



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 21196/2022

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
<i>2023/10/25</i>	
DATE	SIGNATURE <i>[Signature]</i>

In the matter between:

AFRIFORUM NPC

Applicant

and

**MINISTER OF INTERNATIONAL RELATIONS AND
CO-OPERATION**

First Respondent

**DEPUTY MINISTER OF INTERNATIONAL RELATIONS
AND CO-OPERATION**

Second Respondent

**DIRECTOR-GENERAL, DEPARTMENT OF
INTERNATIONAL RELATIONS AND CO-OPERATION**

Third Respondent

**AFRICAN RENAISSANCE AND INTERNATIONAL
CO-OPERATION FUND**

Fourth Respondent

**ADVISORY COMMITTEE, AFRICAN RENAISSANCE
AND INTERNATIONAL CO-OPERATION FUND**

Fifth Respondent

MINISTER OF FINANCE

Sixth Respondent

DIRECTOR-GENERAL, DEPARTMENT OF FINANCE

Seventh Respondent

**DEPUTY DIRECTOR-GENERAL, DEPARTMENT OF
FINANCE**

Eight Respondent

NATIONAL TREASURY

Ninth Respondent

PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA

Tenth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

Eleventh Respondent

Summary: Judicial review – Administrative action – Promotion of Administrative Justice Act 3 of 2000 – Test – Executive conduct – Principle of legality – Mandatory prescripts not followed – Decision reviewed and set aside

Afriforum sought to have National Treasury's decision to approve a surplus retention request reviewed and set aside. It also sought to review and set aside a decision made on the recommendation of the African Renaissance Fund supported by the Ministers of DIRCO and Finance, to donate R50 million to Cuba. The court first had to consider if the decisions were administrative action and it found that they were not. The court held that the decision to approve the surplus retention request was lawful. The donation decision was, however, held to be unlawful because the ARF Advisory Committee, which made the recommendation to donate, was not quorate.

ORDER

1. the decision of the First, Third, Fourth and Sixth Respondents to donate R50 million to the Republic of Cuba is reviewed and set aside.
2. the First, Third, Fourth and Sixth Respondents are ordered to pay fifty percent (50%) of the Applicant's costs.

JUDGMENT

MLAMBO, JP (Dlamini J and Cowen J concurring)

Introduction

- [1] On 2 February 2022 South Africa woke to the news that the South African Government had, through the Department of International Relations and Cooperation (DIRCO), taken a decision to donate R50 million to the Republic of Cuba (Cuba). This was announced by the Deputy Minister of DIRCO, whilst addressing a parliamentary oversight committee. Following on this announcement, the Applicant (AfriForum) dispatched a letter, through its lawyers, to the Minister of DIRCO, requesting clarification about the source of the R50 million donation to Cuba. AfriForum further asked, *inter alia*, when the decision to make the donation was made, whether it was being made in accordance with any bilateral agreement between the two governments and how the decision to make the donation was justified by DIRCO given the “dire socio-economic situation” that South Africa faced. AfriForum also sought an undertaking that the donation would not be made until the questions raised had been addressed sufficiently.
- [2] DIRCO responded through the Acting Director-General, per letter dated 25 February 2022 stating, *inter alia*, that the allocation of R50 million would not be made in terms of any agreement but as a response to a request from the Cuban Government and that this would be done in line with section 4(e) of the African Renaissance and International Cooperation Fund Act,¹ which authorised the African Renaissance and International Co-operation Fund (African Renaissance Fund) to utilise funds to enhance humanitarian assistance.
- [3] This response did not appease AfriForum who, on 1 March 2022, and on the basis that no undertaking was made not to go ahead with the Cuban donation, launched an urgent application in this Court. It sought an order that, pending this application, the Respondents be interdicted from paying over the R50 million or any part thereof to Cuba. The interim interdict was granted on 22 March 2022² and the Respondents unsuccessfully applied for leave to appeal that order. They were further unsuccessful in an application for direct access to the Constitutional Court. They then redirected their efforts and petitioned the Supreme Court of Appeal for leave to appeal. That petition was also unsuccessful.

¹ 51 of 2000 (the Act).

² *AfriForum NPC v Minister of International Relations and Co-operation and Others* [2022] ZAGPPHC 185.

This Application

- [4] This is the application foreshadowed in AfriForum's successful interdict application. It seeks to review and set aside the Eighth Respondent's decision, taken on behalf of the Seventh Respondent, to approve the Fourth Respondent's request to retain an accumulated cash surplus, in its allocated budget for the 2021/2022 financial year, i.e. as at 31 March 2022. Also sought to be reviewed and set aside is the decision of the First and/or the Second to the Sixth Respondents to donate the amount of R50 million to the Republic of Cuba and/or subsequent supply chain processes related thereto. AfriForum further seeks certain declaratory relief as well as an order for costs against any Respondent opposing this application.

The Parties

- [5] AfriForum is the Applicant, a non-profit company duly incorporated in the Republic of South Africa. It styles itself as actively involved in the promotion of the rule of law and constitutional rights.
- [6] The First and Second Respondents are the Minister and Deputy Minister of International Relations and Co-operation. They are the cabinet member and deputy, responsible for DIRCO. The Minister and Deputy Minister referred to in this matter are Ms Naledi Pandor and Mr Alvin Botes. The Third Respondent is the Director-General of DIRCO.
- [7] The Fourth Respondent is the African Renaissance Fund. It is a schedule 3A public entity in terms of the Public Finance Management Act.³ It was established in terms of section 2 of the Act and is located within DIRCO. In terms of section 2, the African Renaissance Fund consists, inter alia, of "money appropriated by Parliament for the Fund".⁴ Its objects are found in Section 4 and are:

- "4. The money in the Fund must be utilise to enhance –
- (a) co-operation between the Republic and other countries, in particular African countries.
 - (b) the promotion of democracy and good governance.
 - (c) the prevention of conflict.

³ 1 of 1999 (the PFMA).

⁴ Section 2(2) of the Act.

- (d) socio economic development and integration; and
- (e) humanitarian assistance and human resource development.”

- [8] The Fifth Respondent is the Advisory Committee of the African Renaissance Fund (the Advisory Committee) being the Committee envisaged in section 5 of the Act. In terms of section 5(1), the Advisory Committee consists of the Director-General of DIRCO or his delegate, three officials from DIRCO appointed by the Minister and two officials of the Department of Finance appointed by the Minister of Finance, i.e. six members in total. Funds accruing to the fund must be “disbursed upon the recommendation of the Advisory Committee and approval by the Minister in consultation with the Minister of Finance”.⁵ The operations of the Advisory Committee are further carried out in line with its Terms of Reference which will be considered later in this judgment. The First to Fifth Respondents, are sometimes also collectively referred to as the DIRCO Respondents.
- [9] The Sixth Respondent is the Minister of Finance, the Minister in the cabinet responsible for the Department of Finance; the Seventh Respondent is the Director-General of the Department of Finance; the Eighth Respondent is the Deputy Director-General of the Department of Finance. The Ninth Respondent is the National Treasury, as contemplated in section 5 of the PFMA. The Seventh to Ninth Respondents will sometimes be collectively referred to the Treasury Respondents.
- [10] The Tenth Respondent is the Parliament of the Republic of South Africa, as contemplated in section 42 of the Constitution and the Eleventh Respondent is the President of the Republic of South Africa, the head of both the state and national executive of South Africa, as contemplated in section 83 of the Constitution. These Respondents have played no part in these proceedings.

Salient facts

- [11] On 31 May 2021, the Acting Director-General of DIRCO transmitted a request to the Ninth Respondent (National Treasury) to retain a cash surplus, in the budget of the African Renaissance Fund, as at 31 March 2021. The request was made in terms of section 53(3) of the PFMA. This section provides that a Schedule 3 public

⁵ Section 5(3) of the Act.

entity may not accumulate a surplus unless the prior written approval of the National Treasury has been obtained. In the request, the Acting Director-General documented both the available and committed funds in the Fund in (a) displaying that the surplus declared as at 31 March 2021 was R 71 537 000.00 (R71 million) and (b) requesting approval to retain the said surplus amount, which would be “earmarked for any urgent humanitarian assistance to African countries as a result of national disasters”.

- [12] This request was, according to the DIRCO Respondents, made in terms of National Treasury Instruction No 12 of 2020/2021 which outlines the process to be followed by accounting officers who declare surpluses. The Treasury Instruction specifies that Schedule 3A entities are permitted to submit surplus retention requests to National Treasury as at 31 March (year-end).
- [13] Meanwhile, on 20 July 2021, Cuba’s Ambassador to South Africa wrote to the Minister of DIRCO requesting emergency assistance consisting of food and medical supplies. He motivated the request as being based on the dire situation that Cuba found itself in due to sanctions imposed on it by the United States of America and the effects of the Covid-19 pandemic.
- [14] On 29 July 2021 and regarding the surplus retention request, there was email communication between National Treasury and the Secretariat of the African International Renaissance Fund regarding the calculations of how the surplus was determined. The communication anticipated that R50 million of the R71 million may be used to provide assistance to Cuba.
- [15] On that same day, the Deputy Director-General, for the Americas and Europe Branch of DIRCO, prepared a memorandum for the consideration of the Advisory Committee which recommended that an amount of R50 million be approved for “urgent humanitarian assistance to the Republic of Cuba for the procurement of South African goods to alleviate the humanitarian crisis”.
- [16] The Secretariat of the African Renaissance Fund then circulated a memorandum by e-mail to its Advisory Committee members, the purpose of which was “to submit, for the ARF Advisory Committee’s consideration, the request from the Republic of Cuba for urgent assistance.” This is repeated in the conclusion of the

memorandum, under the heading "Recommendation" it says: "It is recommended that the ARF Advisory Committee ... considers recommending R50 million for the urgent humanitarian assistance to Republic of Cuba (*sic*) for the procurement of South African goods to help alleviate the humanitarian crisis."

- [17] Furthermore, on the same day, 29 July 2021, having received responses from some Advisory Committee members, approving the decision to make the R50 million donation to Cuba, the Secretariat sent a memorandum to the Minister and Director-General of DIRCO, with a recommendation, to approve the donation. The memorandum requested the Minister to source the concurrence of the Minister of Finance, regarding the Advisory Committee's recommendation. The memorandum was endorsed by the Director-General of DIRCO on 30 July 2021 and by the Minister of DIRCO on 1 August 2021.
- [18] It is recorded in the memorandum that the Advisory Committee's recommendation was in line with section 5 of the Act, to disburse funds from the African Renaissance Fund as contemplated in subsections 2, 3 and 4; that the financial or legal implications regarding the Advisory Committee's recommendation were based on the request submitted to National Treasury requesting a retention of surplus funds to the tune of R71 million; that the Act specified that the funds must be made available or disbursed upon the recommendation of the Advisory Committee and the approval by the Minister in consultation with the Minister of Finance; and that Cuba's formal request for assistance for food and medical supplies to South Africa could be addressed by extending facility B of the Expired Agreement on Economic Assistance with Cuba.⁶
- [19] As regards the surplus retention request and on 30 July 2021, National Treasury called for the audited financial statements of the African Renaissance Fund and these were submitted on 2 August 2021. On 3 August 2021 National Treasury (through its Acting Director-General) granted its approval to the African Renaissance Fund to retain the surplus of R71 million accumulated for the

⁶ This was a bilateral agreement entered into between the governments of South Africa and Cuba in December 2010. It had three facilities. Facility A was a conditional grant of money to purchase goods in South Africa and elsewhere. Facility B was a solidarity grant to purchase goods in South Africa. Facility C was a credit line from South Africa to Cuba.

2020/2021 financial year. The memorandum placed before the Acting Director-General anticipates, in express terms, that the surplus may be used to assist Cuba.

- [20] On 1 August 2021, the request for the Finance Minister's concurrence for the donation was formalised in a letter to him and he confirmed his concurrence in the Advisory Committee's recommendation, on 13 August 2021.

AfriForum's case

- [21] AfriForum's overarching basis for this application is that South Africa is in dire straits on a number of fronts economically. It refers to the well-known service delivery challenges in South Africa which, it says, are the consequence of a lack of sufficient funding for government to undertake all its constitutional obligations as well as the after-effects of the Covid-19 pandemic and the lockdown. The primary stance based on this country's reported service delivery failures and the parlous state of the economy was echoed in the National Assembly, on 22 February 2022, when a member of the Democratic Alliance,⁷ referring to the Cuban donation, posed the following question to the Minister - "[w]hether, against the background of record high unemployment figures and persistent levels of poverty in the Republic, she has found that the Government's R50 million donation to the government of the Republic of Cuba for special intervention purposes, could have been put to better use at home?" Without mentioning the full response of the Minister, it suffices to say that she stated that the request from Cuba was due to chronic shortages in food, fuel, medicine and electricity in that country and that the Government of South Africa had responded positively in the context of reciprocity and its historical friendship and solidarity with the Republic of Cuba.

- [22] In its founding affidavit, AfriForum makes the point that, in view of the South African realities discussed in the preceding paragraph, it was inconceivable for National Treasury to grant the retention request as well as for the DIRCO Respondents, with the concurrence of the Minister of Finance, to make the decision to donate R50 million to Cuba.

⁷ A political party and the official opposition in Parliament.

[23] Reliant on this background, AfriForum's case rests on two primary pillars. In the first place it seeks the review of the Treasury respondents' decision to approve the surplus retention request made by the African Renaissance Fund. Foreshadowed in this part of the case, are all decisions taken from the initiation of the request up to and including its approval. Secondly, AfriForum attacks the decision of the African Renaissance Fund to approve the Cuban donation, supported by the two Ministers. Also countenanced in this part of AfriForum's case is each and every decision taken underpinning the African Renaissance Fund's initiation of the internal approval processes up to and including the final decision adopted when the concurrence of the Minister of Finance was secured to make the donation.

Is the approval of the surplus retention request administrative action?

[24] AfriForum argues that the impugned conduct is reviewable under PAJA or alternatively in terms of the legality principle in the Constitution. Thus, the starting point should be to determine whether any of the impugned decisions are administrative action. If they are, they are reviewable under PAJA and if they are not, then they are reviewable under the principle of legality.⁸

[25] Our jurisprudence fortunately provides the necessary guidance in these matters. It is necessary, at the outset, to determine whether National Treasury's approval of the request by the African Renaissance Fund, to retain the accumulated surplus, and the subsequent decision by the DIRCO Respondents with the concurrence of the Minister of Finance, to donate R50 million from that surplus to Cuba, constitute administrative action. In *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and another*,⁹ the SCA said the following in relation to the starting point when determining if a decision is administrative action:

"When regard is had to the structure of the definition of an administrative action, the requirement that the decision be of an administrative nature, is a gateway to determining whether a particular decision constitutes

⁸ If a decision cannot be reviewed under PAJA, it does not mean it cannot be reviewed at all, rather that it can be reviewed under the principle of legality. See *Prudential Authority of the South African Reserve Bank v Msiza and Another* [2023] ZAGPPHC 313 at para 16; *National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others* [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) at paras 112-113; *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) at para 38.

⁹ [2021] ZASCA 157; [2022] 1 All SA 138 (SCA); 2022 (1) SA 424 (SCA).

administrative action. As Wallis J explained in *Sokhela and others v MEC for Agriculture and Environmental Affairs*, this requirement demands that a detailed analysis be undertaken of the nature of the public power or public function in question, “to determine its true character”. Thus, the determination of what constitutes administrative action does not occur by default, and “[t]he court is required to make a positive decision in each case whether a particular exercise of public power or performance of a public function is of an administrative character.”¹⁰ (Footnotes omitted.)

[26] In *Minister of Defence and Military Veterans v Motau and Others*,¹¹ the Constitutional Court provided a convenient breakdown of the elements contained in the definition of administrative action as found in section 1 of PAJA. At paragraph 33, the Court said administrative action is:

“a decision of an administrative nature; by an organ of state or a natural or juristic person; exercising a public power or performing a public function; in terms of any legislation or an empowering provision; that adversely affects rights; that has a direct, external legal effect; and that does not fall under any of the listed exclusions”. (Footnote omitted.)

And further at paragraph 34:

“To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that enquiry. But the requirement has two important functions. First, it obliges courts to make a “positive decision in each case whether a particular exercise of public power ... is of an administrative character”. Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration”. (Footnotes omitted.)

¹⁰ *Ibid* at para 14.

¹¹ [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (“*Motau*”).

[27] In *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*,¹² as to what is meant when saying a decision is of an administrative nature, the SCA said:

"Whether particular conduct constitutes administrative action depends primarily on the nature of the power that is being exercised rather than upon the identity of the person who does so. Features of administrative action (conduct of 'an administrative nature') that have emerged from the construction that has been placed on s 33 of the Constitution are that it does not extend to the exercise of legislative powers by deliberative elected legislative bodies, nor to the ordinary exercise of judicial powers, nor to the formulation of policy or the initiation of legislation by the executive, nor to the exercise of original powers conferred upon the President as head of state. Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals."¹³ (Footnotes omitted.)

[28] The decision to approve the surplus retention request as well as the decision to approve the Cuban donation are pre-eminently the exercise of public powers. This much is borne out by the jurisprudence examined. The African Renaissance Fund as a schedule 3A entity, is a public entity and, similarly, National Treasury, without doubt is also a public body. These organs of state took the decisions at issue when performing public functions, and while exercising public power. This was described by the Constitutional Court in *Chirwa v Transnet Limited and Others*,¹⁴ as follows:

"In my view, what makes the power in question a public power is the fact that it has been vested in a public functionary, who is required to exercise the power in the public interest. When a public official performs a function in relation to his or her duties, the public official exercises public power.... Transnet is a creature of statute. It is a public entity created by the statute and it operates under statutory authority."¹⁵

¹² [2005] ZASCA 43; [2005] 3 All SA 33 (SCA); 2005 (6) SA 313 (SCA) ("*Greys Marine*").

¹³ *Ibid* at para 24.

¹⁴ [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 2 BLLR 97 (CC); (2008) 29 ILJ 73 (CC).

¹⁵ *Ibid* at para 138.

[29] I hold the view that the exercise of the power to approve the surplus retention request is executive in nature. What we are dealing with here is conduct concerning budget and fiscal management undertaken by the executive in furtherance, in this instance, of policy laden processes to support its foreign policy endeavours. For this reason alone, the approval of the surplus retention request, must be subjected to the legality standard of review.

[30] The remaining material requirements are whether the decision to approve the request, adversely affects the rights of any person and had a direct, external legal effect. In *Greys Marine*, the SCA considered the impact of these requirements and said:

"The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."¹⁶

[31] The Constitutional Court endorsed this view in *Joseph and Others v City of Johannesburg and Others*,¹⁷ when it held that:

"The qualifying phrase "direct, external legal effect" appears in the definition of administrative action under section 1 of PAJA. I need do no more on the facts of this case than endorse the broad interpretation accorded to this phrase by the Supreme Court of Appeal in *Grey's Marine*, where it stated that the phrase "serv[es] to emphasise that administrative action impacts directly and immediately on individuals." Indeed, a finding that the rights of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a "direct, external legal effect" on the applicants. Conversely, a finding that the rights of the applicants were not materially and adversely affected would have the result that section 3 of PAJA would not apply."¹⁸

¹⁶ *Greys Marine* above n 12 at para 23.

¹⁷ [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

¹⁸ *Ibid* at para 27.

- [32] In my view, AfriForum has not shown that the decision to approve the retention request had a “direct and external legal effect” on it and its members or adversely affected their rights. For this reason too, that decision is not administrative action. I return below to the characterisation of the donation decision.

The lawfulness of the decision to approve the surplus retention request

- [33] AfriForum has argued that the decision to approve the request was unlawful and/or irrational and/or unconstitutional and that mandatory and material procedures which were prescribed by the empowering legislation were not complied with. Based on these broad arguments AfriForum submitted that the decision to approve the surplus retention request was unlawful.
- [34] The building blocks of AfriForum’s attack of the approval of the surplus retention request, commences with the initiation of the request. It says that applying for the surplus retention two months earlier than the time when such requests could be made i.e., 1 August, was unlawful in light of the objectives of the Fund – being to provide humanitarian assistance. It argues that there is good reason for not requesting a retention before 1 August as new events like natural disasters that would necessitate a need for humanitarian assistance, could occur after the surplus retention is approved. A request before 1 August would result in the African Renaissance Fund not being able to assist as funds would already be earmarked for other causes.
- [35] It also argues that early requests would lead to the inability of the African Renaissance Fund to fully disclose contingent liabilities that could arise before 1 August. It further argues that because National Treasury was not informed that the money would be used for the Cuba donation, it would have formed part of contingent liabilities. Additionally, it argues that there was no detailed information, accompanying the request, regarding contingent liabilities. Its final argument on this point, is that the surplus retention request was premised on rendering humanitarian assistance to African countries and the donation to Cuba was unlawful as Cuba is obviously not an African country.
- [36] I’m not persuaded that these submissions hold water. The fact of the matter is that the surplus retention request was made at the end of the relevant financial year

when it had become clear how much the accumulated surplus was. I'm aware of no bar to the submission of the retention request after the end of the financial year and before August. AfriForum has pointed to none. In any event the legislative scheme evinces no bar to such early requests. In this regard, Regulation 6.4 of the Treasury Regulations contemplates submission of roll over requests by the end of May and this regulation is readily reconciled with the Treasury Instruction which contemplates that the applications are only subsequently presented to the decision maker.

- [37] Admittedly, no audited financial statements accompanied the request as these had been submitted to the Auditor-General for auditing. I can however find no basis on which to find that the surplus retention request must be reviewed and set aside on the basis that no audited financial statements accompanied it. That fact does not render the request unlawful. It is self-evident why no audited financial statements accompanied the request – these were submitted to the Auditor-General for purposes of the annual audit. It has also correctly been pointed out by the Treasury Respondents that submitting on 31 May was appropriate because in terms of section 55(1)(c) of the PFMA, public entities must submit their financial statements to both National Treasury and the Auditor-General for audit within two months after the end of the financial year. Moreover, the Treasury Instruction makes provision for the request to be presented to the decision-maker after August.
- [38] AfriForum's argument that a correct statement of contingent liabilities would have become clear around August is misconceived. It overlooks the fact that when the African Renaissance Fund submitted its financial statements for auditing purposes, contingent liabilities would already have been determined. No contingent liabilities were declared as there were none. AfriForum's argument, that the R71 million could have become a contingent liability had the Cuba aid not been mentioned, is a red herring. That amount was an accumulated surplus and was committed to no causes. As such it could never have been regarded as a contingent liability. Contingent liabilities are determinable at the end of the financial year and if there were none when the financial year ended, none could materialise thereafter, as appears to be suggested by AfriForum.

- [39] What is important is that the request is presented and considered between 1 August and 30 September and that all supporting documentation was before Treasury. The supporting documentation envisaged in the Treasury Instruction and section 53(3) of the PFMA accompanied the retention request, including the audited financial statements, which were submitted subsequently and after the annual audit. This documentation included: a calculation of how the surplus was arrived at; a motivation detailing how the surplus arose; that there were no contingent liabilities; and a schedule of new commitments for the 2021/22 financial year. It is therefore incontrovertible, that when the Treasury Respondents considered and approved the request, all the required documentation had been submitted by the DIRCO respondents.
- [40] Additionally, AfriForum's contention that the African Renaissance Fund was only able to afford the donation after the surplus, is not supported by the uncontested evidence before us. It is apparent from the calculations accompanying the request that the surplus was R557 060 000 (five hundred and fifty-seven million and sixty thousand rand), of which R485 523 000 (four hundred and eighty-five million five hundred and twenty three thousand rand) were committed funds and R71 537 000 (seventy one million five hundred and thirty seven thousand rand) were uncommitted funds. This was the surplus amount and the subject of the retention request. This amount was mentioned in the retention request to National Treasury as the funds that would be earmarked for urgent humanitarian assistance to African countries that might arise, hence the assertion that these funds were uncommitted. The R71 million was within the African Renaissance Fund's budget but could not be used as it was a surplus and required approval by National Treasury to be retained and used to further the objectives of the African Renaissance Fund. Under no circumstances could this amount be regarded as a contingent liability.
- [41] As to AfriForum's submission that the request was unlawful and unconstitutional as it mentioned Cuba which is not an African country, I can only refer to the wider objectives of the African Renaissance Fund. This is a fund that not only has a continental outlook but a global one. Granted, the request to retain the surplus mentioned that the funds would be used to assist African countries, but this does

not delegitimise the request *per se* and its approval. We have also not been shown any evidence that there were requests from African countries that were overlooked in favour of Cuba. Moreover, by the time the request was presented to National Treasury in August, DIRCO had informed National Treasury that the donation to Cuba was at that stage under consideration and that the assistance to Cuba would be from that surplus, on being approved.

- [42] AfriForum further attacks National Treasury's approval of the surplus retention request predominantly based on its overarching criticism that South Africa's economy was in the doldrums, with high levels of unemployment and that the Government had failed spectacularly on the service delivery front. This challenge to the approval of the request ignores the regulatory framework applicable to National Treasury and the treatment of funds appropriated through Parliament to entities such as the African Renaissance Fund. AfriForum's submission suggests that National Treasury should have refused the request and redirected the surplus funds to other purposes and presumably to other entities and departments so to speak. This is a misconceived submission. It ignores the fact that the approval of the retention of the surplus was for a broader purpose of enabling many potential projects that accord with the purpose of the African Renaissance Fund, which differs from the approval of any specific project. As pointed out by the Treasury Respondents, had the surplus not been approved then various support projects to other deserving countries including Mozambique (for example, due to effects of cyclone Idai), Zimbabwe, Guinea, Madagascar, South Sudan, and others, for which commitment had been declared would not have been possible.
- [43] Regarding Parliament's role in such matters, Chapter 4 of the PFMA governs the appropriation of funds by Parliament for the state and its entities. The Act specifically reiterates that this function is the preserve of Parliament, not National Treasury. In carrying out its functions, Parliament makes policy choices that are available to it, to meet the broad and diverse needs and imperatives of the South African government and society. The Treasury Respondents have also pointed out that, in appropriating any funds for the African Renaissance Fund to be donated to foreign governments, Parliament does so fully mindful of the prevailing circumstances and makes appropriate appropriations having regard to such

circumstances. These Respondents have demonstrated, without counter from AfriForum, that the appropriation of funds from the fiscus happens within, and is informed by, a strictly determined legislative scheme.

- [44] AfriForum contends that because it brought this application in the public interest and that public funds are involved, the rights of the public are affected. AfriForum's stance is based on its assertion that had National Treasury not approved the retention request, the funds would have reverted to National Treasury, where the funds would then be appropriated to other areas to address the service delivery challenges faced by the country. This is nothing more than mere speculation. The SCA's warning on hastily relying on inferential reasoning is helpful to consider. In *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality*,¹⁹ at paragraph 40, it described the process of inferential reasoning as "call[ing] for an evaluation of all the evidence and not merely selected parts". It continued by stating the importance of distinguishing the making of inferences from conjecture or speculation in the following terms:

"The inference that is sought to be drawn must be 'consistent with all the proved facts: If it is not, then the inference cannot be drawn' and it must be the 'more natural, or plausible, conclusion from amongst several conceivable ones' when measured against the probabilities."²⁰ (Footnotes omitted.)

- [45] It is clear to me having traversed AfriForum's arguments, that there is no basis on which to review and set aside the approval of the retention request. AfriForum has simply not put up any case showing that the decision was unlawfully and/or irrationally made. I must also reiterate that AfriForum has not shown that the decision to approve the retention had a "direct and external legal effect" on it and its members. Unless the PFMA is challenged, there can be nothing wrong in approving a request to retain a surplus where it complies with all the prescribed requirements as well as satisfies the requirements of the principle of legality.

Is the donation decision administrative action?

¹⁹ [2017] ZASCA 77; [2017] 3 All SA 382 (SCA); 2018 (1) SA 391 (SCA).

²⁰ *Ibid* at para 42.

- [46] AfriForum argues that the decision to donate R50 Million to Cuba is administrative action and that it was irrational for the African Renaissance Fund supported by the two Ministers to approve the donation. The submission is that this was clearly the application of legislation and amounted to the exercise of a discretion in light of the relationship that South Africa had with Cuba for a long time. It argued that the donation decision appears to be a narrower exercise of statutory power which might also give effect to formulated policy. In this regard they relied on the *Motau* judgment of the Constitutional Court.²¹ They argued that South Africans in general are adversely affected when their government simply gives away large sums of money which could be used to address prevailing service delivery shortfalls.
- [47] AfriForum has argued that it brought this application in the public interest, and that the decision to donate money to Cuba was administrative action as the public is affected adversely when its Government ignores domestic needs and gives away monies such as we have here. It is on this basis that AfriForum submitted that the decision to donate R50 million to Cuba is reviewable under PAJA because section 4 thereof caters for administrative action that affects the public. Furthermore, they submit that some form of public participation as provided for in section 4 of PAJA should have been followed before the decision was taken.
- [48] The DIRCO Respondents maintain that the donation decision is executive action and is not subject to PAJA. They maintain that the request to provide humanitarian assistance to the Republic of Cuba and the subsequent decision to allocate funds for that purpose is a policy decision which the Minister and the Minister of Finance took. They also argue that the decision does not have direct and immediate consequences for individuals or groups of individuals, as the Act is clear about the funds appropriated for the African Renaissance Fund and further that the Act does not prescribe how African Renaissance Fund beneficiary countries ought to be selected which remains the broad prerogative of the African Renaissance Fund.
- [49] Section 1(aa) of PAJA provides that executive powers and functions of the executive are excluded from the list of administrative acts. The section further provides *inter alia* that sections 85(2)(a)-(e) and 92(3) are executive actions. The

²¹ *Motau* above n 11.

executive authority is essentially involved with the preparation, initiation and implementation of legislation, the development and implementation of national policies, and co-ordination of the functions of State departments.

[50] The Constitutional Court in *Glenister v President of the Republic of South Africa and Others*,²² held that “under our constitutional scheme it is the responsibility of the executive to develop and implement policy”.²³ The Court also stated that it is “not for the Court to disturb political judgments, much less to substitute the opinions of experts”²⁴

[51] The function of the executive is therefore the formulation of policies which may lead to the making of laws, and to oversee the implementation of laws and policies by government departments. In this way the executive is meant to promote effective and efficient governance. In *Motau*, the Constitutional Court defined executive powers as:

“Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, “[a]administrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.”²⁵

[52] Our Courts show particular respect for Government’s prerogative in making decisions in the conduct of its foreign affairs. In *Kaunda and Others v President of the Republic of South Africa*,²⁶ the Constitutional Court held that the Executive’s conduct of South Africa’s international affairs is subject to legality review and in the same breath, also stressed that the Government has a broad discretion in matters such as these which must be respected by our Courts. The Court summarised the principle as follows:

²² [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

²³ *Ibid* at para 67.

²⁴ *Ibid*.

²⁵ *Motau* above n 11 at para 37.

²⁶ [2004] ZACC 5; 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC); 2005 (1) SACR 111 (CC).

“Decisions made by the Government in these matters are subject to constitutional control. Courts required to deal with such matters will, however, give particular weight to the Government’s special responsibility for and particular expertise in foreign affairs, and the wide discretion that it must have in determining how best to deal with such matters”.²⁷

- [53] In *Geuking v President of the Republic of South Africa and Others*,²⁸ the Constitutional Court described the President’s granting or refusal of consent to an extradition request as a policy decision based on considerations of comity and reciprocity and having more to do with the relationship between South Africa and the state requesting the extradition than with the merits of the application itself.
- [54] These decisions confirm that executive action also involves the exercise of public power but relating to the formulation of legislation and policy. This covers action that is polycentric and is removed from bureaucratic action that is subject to legislative prescripts.
- [55] The decision to provide assistance to Cuba including the decision of the Minister of Finance’s decision to concur in that decision, are decisions embedded in the foreign policy of South Africa towards Cuba and are based on historic relationships between the two countries. The Act was promulgated with the objective of establishing the African Renaissance Fund whose objects include, *inter alia*, to enhance humanitarian assistance to other countries with a view to strengthen cooperation between the Republic and such countries. Such humanitarian assistance is funded from funds appropriated by Parliament in terms of the Appropriation Act. Furthermore, the exercise of powers under section 5(3) and 5(4) of the Act is clearly executive in nature.
- [56] In this context therefore, the decision was more concerned with foreign policy than with the implementation and the application of policy more specifically.²⁹ Based on this, there can be no argument that the decision of the DIRCO Respondents to make a donation to Cuba must be scrutinised through the administrative action

²⁷ *Ibid* at para 144.

²⁸ [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) at para 26.

²⁹ *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College (PE) (Section 21)* [2000] ZACC 23; 2001(2) SA 1 (CC); 2001 (2) BCLR 118 (CC) at para 18, with reference to *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at paras 142 and 143.

prism. It is the principle of legality that applies in view of the polycentric and executive nature of the decision. It's a decision taken to grant humanitarian assistance to Cuba and amounts to an exercise of a policy prerogative, exercised in the Minister's official capacity as a member of the national executive and authorised to do so by the Act in consultation with and concurrence of the Minister of Finance. The Act gives relevant members of the executive the power to make these kinds of decisions, because they are quintessentially foreign policy decisions.

- [57] The donation decision was taken in accordance with policy, specifically foreign policy prerogatives, and it was taken for the benefit of the people of Cuba, in support of the international relations between the two countries. The funds at the disposal of the African Renaissance Fund are specifically allocated to it for the purposes found in the Act.

Does the donation decision comply with the prescripts of the legality principle?

- [58] Having determined that the donation decision was executive in nature and subject to legality scrutiny, I must now determine if the decision survives that scrutiny. AfriForum made a series of submissions as to why the donation decision was unlawful. One argument raised which may well have had merit was not adequately foreshadowed in the notice of motion or pleaded, specifically that the Advisory Committee was not fully constituted in that one requisite DIRCO representative has not been appointed. For the most part, and to the extent that the issues raised by AfriForum were pleaded, they are meritless and only one requires attention.
- [59] AfriForum argued that the Advisory Committee was not properly constituted when it took the decision that the donation be made. It argued that the voting threshold was not met as only three of the six members voted in support of the decision. Simply put, AfriForum has argued that the decision was not supported by a majority of Advisory Committee members eligible to vote.
- [60] In response, the DIRCO Respondents say that the terms of reference do not require all members of the Committee to be present, but rather a quorum of 50% of the members plus 1. As to the vote, they say that four members voted thus meeting the required threshold.

[61] I have already mentioned that the Advisory Committee consists of four DIRCO and two Finance officials. The terms of reference provide for the appointment of alternates to the main members,³⁰ also appointed by the respective Ministers. Alternate members attend meetings in the main member's stead in their absence.³¹ The terms of reference also provide for when and how Advisory Committee business is to be conducted to the following effect:

- 61.1. Four committee members constitute a quorum, without which the committee business cannot proceed.
- 61.2. There are no fixed rules concerning the composition of a quorum except to say that it should include the Committee Chair, Vice-Chair or another member designated to act as the interim Chair or Vice-Chair should either not be able to attend the meeting.
- 61.3. At least one member from the National Treasury must be present at the Advisory Committee meeting to comprise a quorum.
- 61.4. A decision of the majority of the members of the committee present at any formally constituted meeting of the committee shall constitute a decision of the committee.

[62] The uncontested evidence tells us that the Secretariat of the Advisory Committee sent an email to four Advisory Committee members, and three alternate Advisory Committee members, to consider the Cuban request for humanitarian assistance. The members mentioned in the memo are Ambassador Losi (DIRCO), Mr Robin Toli (Finance), Ambassador Tsengiwe (DIRCO), Mr Themba Zulu (Finance). Additionally the alternate members also mentioned in the email are Ms Bhengu (DIRCO), Ms Nkuna-Shilubane (Finance) and Ms Naran (Finance). The evidence is further to the effect that only two members responded, approving the recommendation to make the donation to Cuba. They are Mr Robin Toli and Ambassador Ganga Tsengiwe. One Alternate member also voted in favour and that is Ms Hlengiwe Bhengu. No other email response is recorded especially from Ambassador Losi who, the DIRCO Respondents state, also voted. There is however no evidence from the record that she voted. The allegation that she voted

³⁰ Paragraph 4.2.

³¹ Paragraph 9.2.

is made by the deponent of the DIRCO Respondents' answering affidavit, Mr Zane Dangor, the current Director-General of DIRCO, who was not involved in that process. As to that allegation however, Ambassador Losi has not filed a confirmatory affidavit to confirm that she voted. We are mindful that there is a document on the record which appears to reflect her signature in her capacity as Acting Director-General and which seeks the Minister's support as well as the Finance Minister's concurrence. To the extent that I can make out, that was a step subsequent to the voting process which was designed to establish if there was support for the decision to make the donation. These aspects are, however, not adequately traversed in the evidence to justify a conclusion that Ambassador Losi duly participated and voted.

- [63] The Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Another*³² held that:

"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive 'are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law'. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."³³ (Footnotes omitted.)

- [64] The executive cannot exercise its power or perform a function beyond that which is conferred on it by law, further that power must not be misconstrued. The decision must be rationally related to the purpose for which the power was conferred, otherwise the exercise of the power would be arbitrary and at odds with the Constitution. Our courts have established that rationality applies not only to the decision, but also to the process in terms of which that decision was arrived at. In

³² [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

³³ *Ibid* at para 49.

Democratic Alliance v President of South Africa and Others,³⁴ the Constitutional Court held that:

"We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality."³⁵

- [65] Clearly, AfriForum's contentions regarding the record of Ambassador Losi's vote are correct. She was the Acting Director-General of DIRCO at the time and indeed, there is no indication that she voted. It must be accepted that three of the six Advisory Members voted and this is less than the required majority threshold, prescribed in the terms of reference. Therefore, there is merit to the claim that there was no majority vote when the African Renaissance Fund made the recommendation to the Minister of DIRCO.
- [66] To comply with the principle of legality the recommendation by the Advisory Committee had to be in line with or comply with the prescripts of how that committee took decisions. This is mandatory. The terms of reference require a threshold majority of four participating members of the Advisory Committee. The Advisory Committee recommendation therefore fell short of the required threshold for the decision to meet constitutional imprimatur. The ineluctable conclusion is that the donation decision suffered from illegality in that it was not taken by a quorate Advisory Committee. This means that the donation decision is liable to be reviewed and set aside.
- [67] AfriForum had also sought to review and set aside the procurement processes incidental to the donation decision. It is common cause that after the interdict was granted, the donation decision was never implemented. What that means is that no actual procurement decisions were taken to implement the donation decision. For that reason, no declaratory relief can follow where no conduct followed the impugned decision that has just been found to be unlawful.

³⁴ [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC).

³⁵ *Ibid* at para 37.

Costs

[68] The *Biowatch* principle applies in this case because this is constitutional litigation. Afriforum was successful in its review of the donation decision and should recover its costs to the extent of its success. There is no basis however to mulct the Second Respondent with the Applicant's costs. He didn't take part in this litigation. The Advisory Council was cited as the Fifth Respondent but within the context of the Act, it has no separate existence outside of the African Renaissance Fund. It is a legislatively created structure established within the African Renaissance Fund for the specific purpose of complementing the activities of the African Renaissance Fund in the treatment of assistance to other countries in line with the objectives of the African Renaissance Fund. The decision to make a donation to Cuba even though recommended by it, was in the final analysis a decision of the two Ministers and the African Renaissance Fund. Therefore, for all intents and purposes, the Advisory Council is part and parcel of the African Renaissance Fund and as such cannot attract liability for costs in its name.

[69] In the circumstances an order is granted that –

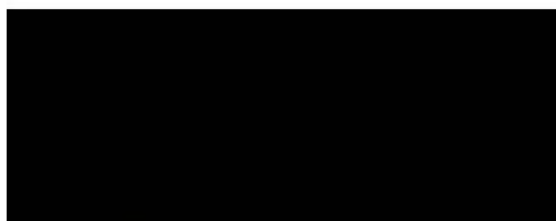
1. the decision of the First, Third, Fourth and Sixth Respondents to donate R50 million to the Republic of Cuba is reviewed and set aside.
2. the First, Third, Fourth and Sixth Respondents are ordered to pay fifty percent (50%) of the Applicant's costs.

I agree.


D MLAMBO
JUDGE PRESIDENT
GAUTENG DIVISION, PRETORIA


J DLAMINI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.



 SJ COWEN
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

For the Applicant:

J G C Hamman and H Scholtz instructed
by Hurter Spies Incorporated

For the First to Fifth Respondents:

W Trengrove SC and H Rajah instructed
by State Attorney, Pretoria

For the Sixth to Ninth Respondents:

M Sello SC and B Lekokotla instructed
by State Attorney, Pretoria

Date heard: 15 May 2023

Date delivered: 25 October 2023