attended a meeting with the Minister. During the said meeting third respondent raised a series of complaints regarding the

governance of the Board. Following the meeting, on the 15 March 2022, the Minister issued a notice to each of the applicants advising them of his intention to dissolve the Board and terminate applicants' appointments as members of the Board. The Minister stated that the Board was facing "several governance challenges" which were leading to instability in the entity and invited the applicants to furnish him with written reasons as to why he should not dissolve the Board and thus terminate their appointments. Applicants' representations having been duly submitted, the Minister none-the-less took the impugned decisions. In his letter to the applicants the Minister stated that the governance challenges and alleged misconduct by some Board members has the potential of subjecting the Board to disrepute.

[6] It also appears to be common cause that the applicants and the third respondent as chairperson of the Board were not seeing eye-to-eye regarding *inter alia*:

Third respondent allegedly taking unilateral decisions on issues affecting the Board. Some which are said to be in direct conflict with decisions already taken by the Board.

Convening of a special Board meeting to discuss matters some of the Board members felt were urgent.

Matters pertaining to the appointment of a Chief Executive Officer for Amatola Water.

First applicant in her capacity as Deputy Chairperson of the Board giving notice that she will be calling a special Board meeting to discuss inter alia appointment of a Chief Executive Officer; the Special Investigation Unit report that had recently been published; and another to discuss demands by the South African Municipal Workers Unions (SAMWU).

Chairpersons (third respondents) allegations about governance challenges.

[7] Applicants do not deny the existence of challenges facing the Board, they none-the-less contend that the Board was making progress in the delivery of its mandate.

[8] Applicants contend that the decisions taken by the Minister are flawed for the following reasons:

“1. The course of action followed by the Minister is drastic. It was open to the Minister to invoke his powers in terms of the Act to investigate any allegations against any Board members and/or to issue directives to the Board. There appears to be no justification for those processes to be overlooked.

2. None of the applicants has, to the best of our knowledge, been accused of any misconduct or otherwise unethical behaviour.

3. In the event that any of us has been so accused, we have not been informed of such accusations and given an opportunity to respond.

5. The governance challenges appears to have arisen only in relation to a small number of Board members. This does not justify adverse decisions against all members of the Board.

6. Despite the Minister purporting to have given the applicants an opportunity to make representations, it does not appear that these representations have been considered. In this regard the applicants submit that had our submissions been taken into account, the Minister would not have proceeded with the termination of our membership and the dissolution of the Board.”

And so, applicants assert that the Minister’s impugned decisions stand to be reviewed and set aside on the following grounds:

They were procedurally unfair as contemplated in *Section 6 (2) (c)* of the *Promotion of Administration of Justice Act (PAJA)*.¹

They were taken because irrelevant considerations were taken into account (*Section 6 (2) (e) (iii) of PAJA*).

They were taken arbitrarily or capriciously in terms of *Section 6 (2) (e) (vi) of PAJA*.

They were irrational (*Section 6 (2) (f) of PAJA*).

They were unreasonable (*Section 6 (b) (h) of PAJA*).

Alternatively, and in the event that *PAJA* is found not to be applicable, the decisions stand to be set aside on the common law ground of illegality and irrationality.

[9] In their supplementary affidavit, following the receipt of the *Rule 53* record, applicants contend that the record confirms that the Minister did not consider their submissions prior to taking the impugned decisions as it contains no evidence that he considered other measures, short of dissolving the Board in its entirety. Such measures, so it is contended, include issuing directions in terms of *Section 45* of the *Water Services Act*. Furthermore, that the record consists of untested and unsubstantiated allegations of misconduct which the applicants deny. Furthermore, that the Minister took the allegations at face value without applying his mind thereto and without adequate engagement with the parties.

[10] First respondent resists the application on the following grounds:

(i) Failure to comply with *Section 53 (3)* of the *Uniform Rules* of this Court. Namely, making copies of the portions of the record as may be necessary for the purposes of the review. This in my view is not fatal to the application.

¹ Act 3 of 2000.

(ii) The decision(s) in question is / are concerned with the setting of policy and not administrative in nature. That therefore the application in so far as it is based on *PAJA* is ill advised.

(iii) The court is impermissibly being asked to usurp the functions of the Minister which are bestowed on him by *Section 35 (1)* of the *Water Services Act*.

[11] The Minister then proceeds to outline the background facts about the matter. This exposition of background facts is comprised mostly of allegations or complaints received about first and second applicants, such as unauthorised use of a motor vehicle by second applicant. Allegations of the Board being dysfunctional etc, as a result of disharmony between the chairperson and some members of the Board. Complaints against the applicants dating back to the previous Minister's tenure. The commissioning of investigations into the allegations by a firm of attorneys which produced two reports. I do not propose to deal with these allegations in any length. This application is less about whether there is merit in the allegations / complaints. It has everything to do with the manner in which the Minister took the impugned decisions. It is also, in my view, less about the correctness or the action / decision taken by the Minister, but more about the manner in which the decisions were taken and reasons thereof. It was in light of *inter alia* these allegations that he felt that the Board was unstable and made his intention to dissolve same known to the applicants. Inviting the applicants to provide reasons why the Board should not be dissolved. We now know that after receipt of the representations made by the Board members, the Board was dissolved. The Minister asserts that he considered the Board members' representations before cutting their term of office short. The Minister insists that he exercised his powers in terms of *Section 35 (5)* of the *Water Services Act* in this regard. That the said powers are of an executive nature as opposed to being administrative in nature.

[12] The significance of the difference between the exercise of executive as opposed to administrative powers lies in the fact that the provisions of *PAJA* apply to

the exercise of the latter power. Whereas the exercise of executive powers is subject to the principles of legality and rationality.

[13] I have already alluded to the fact that the applicants complain that there is no evidence that the Minister considered their representations prior to dissolving the Board. They further assert that the *Rule 53* record does not contain evidence of any meaningful engagement with the applicants' representations or responses to the allegations against them. In response, the Minister is adamant that he had consideration to applicants' representations before he dissolved their Board. Adding that the applicants, although they deny the allegations against them, they acknowledge problems within the Board.

[14] A few observations about the *Rule 53* record:

It contains notices addressed to most of the Board members about the Minister's intention to dissolve the Board dated 15 March 2022. Also calling upon the Board members to submit written reasons why the Board should not be terminated and their appointment to be terminated.

Letters of appointment as interim Board members dated 25 March 2022.

Letters to former Board members terminating their appointments dated 28 March 2022.

The written submissions from the applicants do not form part of the record.

[15] The letter addressed to the applicants advising them of the termination of their appointments as members of the Board, record that the Minister has considered their responses (written submissions).

[16] First, third and fourth applicants' written submissions form part of their founding papers. The submissions are comprehensive. They also encompass recommendations about alternative solution to the Minister as opposed to the

dissolution of the Board. Applicants suggest that these would be rational and fair. First applicant's written submissions span some 12 pages.

[17] Before considering whether the impugned decisions are administrative or executive in nature, I am of the view that irrespective of the categorisation of the decisions, the court scrutiny is appropriate in both cases. In other words, in both instances, be they executive decisions or constitute administrative action, the court scrutiny will find a place. The only difference being whether such scrutiny will be in terms of *Section 3* of *PAJA* or the common law principle of legality. The latter principle requires the decision to be rationally connected to the purpose for such it was taken and for fairness to be observed. It is trite that administrative action is subject to a higher level of scrutiny in terms of the provisions of *PAJA* whereas for executive decisions is subject to less exacting scrutiny as required or called for by the principle of legality.²

[18] The Minister contends that his decision to appoint and or terminate Board members is an executive decision and not an administrative action and therefore can not be set aside in terms of *PAJA*.

[19] The Minister acted in terms of *Section 35 (5)* of the *Water Services Act 108 of 1997* which provides that:

“The Minister may terminate the appointment of any or all the members of the Water Board.”

Item 4 of *Schedule 1* to the Act provides for termination of office of Board members and state that a member of a Water Board ceases to hold office –

(a) *from the effective date of his or her resignation;*

(b) *if he or she has been absent from more than two consecutive meetings without leave of the chairperson;*

² Minister of Defence and Military Veterans v Motau and Others [2014] ZACC 18 [27].

- (c) *if he or she has become disqualified in terms of item 2 of this Schedule;*
- (d) *if he or she has been declared to be of unsound mind by a competent authority; or*
- (e) *if his or her appointment has been terminated in terms of Section 35 (5) of the Act.*

It is also contended that the Minister also acted also in terms of *Public Finance Management Act 1 of 1999 (PFMA)*. It was argued on the Minister's behalf that he is not required or obliged to conduct an investigation before exercising his powers in terms of *Section 35 of 108 of 1997*. Further that the decision to appoint and terminate the Board is an executive decision as opposed to an administrative action. Reliance for this submission is placed on the matter between ***Phineas Kgahliso Legodi v Minister of the Department of Human Settlement Sanitation and Water and Others***.³ I could not find any support for the submission. That application was instead struck off the urgent roll for lack of urgency. Even though that matter was also concerned with *inter alia* the appointment of an interim Board. The application for interim relief in the other matter relied on in this regard, ***David Dikoko and Others v Minister of Human Settlement Water Sanitation and Others***⁴ was also dismissed. Amongst other reasons for the dismissal of the application was due to the reason given by the Minister to terminate the Board, namely that he was correcting a breach of Cabinet policy. The policy required that the Cabinet endorses the appointment of the Board members. In this matter the court felt it was being impermissibly being invited to intrude into the terrain of the Executive arm of the State.

[20] This leads to the question of what the distinction is between administrative action on the one hand and executive action on the other. The fact that it is the Minister who took the decision does not help much in deciphering whether the

³ Case number 25068/2020 Gauteng Division, Pretoria.

⁴ Case number 24279/2020, also a decision of the Gauteng (Pretoria) High Court.

decision is of an administrative or executive nature. In the matter of the ***President of the RSA v South African Rugby Union***⁵ the following was stated in this regard:

“[141] In s 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

[142] As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute ‘administrative action’ within the meaning of s 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute ‘administrative action’ as contemplated by s 33, but not all acts by such members will do so.

[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A

⁵ 2000 (1) 1 CC at 67 [141] – [143].

series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject-matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject-matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis.”

In *Permanent Secretary, Education & Welfare, EC v Ed-U-College (PE) (Sec 21)*.⁶ The court referred to the dictum in the *SARFU* matter above and went on to state:

“It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the Executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action.”

Later at paragraph 21 the court had this to say:

⁶ 2001 (2) SA 1 CC at 14 B-D.

“The principle of subsidy allocation to independent schools is determined in the first instance by the legislature. Once it has allocated money for independent schools, the MEC is then empowered to determine the manner of how it is to be spent. Although there are a range of ways in which this power can be exercised, it must always be exercised within the constraints of the budget set by the Legislature. Furthermore, it is not a power which the Legislature would be suited to exercise. The determination of which schools should be afforded subsidies and the allocation of such subsidies are primarily administrative tasks. The determination of the precise criteria or formulae for the grant of subsidies does contain an aspect of policy formulation but it is policy formulation in a narrow rather than a broad sense. The decision apparently constitutes a broad policy decision because it purports to determine how the allocated budget is to be distributed and not the amount to be given to each school. However on closer scrutiny it is in fact not so broad because the MEC determines not only the formula but also in effect the specific allocations to each school. This case may be close to the borderline. However I am persuaded that the source of the power, being the Legislature, the constraints upon its exercise, and its scope point to the conclusion that the exercise of the s 48(2) power constitutes administrative action, not the formulation of policy in the broad sense as suggested by the applicants.”

Finally, the Constitutional Court in ***Albutt v Centre for the Study of Violence and Reconciliation***⁷ held that on the issues before it, it was not required or it was not necessary to answer the question whether the exercise of the power to grant pardon constitutes administrative action and whether *PAJA* applies to applications for pardon. They had this to say about the exercise of public power:

“[49] It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of s 84(2) (j), we held that, although there is no right to be pardoned, an applicant seeking pardon has a right to have his application ‘considered and decided upon

⁷ 2010 (3) SA 293 CC.

rationality, in good faith, [and] in accordance with the principle of legality'. It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it."

This leads me to the Minister's contention that the *Water Services Act* bestows him with unfettered discretion to terminate or dissolve the Board. Reference to unfettered discretion is a misnomer as pointed out by the authors *Hoexter* and *Penfold* in their publication *Administrative Law in South Africa, 3rd Edition*⁸ when they state:

"Unlike discretionary powers, mechanical (sometimes 'ministerial') powers involve little or no choice on the part of their holder. In fact, 'purely mechanical' powers are more in the nature of duties. This can be illustrated by comparing the power to issue a dog licence on payment of a fee and the power to grant it 'in deserving cases'. In the first case the purely mechanical power gives the licensing official no choice at all in the matter, and this effectively means that the official is under a duty to issue a licence on payment of the fee. In the second, the power to identify 'deserving cases' entails choice, and is therefore discretionary.

Although the second power seems to involve no duty at all, it is important to realise that the holder of discretionary power never has a completely free hand. First, to act with discretion means to act wisely and after due reflection; and so while discretion can be very wide, it is never completely 'free', 'unfettered', 'absolute' or 'arbitrary', notwithstanding the frequency with which these and similar adjectives have been used by the courts. Baxter rightly describes an 'unfettered discretion' as a contradiction in terms. Secondly, the idea of uncontrolled or unguided discretion is hopelessly at odds with contemporary constitutionalism. In the South African context, our Constitution requires that there be some constraints on broad discretionary powers. As the Constitutional Court has explained, this is not only to minimise the danger of a violation of rights but also 'so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of

⁸ Page 65.

those powers or in what circumstances they are entitled to seek relief from an adverse decision’.”

[21] So, there is no merit in the submission that the Minister’s discretion in this regard is unfettered or unbridled.

[22] I am not persuaded that the appointment and termination of a Board is an executive decision. The respondent does not say why the taking of the impugned decisions amount to executive decisions / action. It certainly cannot be said to amount to a policy of formulation policy decision/s. Therefore, must be an administrative action. Be that as it may, there are prescribed requirements for administrative action to be procedurally fair as laid out in *PAJA* in particular *Section 3*. Applicants do not say in what way these requirements were not met. Their qualm, as I understand their case is that the Minister took the allegations against them at face value and acted in the manner he did based on incomplete and untested allegations. Furthermore, that he did not engage the applicants especially those against whom allegations were made, treated the allegations as established facts, and did not apply his mind to the said allegations. I am not persuaded that these are sufficient reasons to review the decisions taken by the Minister in terms of *PAJA*.

[23] Applicants argued in the alternative that the decisions are reviewable on the basis of the principle of legality. This principle require that every exercise of public power must be rational. The Minister justifies his decision to dissolve the Board on the basis that the Board was dysfunctional and goes on to assert:

“43. The Board cannot continue to be dysfunctional at the expense of the residents of the Eastern Cape Province. My decision to terminate the membership of the members of the Board was accordingly rational under the circumstances. It is respectfully pointed out that the Water Board is responsible for the constitutional right of access to water as guaranteed in

terms of Section 27 of the ***Constitution of the Republic of South Africa***, 1996.”⁹

[24] Whilst the applicants concede that there was disharmony amongst members of the Board, especially with the Chairperson, there was a conflict between the erstwhile members of the Board. They deny that this at the expense of the residence of the Eastern Cape Province. They point out that all what the common cause factors relating to disagreements between the Board members in particular about the need for a special Board meeting only point to the existence of a disagreement amongst Board members. Further that the Minister’s conclusion that the dysfunctionality of the Board is at the expense of the residence of the Eastern Cape Province is farfetched. On the contrary, so the applicants demonstrate, in their written submissions and in the founding affidavit that the Board has risen above the conflict concerned and achieved progress in the Board’s primary activity.¹⁰ As indicated earlier in this judgment, applicants’ written submissions do not form part of the *Rule 53* record. They are annexed to the founding affidavit. Applicants also argue that nowhere in the *Rule 53* record is there any suggestion of a negative impact on the water services in the Eastern Cape Province. Applicants also assert that the Minister only noted their assertions about the strides they made as a Board. That he does not deny that the applicants have contributed substantially to the reliable provision of water services to the people of the Eastern Cape. It is their case therefore that it follows that the decisions taken by the Minister are entirely irrational and fall to be reviewed and set aside. It is apposite to note that the reason given by the Minister when he advised the applicants of his intention to dissolve the Board and terminate their membership was that the governance challenges have led to instability within the entity. The conduct namely, alleged misconduct by some members has the potential of subjecting the Board to disrepute. There is no mention of “instability” being at the expense of the residents of the Eastern Cape Province.

[25] In the circumstances, can it be said that the Minister’s decision in this regard is so unreasonable that no reasonable decision maker could have reached it? In the

⁹ First respondent’s answering affidavit page 260 of the indexed papers.

¹⁰ See for example paragraph 9 of founding affidavit page 4 of indexed papers.

matter of ***Pharmaceutical MNFRS of SA: IN RE Ex Parte President of the RSA***¹¹
the court had this to say about rationality of a decision:

“[85] It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.”

In ***Minister of Water and Sanitation v Sembcorp Size Water (Pty) Limited and Another***¹² the court held that in this regard the court must determine whether there is a rational link between the decision and the purpose sought to be achieved.

[26] *Section 29* of the *Water Services Act* provides that the primary activity of a water Board is to provide water services to other service institutions within its service area. The duties of a water Board are set out in *Section 38* of the Act. It is common cause that water Board members are bound by a Board Charter. Common cause is also the fact that Board members are bound by a Code of Conduct and Ethics for Board Members.

[27] There is no evidence that the applicants breached any of these instruments. Instead, they have demonstrated as aforesaid that they have made strides in achieving the objectives of the Water Board. The Minister justifies the decision to dissolve the Board by asserting that even though the applicants acknowledge that the Board was dysfunctional, they still expect him to keep it in place at the expense of the residence of the Eastern Cape and risk that the constitutional obligation to provide water would not be fulfilled. In my understanding, applicants only acknowledge governance issues within the Board not dysfunctionality.

¹¹ 2000 (2) SA 674 CC [84].

¹² [2021] ZACC [21] paragraph 44.

[28] I am not persuaded that the decision to dissolve the Board which gave rise to the ancillary decisions is rationally connected to the purpose sought to be achieved. It accordingly falls to be reviewed and set aside as being unlawful.

[29] *Section 172 (1) (b)* of the Constitution provides that in these circumstances, a court may make any order that is just and equitable, including –

- (i) an order limiting the retrospective effect of the declaration of invalidity

I have been urged on behalf of the Minister that it would be just and equitable not to order the re-instatement of the Board even if the decision of the Minister may have been set aside.

[30] On the other hand, first applicant in her written submissions to the Minister makes the point that acceptance of an appointment to the Board of a State entity presents a risk to one's personal brand and professional image. In my view therefore, it will not be just and equitable not to order the re-instatement of the Board in these circumstances. Even though applicants seek an order to the effect that they be re-instated retrospectively, no facts were brought to my attention regarding the efficacy of an order in those terms.

[31] In the result, the following order will issue:

(a) The decision taken by the first respondent on or about the 25 March 2022 to terminate the applicants' appointment to the Amatola Water Board in terms of Section 35 (5) of the Water Services Act 108 of 1997 is reviewed and set aside.

(b) So is the decision taken on or about the same date as mentioned in (a) above to dissolve the Amatola Water Board.

(c) The applicants are to be re-instated as members of the Amatola Water Board with immediate effect.

(d) The first respondent is ordered to pay the costs of the application.

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants: Adv: N. Stein
Instructed by: B.B NYANDA ATTORNEYS
C/o MABECE TILANA INC.
39 New Street
MAKHANDA
Ref: S Tilana
Tel.: 046 – 622 2432 / 084 827 9268

For the Respondent : Adv: M. C. Erasmus SC & Adv: M. Vimbi
Instructed by: STATE ATTORNEY (GQEBERHA)
C/o LULAMA PRINCE ATTORNEYS
22 Hill Street
MAKHANDA
Ref: Ms L Prince
Tel.: 061 416 4214

Date Heard: 19 January 2023

Date Reserved: 19 January 2023

Date Delivered: 24 May 2023