

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No. 5167/2020

In the matter between:

VISVIN GOPAL REDDY

SIBONISO SHABALALA

WILLIAM MAPENA

TEBOHO NKHAHLE

NOMPUMELELO CHAMANE

MBALI THULILE BARBARA NDLOVU

SIMOSENKOSI WISEMAN CHAMANE

SULEMAN BADAT

THANDWA ZIZWE MTHEMBU

FIRST APPLICANT

SECOND APPLICANT

THIRD APPLICANT

FOURTH APPLICANT

FIFTH APPLICANT

SIXTH APPLICANT

SEVENTH APPLICANT

EIGHTH APPLICANT

NINTH APPLICANT

And

**MINISTER OF HUMAN SETTLEMENTS,
WATER AND SANITATION**

**MEMBERS OF THE INTERIM BOARD
LISTED IN ANNEXURE "A"**

UMGENI WATER

FIRST RESPONDENT

SECOND TO TWELFTH
RESPONDENTS

THIRTEENTH RESPONDENT

JUDGMENT

BEZUIDENHOUT, J

1. Applicants are seeking the relief in Part "B" of the Notice of Motion which is as follows:

- I. That First Respondent's decision communicated on 3 August 2020 to disband Umgeni Water Board (ie. to terminate the membership of Umgeni water Board

or those members appointed by the former Minister on 1 May 2019) be and is hereby declared unlawful and it is reviewed and set aside.

- II. That the decision of First Respondent to appoint an interim Board (ie. comprising Second to Twelfth Respondents) be and is hereby declared unlawful and it is reviewed and set aside.
- III. That the costs of the application be borne by First Respondent or any such Respondent that is opposing the application, jointly and severally, such costs to include the costs of two counsel.

2. Part "A" of the Notice of Motion consisted of relief sought on an interim basis. This issue has been dealt with and the interim relief was refused.

3. The facts of the case are basically common cause. On 1 May 2019 the then Minister of Human Settlements, Water and Sanitation appointed members of Umgeni Water Board (the Board) with effect from 1 May 2019 for a period of 4 years. This was 7 days prior to the General Election. After the General Election a new Minister was appointed in that portfolio. On 3 August 2020 members of the Board, including Applicants, received a letter from First Respondent (the Minister) dated 31 July 2020 informing them that their positions as members of the Board were terminated with immediate effect from 31 July 2020. The reason for the termination was that the previous Minister did not obtain the approval of Cabinet for the appointment of the said members to the Board.

4. This Board had functioned from May 2019 until 31 July 2020 when the appointments of the Board members of the Board were summarily terminated. Why the reason for doing so only came to the Minister's attention at this stage is

unknown. First Respondent then on 13 August 2020 appointed an interim Board which was inducted on 13 August 2020. They are the Second to Twelfth Respondents in the application papers. They are not opposing the relief claimed in Part "B" nor did they oppose the relief claimed in Part "A" of the Notice of Motion. The relief claimed in Part "B" (ie the review of the decision of the Minister) is only opposed by First Respondent which is the relevant Minister.

5. The then Minister, who appointed the Board in 2019, Mr Gugile Nkwinti, in his capacity as Minister of Water and Sanitation on 27 July 2018 called for nominations to serve as Board members for a period from 1 October 2018 to 30 September 2022. He thereafter on 1 May 2019 appointed the various members of the Board.

6. On 31 July 2020 the then Minister of Human Settlements, Water and Sanitation, Ms L. M. Sisulu, addressed a letter to Applicants indicating that she apologised for the incorrect process that was followed when they were appointed as ordinary members of the Board as their appointments to the Board had to be approved by Cabinet, which did not happen in this case. In order to regularise the process she terminated their appointments and decided to appoint an interim Board to ensure that proper process are followed in appointing a permanent Board. Therefore, it was decided to terminate their membership of the Board with effect from the date of the letter (31 July 2020). They could reapply for appointment to the permanent Board if they were interested in doing so.

7. As set out above, it is common cause that the Minister then appointed an interim Board and that this interim Board was also not approved by Cabinet. It is also common cause that prior to the appointment of the Board members being

terminated, the Board members were not given any notice thereof, nor were they granted an opportunity to submit any submissions as to why they should not be removed as members and that the *audi alteram partem* rule was not applied at all. The only reason provided by the Minister for her decision was that the appointment of Applicants by the previous Minister had not been sanctioned by Cabinet.

8. It is submitted on behalf of Applicants that the decision of the Minister to disband the Board is either reviewable in terms of **PAJA** or that it is a legality review. It was submitted that as the Minister's decision was unlawful it can also be set aside under the principle of legality. It was further submitted that the Minister was not entitled to self-help as she did by disbanding the Board. The principle of law remains that if there was such an illegality in the appointment of Board members, it was a court that had to rule thereon.

9. It was submitted that the question arises whether the conduct of the Minister was administrative action or executive action. If it was administrative action then the *audi alteram partem* principle was not applied and the application must succeed. It was submitted that if it was not administrative action then the issue of legality would arise and the decision must then be examined under that principle. It was submitted that in **Minister of Defence and Military Veterans vs Motau and Others 2014 (5) SA 69 (CC)** it was decided that the implementation of such a decision was administrative action. I was also referred to paragraph 33 of **MEC Department of Education Kwazulu-Natal v Khumalo and Another (D749/08) [2010] ZALC 79; [2010] 11 BLLR 1174 (LC); 2011 (1) BCLR 94 (LC) (6 July 2010)** dealing with the conduct of administrative action. I was further referred to paragraph 39 of the **Motau** judgment, where guidelines are set out to establish whether the power flows from

administrative action or not. It was submitted the source of power being exercised has to be considered in determining whether it is executive or administrative. If such power is exercised in terms of the Constitution it could indicate it is executive in nature and if it is administrative power, it could be sourced in Legislation. It was submitted that in this case the source of power was the **Water Services Act 108 of 1997 (Water Services Act)** and not the Constitution and therefore that the power was exercised in terms of Legislation and is therefore administrative action.

10. It was submitted that the exercise of such power cannot merely be done at the discretion of the Minister. The Minister cannot appoint and terminate the appointment of members to the Board at his/her will. Although First Respondent contends the decision is executive action it does not set out why it is so. It is therefore reviewable under **PAJA**. It was submitted in the alternative that even if it was not administrative action reviewable under **PAJA**, it was reviewable under the principle of legality. The decision was irrational and an error of law. It was further submitted that the interim Board was also not approved by Cabinet and must be subject to the same requirement. The required process was followed when the Board members were appointed and they can then not just merely be removed from their positions. It was submitted that the affidavit of First Respondent did not establish any reason why the power was exercised. It was submitted that First Respondent merely wanted to remove the Board which had been appointed by her predecessor. Further it has to be considered that the Board members were removed fourteen months after they had been appointed with no explanation for such a delay. It was therefore not just and equitable.

11. Applicants raised a point *in limine* that First Respondent (the Minister) did not herself attest to any affidavit. However on the day before the hearing a confirmatory affidavit was provided by First Respondent and this point was then no longer proceeded with.

12. It was submitted on behalf of First Respondent that the issue is whether it is administrative or executive action. If it was administrative then a higher level of scrutiny was required. If it was executive then there is not such a high level of scrutiny required. It was submitted that the power to appoint the Board arose out of **section 35** and **schedule 1** of the **Water Services Act**. It was also submitted that the Minister was entitled to appoint an interim Board and that this was an executive action. It was in terms of the Ministerial Handbook that Cabinet had to be consulted about appointments to the Board. It was submitted that the attack on the interim Board was misplaced as no Board was permanent. It was an executive decision which the Minister took at the time. She derived the power for the appointment and dismissal from her own appointment and was thus executive in nature. The power was in terms of **section 85(2)(a)** of the **Constitution**, which refers to the implementing of National legislation. If the Legislature was prescriptive, it would be administrative action but if not it was executive. **Section 35 of the Water Services Act** grants the Minister wide discretion and powers in performing these duties. **Section 35(5)** allows the Minister to terminate the membership of the Board members.

13. There is no constraint on her power. I was also referred to **sections 28, 29 and 35 of the Water Services Act**, which all relate to Water Boards and its members. First Respondent had to rectify the appointments of the Board members

which were made by the previous Minister seven days before the election. It was submitted that it was a legality issue and that the decision in **Popo Molefi & Others vs Minister of Transport and others 1774/17 Gauteng Division, Pretoria** was not authority that it was executive action. It would only have been necessary to take the decision of the previous Minister, Mr Nkwinti, on review if it could not be revisited. It was submitted that it was a legality review to rectify what the previous Minister did. There was no need to call on Applicants to be heard. It would have served no purpose to call on the previous members, Applicants, to make submissions before making that decision. It was submitted that the costs should follow the result and that there should be no order made on the application, alternative that a declaratory order be made that the decision was unfair but nothing further.

14. **Section 35 of the Water Services Act** deals with the governance of the Water Board. **Section 35(2)** states as follows:

“Schedule 1 regulates the terms of office of Board members, the procedure for the recommendation of persons for appointment of chairperson or Board members and determination of office of Board members.”

Section 35(5) states:

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

In terms of **Schedule 1** of the **Water Services Act** the procedure is set out for the nomination and appointments of Board members and for a selection panel to be constituted for that purpose. **Section 4 of schedule 1** deals with the termination of office of Board members and sets out various reasons therefore and **paragraph 4(1)(e)** states that he or she will cease to hold office if his or her appointment has been terminated in terms of **section 35(5)** of the **Water Services Act**.

15. The power to appoint members and also to terminate the membership of Board member is done in terms of the provisions of the **Water Services Act** and such power is granted to the Minister. **Section 85(2)(e) of the Constitution** states as follows:

“The President exercises the executive authority, together with the other members of the Cabinet, by E performing any other executive function provided for in the Constitution or the National Legislation.”

16. The Minister thus has the right in terms of the **Water Services Act** to appoint members to the Board and to terminate their membership. The question arises whether in doing so the Minister exercises an administrative or executive function. What is the effect of the decision made if it is done in terms of one of these two principles, or is it immaterial which one of the said principles was exercised? It further has to be considered whether the powers granted to the Minister in terms of the **Water Services Act** are absolute in the sense that the Minister can at whim appoint members of the Board and terminate such appointments without consultation with them or requesting any input from them in that regard. Is it an absolute power that the Minister can exercise at his or her discretion when they feel so, irrespective of whether there had been any misconduct or any transgression by any member? Does it extend so far that the Minister can, if he/she feels so, merely terminate the appointment of a Board member irrespective of a Board member having been a member for some time and certain expectations had been created that the Board member would remain a member of the Board for the period for which he/she had been appointed?

17. In **Minister of Defence vs Motau 2014 (5) SA 69 (CC)** the issue was the reinstatement of General Motau after the Minister had terminated his services and that of one Ms Mokoena. They were members of the ARMSCOR Board at the time and it was contended that the procedure set out in the **Companies Act** was not followed. ARMSCOR was managed and controlled by a Board comprising of non-executive members and two executive members. The reason for the termination of their positions as Board members was due to their inactivity in those positions. Appointments to the Board were made in terms of the **Armaments Corporation of South Africa Limited Act 51 of 2003 (ARMSCOR Act)**. One of the issues which arose in this case was whether the Minister's decision constituted administrative or executive action. Paragraph 26 of the judgment deals with the distinction between administrative and executive actions. It was contended by the Minister that her actions were executive actions as contemplated in the Constitution in **section 85(2)(e)** and was excluded from administrative scrutiny and **PAJA**. Respondents however argued that the power of the Minister did not involve policy consideration but implementation of the **ARMSCOR Act**. They therefore contended that it was administrative action and that it had to meet the requirements of **PAJA**. Referring to **section 85 (2) of the Constitution** it held in paragraph 28 that the section should not be read as categorising all powers referred to in it as executive action, as opposed to administrative action, for the purpose of determining the appropriate standard of judicial review. It was held that **PAJA** excludes executive powers or functions of a national executive from administrative law review. **Section 33 of the Constitution** provides for lawful, reasonable and procedurally fair administrative action.

18. It held in paragraph 36 as follows:

"The mere fact that a power is exercised by a member of the executive is not in itself determinative. It is also true that the distinction between executive and administrative action is often not easily made. The determination needs to be made on a case by case basis, there is no readymade panacea or solve all formula."

It was held at 84E:

"Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation."

It continued at 84F:

"A power that is more closely related to the formulation of policy is likely to be executive in nature and conversely one closely related to its application is likely to be administrative."

It was held at 85E:

"The fact that the scope of a functionary's power is closely circumscribed by legislation might be indicative of a fact that a power is administrative in nature."

It continued at 86B-C:

"Thus, this court has found that administrative law review is appropriate where the power under consideration: is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate; is based on considerations of comity for reciprocity between South Africa and foreign states, involving policy considerations regarding foreign affairs; is closely related to a special relationship between the President and the director-general of a security agency; or involves the balancing of complex factors and sensitive subject-matter relating to judicial independence."

19. It was held in paragraph 51:

"For these reasons, I am persuaded that the impugned decisions are not subject to review under PAJA. Because section 8(c) of the Armscor Act is an adjunct to the ministers power to

make defence policy, and thus more closely related to the formulation of policy than its application, the decision to terminate the services of Board members amounts to the performance of an executive function in terms of section 85(2)(e) of the Constitution, rather than the implantation of National Legislation in terms of section 85(2)(a)."

As appears from paragraph 60 of the judgment, ARMSCOR was not discharging its statutory prescribed mandate. The delays amounted to a failure to procure such needed equipment in accordance with the department's needs.

20. In the minority judgment by Jafta J, it held as follows in paragraph 106:

*"By leaving out the powers in section 84(2)(e) and (j) from the list of exclusion, **PAJA** suggests that appointments made by the President in terms of the Constitution, when not acting in his capacity as head of the national executive, constitute administrative decisions and so is his or her decision to pardon offenders and remit penalties. The same applies to decisions taken in terms of section 85(2)(a) of the Constitution, implementation of national legislation, like the Armscor Act, amounts to administrative action unless the Constitution or an Act of parliament provides otherwise. Therefore, ordinarily, the implementation of legislation constitutes administrative action, except where there is a clear indication that it does not."*

21. From the above quotations it is apparent that although the majority judgment found it was an executive function that was exercised, there is no fixed rule which can be applied to determine whether a specific function is an administrative or executive action. Each case would have to be dealt with on its own facts applying the necessary principles to determine whether what transpired was an executive or administrative action.

22. In **President of the RSA vs South African Rugby Football Union and Others 2001 SA 1 (CC)** it was held in paragraph 156:

"In summary, section 84(2)(f) is a special constitutional power confirmed on the President as the head of State. The exercise of this power does not constitute administrative action as contemplated in section 33 of the Constitution. The exercise of his responsibility is nevertheless constrained by the Constitution in a variety of ways."

It continues in paragraph 159:

*"It follows from our conclusion that the act of the President in appointing a commission under section 84(2)(f) of the Constitution does not constitute administrative action, that the **audi** principle has no application to such appointment, whatever the source may be from which the obligation to observe it might otherwise arise."*

23. In **Popo Molefi & Others vs Minister of Transport and others 1774/17 Gauteng Division, Pretoria** it confirmed the appointments to the Passenger Rail Agency of South Africa (PRASA). After considering various decisions, it was found that the removal of Applicants from the Board was administrative action and that it was therefore reviewable in terms of **PAJA**. It concluded that the power of the Minister was sourced from Legislation and not from the Constitution. It was submitted in this matter that whether it was found to be administrative or executive action and was brought under **PAJA** or the principle of legality it could be set aside on the same grounds.

24. Dealing with the issue of whether a Minister after making certain decisions is *functus officio*, it was held in **Retail Motor Industry Organisation and Another vs Minister of Water and Environmental affairs and Another 2014 (3) SA 251 (SCA)** at paragraph 24 as follows:

*"The **functus officio** principle is also intended to foster certainty and fairness in the administrative process. It is not absolute, in a sense that it does not apply to every type of administrative action. Certainty and fairness have to be balanced against the equally important practical consideration that requires the reassessment of decisions from time to time in order to achieve efficient and effective public administration in the public interest."*

In paragraph 25 it held that the principle only applies firstly to final decisions, secondly to where rights or benefits have been granted and where it would be unfair to deprive a person of an entitlement that has already vested, thirdly an administrative decision-maker may vary or revoke a decision if the empowering legislation authorises him or her to do so but subject to procedural fairness, and fourthly it does not apply to the amendment or repeal of subordinate legislation.

25. In **State Information Technology Agency SOC Ltd vs Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC)** it was held that if an organ of State wanted to review its own decision it could not do so in terms of **PAJA** but it was a legality review of its own decision. That is however, not the position in the present matter as the application for review is not being brought by the Department itself but by the individual members of the Board who has been affected by the decision of the Minister. An organ of State must bring a legality review of its own decision. It is applicable to the question whether if the decision of the previous Minister was to be changed whether First Respondent could merely do so or whether a review application had to be brought to do so. In terms of **Gijima** if a review application was to be brought by the Minister it would have to be a legality review and not a review in terms of the provisions of **PAJA**.

26. **Section 33 of the Constitution of 1996** deals with just administrative action in that everyone has a right to just administrative action that is lawful reasonable and procedurally fair. **Section 85 of the Constitution** deals with the executive authority of the Republic, and states:

"1. The executive authority of the Republic is vested in the President.

2. The President exercises the executive authority, together with the other members of the Cabinet by-

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) coordinating the functions of state departments and administration;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation."

27. As set above each case has to be decided on its own facts. In the present matter the power to appoint the Board was granted to the Minister in terms of the **Water Services Act 108 of 1997. Section 35 and Schedule 1 of the Water Services Act** provides that the Minister may appoint and terminate the appointments to the Water Board. In the present matter, when the Minister took over the portfolio, the Board members served in those positions appointed by the previous Minister. Their appointments were terminated over a year after their appointments. The only reason provided to them why their appointments as Board members were terminated was that their appointments had not been approved by Cabinet. There is also no indication that the interim Board that the Minister appointed was approved by Cabinet. There is no requirement in the **Water Services Act** that the appointment of

Board members has to be approved by Cabinet. It is only referred to in the Ministerial Handbook.

28. By merely writing to the Board members and informing them that their appointments are due to the said error terminated, First Respondent performed an administrative action in terms of the **Water Services Act** which grants the Minister the authority to appoint Board members and terminate such appointments. If the Minister was of the view that the appointments did not comply with the legal requirements and was irregular a legality review should have been brought to have the appointments set aside.

29. Having considered the decisions referred to and the facts of the present case it is common cause that the Board members were not informed or requested to provide any input before their positions were summarily terminated by First Respondent. It was submitted that as it was an executive function the *audi alteram partem* rule did not apply. In my view considering that the power to appoint originates not in terms of the **Constitution** but in terms of the **Water Services Act** that it is a function that the Minister performs which is granted to the Minister by the said legislation. In my view it is therefore administrative action that is reviewable in terms of **PAJA**. It is not as pointed out above a review by the Minister of the decisions of the previous Minister in which event in terms of **Gijima** it would indeed have been a legality review.

30. As there had been no consultation with the Board members but merely a summarily termination of their appointments, the actions of First Respondent was unfair and not in terms of the Constitution nor procedurally fair and Applicants are

entitled to have it reviewed. Applicants were not given an opportunity to respond or address nor given an opportunity to be heard and the whole procedure was therefore procedurally unfair.

31. There is also no provision in the **Water Services Act** for the appointment of an interim Board. The appointment of the interim Board was also not approved by Cabinet and such appointments must therefore be set aside.

32. Even if I am incorrect in finding that it was an administrative action in my view even if it was a legality review Applicants would still be entitled to have the decision of First Respondent reviewed and set aside under the principle of legality. If it was a legality review the decision still had to be rational and fair. Considering the facts as to how the Board members were removed and the time that lapsed before this was done, the termination of their appointments was unreasonable and irrational. Applicants were appointed for a 4 year term and it could never have been the intention of the legislature, nor could it be rational that the Minister can at any time merely appoint or terminate the appointment of a Board member at his/her whim. Expectations are created when the Board members are appointed for a period of 4 years. The Board member whose membership is to be terminated can expect to be requested to present some response or address to the Minister before such a decision is to be made. It would create the possibility of members being appointed and dismissed at any time as the Minister wishes, even if they did nothing wrong, which would result in chaos and make it impossible for a Board to function. The expectation of serving for 4 years remains and accordingly in my view even if it was a legality review, as I have stated, Applicants are entitled, due to the procedural unfairness, to have the decision reviewed and set aside.

33. The right of the Minister to appoint Board members and terminate their appointment cannot be an absolute right without any recourse. This could never have been the intention of the legislature. Such decision must be made applying the principles of natural justice.

ORDER:

An order is therefore granted in terms of paragraphs 1, 2 and 3 of Part B of the Notice of Motion.



BEZUIDENHOUT J

Date heard: 11 June 2021

Date handed down: 21 October 2021

The matter was heard virtually and it was agreed that it would be provided to the respective parties by electronic means and that the original judgment would be placed in the court file.

*The judgment is deemed to be handed on the **21st day of October 2021 at 10h00.***

APPEARANCES

On behalf of the Applicants:

Mr T. G. Madonsela SC

Mr N S V Mfeka

Ms Palmer

Instructed by:

Strauss Daly Incorporated

41 Richefond Circle, Ridgeside Office Park

Umhlanga

Ref: RED892.1/AKHOZA/dd/nm/TM2

Email: ddeeplal@straussdaly.co.za

nmncube@straussdaly.co.za

On behalf of the First Respondent:

Mr C Erasmus SC

Mr N Vimbi

Instructed by:

The State Attorney

KwaZulu-Natal

6th Floor Metropolitan Life Building

391 Anton Lembede Street

Durban

Email: nramlall@justice.gov.za

nishalramlall@gmail.com

mce7@loftusadv.co.za