



Not Reportable

Case No: J 1361/18

In the matter between:

REMBULUWANI TRADEWIN TAKALANI

Applicant

and

SEDIBENG WATER BOARD

Respondent

Heard: 8 May 2018

Delivered: 23 May 2018

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant, Mr Takalani is the current Chief Executive Officer of the respondent (the Sedibeng Water Board). He was placed under suspension, and disciplinary proceedings have since been instituted against him, which are scheduled to commence on 1 June 2018.
- [2] Takalani approached this Court on an urgent basis to seek an interim interdict to stay the disciplinary proceedings pending the determination of a review application launched by him on 5 January 2018 in the North Gauteng High Court (Case number 170/2018). The basis of Takalani's review application before the High Court is that the erstwhile Minister of Water and Sanitation

(The Honourable Mrs NP Mokonyane) had acted *ultra vires* the Water Services Act¹ ('The WSA) when she appointed or re-appointed members of the current Board of the respondent. For the purposes of this urgent application, he contends that the Board's decisions to suspend and subject him to a disciplinary enquiry are unlawful and unconstitutional and ought therefore to be set aside under the PAJA², or alternatively under section 1(c) of the Constitution of the Republic.

- [3] These urgent proceeding were launched on 20 April 2018. Prior to doing so, Takalani had requested a postponement of the disciplinary hearing. The application was refused in terms of a ruling issued on 12 April 2018. The respondent had filed its answering papers and Takalani has also since filed his replying papers. The respondent does not take issue with the urgency of the application, and it will thus be treated as urgent.

Background:

- [4] The respondent is a state-owned entity established under section 28 of 'The WSA'. Section 35³ of that Act provides that the water boards will be governed by a board consisting of Chairperson and such members as the Minister may appoint or re-appoint from time to time. Those appointments are made in accordance with the provisions of section 3(1) of Schedule 1 of 'The WSA', which sets out the procedure for the recommendation and appointments.
- [5] The respondent is a national government business enterprise as listed in Schedule 3B of the PFMA and is also the accounting authority in terms of section 49(2)(a) of the PFMA. The responsibility of the respondent as prescribed in the Constitution and 'The WSA' entail acting as an agent of the Department of Water and Sanitation in the implementation of small and large-scale projects related to the provision of water to communities throughout the

¹ Act 108 of 1997

² Promotion of Administrative Justice Act 3 of 2000

³ 'Section 35 Governance of water boards.

- (1) A water board consists of a chairperson and such other members as the Minister may appoint from time to time.
- (2) Schedule 1 regulates the terms of office of board members, the procedure for the recommendation of persons for appointment as chairperson or board members and the termination of office of board members . . .'

Republic. It receives commission from the Department for work done in terms of its statutory obligations.

- [6] Section 36 of 'The WSA' makes provision for the appointment of chief executive officers. Takalani was appointed on 20 May 2014 as the CEO of the respondent in terms of a fixed term contract of five years. Clause 2 of that contract accords Takalani an option of an automatic renewal for a further five years. Section 51(1)(e) of the PFMA obliges the board as the accounting authority to take appropriate disciplinary steps against its employees where there are allegations of contraventions or failures to comply with the provisions of that Act; or where employees commit acts which undermine the financial management and internal control systems of the board; or where they make or permit irregular expenditures or fruitless and wasteful expenditures.
- [7] In August 2017, the Chairperson of the respondent and deponent to the answering affidavit (Matshediso David Dikoko), received an anonymous letter in which allegations of misconduct/irregularities were made against Takalani. The allegations of misconduct were tabled at a board meeting convened by Dikoko where Takalani was invited on 18 August 2017. Following deliberations by the board members, a decision was taken to place Takalani on indefinite special leave with immediate effect pending investigations into the allegations.
- [8] On 11 October 2017, and following requests by Takalani's attorneys of record, correspondence was sent to his attorneys detailing the nature of the allegations against him. These were based on the findings and reports of two independent forensic investigating entities (Open Water Advanced Risk Solutions (Pty) Ltd and Entsika Consulting Services (Pty) Ltd) made available in October and November 2017. Takalani was issued with a notice of intention to suspend him and was requested to make representations. He was thereafter placed on official suspension with effect from 12 December 2017.
- [9] The respondent thereafter decided to institute disciplinary proceedings against Takalani and another employee, Lebitso, with whom it was alleged he

had conspired in the acts of misconduct alleged. Those proceedings were driven by its attorneys of record, Waks Silent Inc. Retired Supreme Court of Appeal Judge Nugent JA was appointed as chairperson of the disciplinary enquiry. A formal 'charge sheet' was issued setting out the nature of allegations against Takalani and Lebitso. The allegations of irregularities related to fraud, nepotism, corruption, bribery and abuse of power, and involved amounts between R275 million and R292 million.

- [10] Flowing from a pre-arbitration meeting held on 9 April 2018 before Nugent JA, Takalani as represented by counsel had made it clear that he was willing to face the disciplinary enquiry and did not object to the presiding officer. His main contention however was that the disciplinary action had to be constitutional and lawful. In his view, the board was not entitled to institute those proceedings against him and he therefore sought a postponement of the disciplinary proceedings (A notice in that regard had been issued on 6 April 2018). The application was opposed. Arguments and written heads of argument were presented, and Nugent JA refused the application in a ruling issued on 12 April 2018 with full reasons.

The legal framework:

- [11] It being common cause that the disciplinary proceedings had commenced but for the fact that an application for a postponement was made and refused, it is accepted that this Court as confirmed by the Labour Appeal Court in *Booyesen*⁴ has jurisdiction to intervene in uncompleted disciplinary proceedings.
- [12] The jurisdiction of the Court is nonetheless not open ended, as the intervention in uncompleted proceedings is dependent upon whether

⁴ *Booyesen v Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC); (2011) 32 ILJ 112 (LAC) at para 54 where it was held that;

"To answer the question that was before the court a quo, the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However, such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive"

'exceptional circumstances' exists, in the sense that a grave injustice would result if the Court refused to intervene⁵.

[13] It was submitted on behalf of Takalani that in circumstances where there is a pending challenge to the legality and/or the constitutionality of disciplinary proceedings and the requirements of an interim interdict had been met, this court had on numerous occasions confirmed the existence of exceptional circumstances⁶. Central however to such interventions is the Court's discretion in determining whether the uncompleted disciplinary hearings should be stayed, considering whether it would be in the interests of justice to grant such an order.

[14] The requirements for interim relief and principles applicable in that regard were succinctly set out by Landman J in *Gross Border Development Consultants (Pty) Ltd v MEC: North West Provincial Government: Department of Local Government and Human Settlements and Others*⁷. To do justice to Landman J's exposition, it would be sensible to quote paragraph 20 of the judgment at length, where the following was stated;

[20] I have distilled from the **OUTA**⁸ judgment the following elements and consideration regarding the test for interim interdicts where a temporary restraint or interdict is sought against the exercise of statutory power well ahead of the final adjudication of a claimant's case and I have added some of the rules regarding a court's discretion in this context:

⁵ See *Jiba v Minister: Department of Justice and Constitutional Development and others* [2009] 10 BLLR 989 (LC), (2010) 31 ILJ 112 (LC) at para 17, where it was held that;

'Although the court has jurisdiction to entertain an application to intervene in uncompleted disciplinary proceedings, it ought not to do so unless the circumstances are truly exceptional. Urgent applications to review and set aside preliminary rulings made during the course of a disciplinary enquiry or to challenge the validity of the institution of the proceedings ought to be discouraged. These are matters best dealt with in arbitration proceedings consequent on any allegation of unfair dismissal, and if necessary, by this court in review proceedings under s 145.'

⁶ See *McBride v Minister of Police and Another* (J1396/15) [2015] ZALCJHB 216 (24 July 2015); *Golding v Regional Tourism Organisation of Southern Africa and Other* (J2501/17) ZALCJHB 376 (18 October 2017); *IMATU v City of Matlosana* (J28/14) [2014] (26 February 2014) at paras 7 – 8; *IMATU and Another v City Of Matlosana Local Municipality* (2014) 35 ILJ 2459 (LC) at para 26 - 28

⁷ (M253/15) [2015] ZANWHC 42 (7 August 2015)

⁸ *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (CCT 38/12) [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (20 September 2012)

- (a) The test is the well-known test set out in **Setlogelo v Setlogelo 1914 AD 221**, **Webster v Mitchell 1948 (1) SA 1186** (WLD) and **Gool v Minister of Justice and Another 1955 (2) SA 682** (CPD). See also **Molteno Brothers and Others v South African Railways and Others 1936 AD 321** at 329 and 331;
- (b) The test requires that an applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy;
- (c) 'Courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out.' Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of Government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the Executive and the Legislative branches of Government unless the intrusion is mandated by the Constitution itself;
- (d) The test must be applied cognizant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution;
- (e) If the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists;
- (f) When a court weighs up where the balance of convenience rests, it must consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the state functionary or organ of state against which the interim order is sought;

- (g) The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm;
- (h) A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights.
- (i) Under the **Setlogelo** test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision;
- (j) The prima facie right is thus a right to which, if not protected by an interdict, irreparable harm would ensue;
- (k) An interdict is meant to prevent future conduct and not decisions already made;
- (l) Apart from the right to review and to set aside impugned decisions, the applicant must demonstrate that the prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions does not require any preservation *pendente lite*;
- (m) There must be an alignment between the decisions the applicant seeks to review, and the source of the harm feared;
- (n) A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted as against the harm a respondent will bear, if the interdict is granted. Thus, a court

must assess all relevant factors carefully in order to decide where the balance of convenience rests;

- (o) A court must respect the separation of powers and thus as set out in the **International Trade Administration Commission v SCAW South Africa (Pty) Ltd [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC)** and **Doctors for Life International v Speaker of the National Assembly and Others [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC)**: 'Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'
- (p) Organs of state are not immunised from judicial review only on account of separation of powers;
- (q) The exercise of all public power is subject to constitutional control. In an appropriate case an interdict may be granted against it if the review court in due course were to find that the organ of state acted outside the law then it is entitled to grant effective interdictory relief if the decisions are contrary to the law and thus void;
- (r) In evaluating where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the Executive or Legislative branches of Government. It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law and thus whether its restraining order will implicate the tenet of division of powers. Whilst a court has the power to grant a restraining order of that kind, it does not readily do so except when a proper and

strong case has been made out for the relief and, even so, only in the clearest of cases;

- (s) A court must carefully consider whether the grant of the temporary restraining order pending a review will cut across or prevent the proper exercise of a power or duty that the law has vested in the authority to be interdicted. Thus, courts are obliged to recognise and assess the impact of temporary restraining orders when dealing with those matters pertaining to the best application, operation and dissemination of public resources. What this means is that a court is obliged to ask itself not whether an interim interdict against an authorised state functionary is competent but rather whether it is constitutionally appropriate to grant the interdict; and
- (t) When the requirements for an interim interdict are met the court has a discretion to refuse to grant an interim interdict even should the requirements be met where the interests of justice require that an interdict be refused. See **Knox D'Arcy Ltd v Jamieson [1996] ZASCA 58; 1996 (4) SA 348 (A)** at 361-362.

Evaluation:

- [15] Takalani has indeed instituted review proceedings before the High Court, to *inter alia*, challenge the legality and constitutionality of the decision to suspend and institute disciplinary proceedings against him. The issue nonetheless remains whether he has satisfied the requirements of the relief he seeks, and whether the facts of his case establish 'exceptional circumstances'. It should nonetheless be borne in mind that even if all the requirements of the relief sought may have been established, the court may within its discretion still refuse to grant the relief, on the grounds that "*...the Court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision*".⁹

Have the requirements of interim relief been established?

⁹See *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (AD) at 361 I; *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (AD) at 691C, where it was held that;

"The granting of an interim interdict pending an action is an extra-ordinary remedy within the discretion of the Court."

- [16] Contrary to Takalani's reliance on the proposition in *Golding* that that he had demonstrated a *prima facie* right simply on the basis that he had instituted an application to challenge the legality of the disciplinary proceedings against him and that such an application was pending, the legal position however as clarified in *South African Informal Traders Forum and Others v City of Johannesburg and Others*¹⁰ and further confirmed in *OUTA* is that a pending review does not in itself establish a *prima facie* right, but that such a right may be established by showing prospects of success in the review application.
- [17] In any event, my reading of the *Golding* judgment does not indicate that the Court in that case concluded that a mere pending review invariably demonstrated a *prima facie* right. At most, the Court in *Golding* appreciated that in the light of the denials by the respondent in that case, there were material dispute of facts which were not for that court to determine. Paragraphs [4] and [14] of that judgment as relied upon in Takalani's heads of argument do not support his contentions¹¹. One cannot quarrel with the orbiter

¹⁰ [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014) At para 25. See also *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* at para 50, where it was held that;

"Under the Setlogelo test the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite*"

¹¹ See *Golding* at para 16. At Paragraph 4 of the judgment as relied upon by Takalani, the Court stated that;

"On 7 September 2017, the applicant received a notice of suspension. A notice to attend a disciplinary hearing, scheduled for the 27th of September 2017, was issued to the applicant on the 15th of September 2017. On the 18th of September 2017, the applicant's attorneys objected to his suspension without him being formally asked to show cause why he should not be suspended. The first respondent upheld the applicant's suspension on the 22nd of September 2017 on the basis that the investigation had been completed. The applicant was required to return to work on the 26th of September 2017."

Similarly, in paragraph 14, the Court held that;

'Prima facie right

[14] In support of the requirement of prima facie right, the applicant submitted that he has a right to a fair labour practice and fair administrative action. In his oral submissions, the applicant's representative submitted that his case was exceptional and that it warranted the stay of his disciplinary hearing in that there was a pending application challenging the lawfulness of resolutions of the Board in the South Gauteng High Court. The basis of applicant's challenge to the lawfulness and the validity of the resolutions was that the resolution that was taken on the 5th of September 2017 mandating the second respondent, being the former Chairperson of the Board, to discipline the applicant was allegedly contrary to the Staff Conditions of Service of the first respondent. The applicant argued further that no provision is made in the Charter of the Regional Tourism Organisation of Southern Africa

and final decisions relied upon by Takalani in the two *IMATU* cases referred to. These decisions as correctly pointed out by the respondent's counsel are distinguishable on the facts. Furthermore, on the strength of the decision in *South African Informal Traders Forum and Others v City of Johannesburg and Others*¹², these decisions do not support the contention that a mere application for a review is sufficient, particularly in the light of other considerations to be taken into account as shall be illustrated in this judgment.

[18] To the extent that Takalani contended that he had reasonable prospects of success with his review application before the High Court, his further contentions that he had established a *prima facie* right are grounded on the following;

18.1 On 14 December 2014, the then Minister issued a memorandum titled '*Administrative Procedure for Appointing Members of Water Boards*'. In the memorandum, the Minister adopted a procedure for the appointment of boards which was to be used instead of the statutory procedures outlined in section 3 of Schedule 1 of the Water Services Act.

18.2 Takalani's contentions are that as is apparent from the memorandum, the Minister sought a different administrative procedure for the appointment of boards as the one in Schedule 1 appeared to be time consuming, costly and susceptible to manipulation to influence a particular income. To that end, the Minister had re-appointed the board without following procedures, and further based on a memorandum sent to her on 6 April 2017 by the Director-General of the department.

18.3 In the latter memorandum, the Director-General recommended that since a full complement of the board required 10 people, there was a vacancy as a result of the death of one member, and that the Minister

(RETOSA) and its Staff Conditions of Service for the constitution of the enquiry committee and institution of disciplinary process as envisaged in the resolution of the 5th of September 2017.'

¹² Supra

should reappoint six of the then ten non-executive directors who were currently serving in the board for a further period of four years in terms of section 35(2) and sections 1 and 2 of Schedule 1 of the Water Services Act. Of the four remaining vacancies, the Director-General had further recommended that they be obtained from a reserve list of the Department. It was then recommended that the Minister should sign the letters attached to the memorandum to inform members of their reappointment and non-reappointment.

18.4 On 6 April 2017, and on the same day of receipt of the Director-General recommendations, the Minister addressed letters to old and new members informing them of their reappointment and non-appointment. This was notwithstanding the fact that the Minister had only approved the Director-General's recommendations on 6 July 2017, some two months after the letters were issued.

[19] It is trite that the exercise of public power which is at variance with the principle of legality is inconsistent with the Constitution itself and is thus invalid¹³. In summary, Takalani contends that in appointing and reappointing members of the board in the manner that she did, the then Minister failed to follow peremptory procedures. He contended that on a contextual and constitutional interpretation of the provisions of section 3(1) of Schedule 1, the Minister still failed to follow the required procedures, and that the procedure followed by her was irrational, arbitrary and thus unlawful.

[20] The respondent nonetheless refutes Takalani's contentions, and submitted that by virtue of his position as CEO, he was obliged to ensure that proper administrative and legal processes were followed in relation to the appointment of board members. It was argued that in any event, his review application was premised on or arose out of his own failure to comply with his obligations as CEO under section 3(3) of the Water Services Board Act.

¹³ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) at para 40

- [21] It was further submitted on behalf of the respondent that for Takalani to have demonstrated a *prima facie* right, he would have to further demonstrate that the Minister's appointment of the board would be held to have been invalid (which he had not); that the appointment of the board would accordingly be set aside; that the decision to institute disciplinary proceedings against him would be set aside; and that on a balance of probabilities, the continuation of the disciplinary proceedings would result in a serious injustice to him.
- [22] It was also submitted that even if this Court were to find that there are *prima facie* grounds for finding that the Minister's appointment of the board was invalid, that was not the end of the matter, as that finding would not in any event axiomatically and immediately set aside all decisions made by the board, including the decision to subject him to discipline. In this regard, it was argued that the setting aside of the Minister's decision would not result in the appointments being set aside or a declaration that all its decisions be found to be null and void. It was argued that on the contrary, once a declaration of invalidity was to be made, the court would be enjoined by common law principles relating to legality and in terms of section 8 of PAJA, to consider what would be a just and equitable order to be made under the circumstances¹⁴.

¹⁴ In reference to *MEC for Health, Eastern Cape and Another v Kirkland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC); *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) at para 29 – 30; and *State Information technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* where it was held that;

"[53] However, under section 172(1)(b) of the Constitution, a court deciding a constitutional matter has a wide remedial power. It is empowered to make "any order that is just and equitable". So wide is that power that it is bounded only by considerations of justice and equity. Here it must count for quite a lot that SITA has delayed for just under 22 months before seeking to have the decision reviewed. Also, from the outset, Gijima was concerned whether the award of the contract complied with legal prescripts. As a result, it raised the issue with SITA repeatedly. SITA assured it that a proper procurement process had been followed.

And,

[54] Overall, it seems to us that justice and equity dictate that, despite the invalidity of the award of the DoD agreement, SITA must not benefit from having given Gijima false assurances and from its own undue delay in instituting proceedings. Gijima may well have performed in terms of the contract, while SITA sat idly by and only raised the question of the invalidity of the contract when Gijima instituted arbitration proceedings. In the circumstances, a just and equitable remedy is that the award of the contract and the subsequent decisions to extend it be declared invalid, with a rider that the declaration of invalidity must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled. Whether any such rights did accrue

[23] Takalani is required to establish a right *prima facie*, *albeit* open to some doubt. That *prima facie* right need not however be clear¹⁵. This is linked to whether Takalani has prospects of success with the review application before the High Court. In determining whether Takalani has prospects of success with his review application, and to the extent that the appointment/re-appointment of the current board may be found to have flouted every statutory and constitutional imperatives, a few observations need to be made;

23.1 The respondent's defence to the legality of the appointments of the board can at best be described as half-hearted and at worst, muted. This is unsurprising in the light of the current Minister and the Director-General having withdrawn their opposition to Takalani's review application that is pending before the High Court. Any challenge in that regard is further dampened by the concessions made before Nugent JA by the respondent's counsel when the application for a postponement was argued, to the effect that *prima facie*, the appointments made by the erstwhile Minister were irregular and thus invalid¹⁶, *albeit* it was argued that the enquiry nonetheless did not end at that point.

23.2 The *prima facie* view that the appointments were irregular and thus invalid did not however dispose of the matter before Nugent JA, and correctly so. Takalani in his written heads of argument and the submissions made by his counsel at these proceedings nonetheless take the view that Nugent JA's approach that the review court may as a matter of course, preserve the validity of the board's decisions is incorrect as a matter of law.

23.3 It was argued that Nugent JA's approach in refusing a postponement was 'manifestly incorrect' as it in effect, required Takalani to establish that his review application would be entirely successful, thus requiring

remains a contested issue in the arbitration, the merits of which were never determined because of the arbitrator's holding on jurisdiction."

¹⁵ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19 at para 50

¹⁶ See Nugent JA's Ruling on postponement (Annexure 'RTT 1' to the Founding Affidavit)

of him to demonstrate 100% prospects of success, which is a far more stringent approach, which by definition is open to doubt.

23.4 The contentions made on behalf of Takalani are nonetheless misplaced and unsustainable both in law and fact. For the moment, I will discount the fact that Nugent JA's ruling is not the subject of the application before the Court. It has already been pointed out elsewhere in this judgment that authorities referred to do not support the proposition that all that an applicant has to show is that the disciplinary proceedings are unlawful for interim relief to be granted. The matter does not end with that finding or declaration of unlawfulness.

23.5 An ultimate finding that the disciplinary proceedings were unlawfully constituted can only come from a similar finding that the appointment of the board was irregular, unconstitutional and invalid. One cannot separate the two findings as they are intertwined, particularly when one has regard to Takalani's Notice of Motion before the High Court and the prayers sought. If Takalani's approach was to be sustained, this would imply that upon a declaration of invalidity of the appointment of the board in the High Court, he can go back to work and continue with his duties as if nothing happened. This however is legally untenable in the light of the authorities referred to and further in the light of the serious allegations against him, and the nature of the disciplinary proceedings scheduled. Nugent JA made that observation in his ruling by stating that the orders of invalidity sought by Takalani in the review proceedings were sought without qualification, the effect of which would be to nullify the disciplinary instituted, if it were to occur¹⁷.

23.6 The setting aside of the appointments made by the erstwhile Minister has far-reaching consequence, and it does not simply imply that the disciplinary charges would fade away. Equally so, it would not necessarily imply that all other decisions taken by the impugned board would automatically be set aside. That approach is unsustainable

¹⁷ Paragraph 20 of the Ruling

based on the provisions of section 172(1)(i) and (ii) of the Constitution of the Republic, as correctly referred to by Nugent JA in his postponement ruling.

- 23.7 Nugent JA in the postponement ruling had also referred to the apex court's decision in *Democratic Alliance v President of South Africa*¹⁸ for the proposition that in applying the provisions of section 172(1)(b) of the Constitution, the courts, despite declaring any law or conduct as inconsistent with the Constitution and thus invalid, may nonetheless ameliorate the consequences by making an order that is just and equitable. Such an order may include limiting the retrospective effect of the declaration of invalidity and/or, making an order suspending the declaration of invalidity for any period and or any condition, to allow the competent authority to correct the defect.
- 23.8 That approach as contended for by the respondent was further followed in *Atwell Sibusiso Makhanya v The Minister of Water Affairs and Sanitation & others*¹⁹ and in *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*²⁰. It is also in line

¹⁸ 2013 [1] SA 248 (CC)

¹⁹ (1578/2016P; 3861/2016P [2016] ZAKZPHC 109 (28 November 2016)

²⁰ 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 84 - 85 where it was held that;

'It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality.'

And,

'The apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience. The apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake. I do not think that it is wise to attempt to lay down inflexible rules in determining a just and equitable remedy following upon a declaration of unlawful administrative action. The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral; the interests

with the principles established in *OUTA* as explained by Landman J in *Gross Border Development Consultants (Pty) Ltd*, that the test where interim relief is sought must be applied cognizant of the normative scheme and democratic principles that underpin our Constitution, meaning that when a court considers whether to grant an interim interdict, it must do so in a way that promotes the objects, spirit and purport of the Constitution.

- 23.9 A preservation of the invalidity type of order is therefore one of the various options available to the High Court when considering the review application, in the light of the impact of any declaration of invalidity of the appointment of board, the impact on decisions already taken, and other considerations as listed in the respondent's heads of argument²¹, and as further highlighted by Nugent JA in his ruling²².
- 23.10 The seriousness of the allegations that Takalani has to answer to cannot equally be ignored. These possibilities are outlined bearing in mind what was stated in *OUTA*²³, that where an interim interdict is sought pending the institution and finalization of a review application, the court hearing the application for an interim 'need not determine the cogency of the review grounds', and that it would not be appropriate to usurp the pending function of the review court and thereby anticipate its function.
- 23.11 I therefore fail to appreciate the circumstances under which the review Court, once it had made a finding of invalidity, may on the facts of this case be influenced to take a different view from that of the apex court in respect of its remedial powers.
- 23.12 There is therefore no merit in the submissions made on behalf of Takalani that the issue of the manner in which the review court may or

involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.'

²¹ Paragraph 20 of the Respondent's Written Heads of Argument

²² Annexure 'RTT.1 to the Founding Affidavit

²³ At para 31

may not ultimately exercise its remedial powers is irrelevant to the issue of whether the applicant had established *prima facie* right.

- 23.13 Inasmuch as Takalani acknowledged and appreciated that the review court may indeed suspend the declaration of invalidity for a reasonable period to allow the Minister to appoint a board lawfully, in the same vein, he holds the view that the circumstances of his case give him immunity from that declaration. This however cannot be correct as ultimately, what he contends is for the ultimate setting aside of the disciplinary process against him despite his contentions that he wants his day at the disciplinary enquiry. It gives little comfort to the respondent for Takalani to go back to work as if nothing has happened and for him to continue in his position until a new board is appointed.
- 23.14 It is further apparent from the pleadings that Takalani in more ways than others as correctly argued on behalf of the respondent appears to seek to benefit from his own dereliction of duties as CEO. In his pleadings and heads of argument, he had at length, referred to the provisions of section 3 of Schedule 1 of the Water Services Board Act. Significant with those provisions is that in terms of section 3(1) of Schedule 1, once the Minister had required a water board to constitute a selection panel to recommend persons for appointment as members of a board, the CEO must publish a notice calling for nomination in two media of his or her choice, which notice must set out a variety of factors. In terms of section 3(7), the CEO is supposed to be part of the selection panel.
- 23.15 Takalani nonetheless complains of all of these and other procedures not having been followed as the Minister had merely rubber-stamped the Director-General's recommendations. On the other hand, it was the respondent's contention that Takalani was in fact closely involved in setting up and managing the process of selection and appointment of the present board members. All these irregularities however happened under his watch, and there is no evidence that he even raised a whimper. In these circumstances he cannot cry foul when the

chickens come home to roost, and consequently, he cannot benefit from his own inaction, or to a large extent, his acquiescence in the alleged irregularities perpetrated by the Minister and the Director-General in the appointment of the impugned board.

23.16 It is worth repeating that Takalani has consistently professed not to be averse to the holding of the disciplinary enquiry. As I understood his case, or on the common cause facts, he does not have an issue with the right and obligation of a properly appointed board to institute disciplinary proceedings against him, nor does he question the rationality of the decision to institute those proceedings against him. He is adamant that he wants to clear his name at a disciplinary enquiry and has not objected to the appointment of Nugent JA as chairperson of that enquiry. I fail to appreciate how in any event he would have a problem with the disciplinary enquiry in circumstances where he has not challenged the establishment of investigations by the two separate entities, their findings and recommendations to have him subjected to a disciplinary enquiry. That enquiry is driven by the respondent's attorneys of record, *albeit* it was sanctioned by the board.

23.17 In a nutshell, Takalani merely seeks to delay the inevitable. The respondent's proposal that Takalani should have consented to an order that despite the invalidity of the appointment of the board, the decision relating to the disciplinary enquiry against him should be declared valid and binding in order to address his concerns, was not in my view misplaced, and was the most sensible approach in the light of the nature of the disciplinary enquiry and the allegations that he needs to answer to.

[24] It follows from the above that even if there are prospects that the High Court would declare the appointment of the respondent's board to be irregular and unconstitutional, there are limited prospects that the same court would declare invalid and set aside, Takalani's suspension and the impending the disciplinary proceedings. To this end, he has not established a *prima facie* right to the relief that he seeks.

- [25] In the light of the prospects of a preservation order by the High Court based on the authorities referred to in this judgment, it cannot therefore be said that Takalani would suffer irreparable harm if relief is not granted. The prospects of him being subjected to a disciplinary enquiry twice are indeed far-fetched, particularly in the light of the respondent's undertaking on record, that it would not subject him to the same disciplinary enquiry, whether he is found guilty or not.
- [26] The balance of convenience does not in any event favour Takalani. The fact that the review application is set for a hearing on 7 August 2018 does not detract from the fact that serious allegations of misconduct have been levelled against him, which on his own version he is prepared to answer to. There is no merit in Takalani's contentions that the respondent had declined his request to have the review proceedings expedited, and as things stand, the review application is opposed by the respondent. Furthermore, in the light of the strong prospects of a preservation order by the review court, little purpose would be served by delaying the disciplinary proceedings. To delay these proceedings would as correctly submitted on behalf of the respondent, further cause the latter to incur wasteful and fruitless expenditure, in the light of Takalani being placed on paid suspension, whilst someone acting in his position equally has to be paid.
- [27] In the light of the relief sought, little purpose would be served by exploring whether Takalani has alternative available remedies. Be that as it may, there is merit in the respondent's contentions that his alternative remedy is manifest, in that he should seek an order that if the appointment of the board were to be set aside, it should nonetheless decline to set aside the board's decision to institute and prosecute the disciplinary proceedings against him. The respondent undertook not to oppose such an order.

Conclusions:

- [28] To conclude then, even though there are prospects that the review court would declare the appointment of the board to be invalid, irregular and unconstitutional, there are in the same token, greater prospects that the same

court even in the light of that declaration, would as required of it in terms of the provisions of section 172(1)(b) of the Constitution, nonetheless ameliorate the consequences by making an order that is just and equitable. Such an order may include limiting the retrospective effect of the declaration of invalidity and/or, making an order suspending the declaration of invalidity for any period and or any condition, to allow the competent authority to correct the defect. To that end, the likelihood of Takalani's suspension and impending disciplinary proceedings being set aside by the review court for all intents and purposes is indeed minimal.

- [29] Furthermore, Takalani has not satisfied the other requirements of the relief he seeks inclusive of irreparable harm. In the end, the balance of convenience do not favour the granting of the relief he seeks. Crucially however, there are no exceptional circumstances placed before the Court to justify its interference with the disciplinary proceedings, and no grave injustice or a miscarriage of justice may perhaps transpire due to this Court's refusal to intervene²⁴. Ultimately, the interests of justice require that an interdict be refused.

Costs:

- [30] This court may make an award of costs upon a consideration of the requirements of law and fairness. The irony in this application is that Takalani has consistently professed to be willing to answer to the serious allegations of misconduct levelled against him. One would have thought that since the process and set up of the disciplinary proceedings was not an issue as already highlighted elsewhere in this judgment, Takalani would have as he had professed, willingly subjected himself to that process and be vindicated. Inasmuch as he had a right to approach the High Court with his review application, in the same token, that step in my view was merely taken for his own convenience once the disciplinary process was contemplated in earnest. Prior to then, he was, or it appears that he was contend to function under the very same impugned board, let alone remain on paid suspension. It is a classic case of having the best of both worlds.

²⁴ *Booyesen v The Minister of Safety and Security and Others* [2011] 1 BLLR 83 (LAC) at para 54.

[31] Even more disconcerting with this application is that most of the legal arguments presented in these proceedings on behalf of Takalani were dealt with brick by brick and rejected by Nugent JA in his postponement ruling. As to the reason why Takalani had persisted with this application in the face of the lucid postponement ruling remains a mystery. Consequently, the requirement of law and fairness dictate that he be burdened with the costs of this application.

Order:

[32] In the premises, the following order is made;

1. The Applicant's application is dismissed with costs.

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Adv. N Lewis

Instructed by:

Bowman Gilfillan Inc

For the Respondent:

Adv. B Hitchings

Instructed by:

Waks Silent Inc

LABOUR COURT