IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

Case No.: 3683/2022
Date Heard: 22 November 2024
Date Delivered: 2 May 2025

In the matter between:

MINERVA BUNKERING MARINE SERVICES (PTY) LTD	Appplicant
and	
THE ACTING CHIEF EXECUTIVE OFFICER OF THE SOUTH AFRICAN MARITIME SAFETY AUTHORITY	First Respondent
THE SOUTH AFRICAN MARITIME SAFETY AUTHORITY	Second Respondent
TRANSNET NATIONAL PORT AUTHORITY	Third Resondent

JUDGMENT

RONAASEN AJ:

<u>Introduction</u>

The parties to this application

[1] The applicant:

1.1. is Minerva Bunkering Marine Services (Pty) Ltd ("Minerva");

1.2. is a subsidiary of the Minerva Group, which is in turn part of the Mercuria Energy Group. The Minerva Group claims to be the largest physical bunker supplier globally, servicing more than 50 ports around the world;

1.3. took over the existing marine bunkering business of Aegean Marine Petroleum SA ("Aegean") in April 2019; and

1.4. carries on marine bunkering services within the ports of Port Elizabeth and Ngqura, both situated in Algoa Bay.

[2] The first respondent is the Acting Chief Executive Officer of the South African Maritime Safety Authority ("SAMSA") a juristic person established in terms of the South African Maritime Safety Authority Act, 5 of 1998 ("the SAMSA Act").

[3] The second respondent:

3.1. is SAMSA;

3.2. is tasked with the administration and enforcement of the Marine Pollution (Control and Civil Liability) Act, 6 of 1981 ("the MPA"); and

3.3. has as its objectives, in terms of section 3 of the SAMSA Act the safety of life and property at sea; to prevent and combat pollution of the marine environment by ships and to promote South Africa's maritime interests.

[4] I shall refer to the first and second respondents, collectively, as “SAMSA”.

[5] The third respondent:

5.1. is the Transnet National Ports Authority (“the TNPA”) and is an operating division of Transnet SOC Ltd; and

5.2. has authority and responsibility over the commercial seaports of the Republic of South Africa, including the ports of Port Elizabeth and Ngqura (“the ports”).

[6] Minerva seeks no relief against the TNPA, which has not participated in these proceedings and abides the outcome of this application.

Brief overview

[7] In 2012 the Coega Development Corporation initiated a series of meetings to identify common issues which could lead to an increase in maritime business in the Algoa Bay region. One of the areas identified was the possibility of locating a ship-to-ship bunkering operation in Algoa Bay and the ports. One of the key motivations was that if passing vessels could be persuaded to bunker in Algoa Bay there would be positive economic spin-offs for the region.

[8] Aegean was identified as a possible company to develop bunkering operations in Algoa Bay. An audit of Aegean was undertaken during July 2013 by SAMSA, in Greece. This resulted in an approval in principle by SAMSA being granted to Aegean, on 26 July 2013, to conduct ship to ship bunker transfers in Algoa Bay.

[9] The approval in principle became a final approval (“the approval”) on 8 May 2014, after Aegean had met SAMSA’s outstanding requirements. It is not disputed that during 2019 the approval was transferred to Minerva.

[10] On 5 December 2022 SAMSA decided to withdraw the approval ("the decision"). The decision was communicated to Minerva on 6 December 2022.

[11] It is common cause that the decision constitutes administrative action as defined in the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") and is therefore susceptible to review in terms of PAJA.

[12] Pursuant to the decision, SAMSA, on 9 December 2022, issued a document entitled "MARINE INFORMATION NOTICE" ("the notice") to interested parties to provide information on the withdrawal of the approval, which was stated to be of immediate effect.

Litigation history and the relief currently sought

[13] Minerva launched this application on 11 December 2022, in two parts, namely:

13.1. part A, in terms of which it sought urgent interim relief pending determination of the relief sought in terms of part B of the application; and

13.2. part B, by way of which it sought to review and set aside the decision.

[14] On 13 December 22 this Court granted an interim order in favour of Minerva which, in summary, directed that:

14.1. SAMSA would suspend the notice with immediate effect, and would by 15:00 on Tuesday, 13 December 2022, notify all addressees thereof that the notice had been suspended with immediate effect and that vessels calling for bunkers or oil cargo transfers could lawfully continue to use the services of Minerva to that end;

14.2. SAMSA would not take any steps to give effect to the decision provided that all ship-to-ship bunker and cargo transfers would be conducted by Minerva subject to the authority of SAMSA, in law, whether the transfer occurred within or outside the port limits, and such transfers would include any ship-to-ship:

14.2.1. bunker or cargo transfer between the cargo vessel and the mothership;

14.2.2. oil cargo transfer between the mothership and the bunker barge vessel; and

14.2.3. bunker or cargo transfer between the bunker barge vessel and the client vessel;

14.3. the costs in respect of part A of the application would stand over for determination in the review proceedings.

[15] Thus, in addition to the costs of part A of the application, I am required to determine part B of the application in terms of which Minerva, in its amended notice of motion, asks that:

15.1. the decision be reviewed, set aside and be declared unlawful;

15.2. the approval be reinstated;

15.3. the decisions taken to issue various “Admission of Contravention Notices” and the notices themselves be reviewed, set aside and declared unlawful; and

15.4. SAMSA be directed to pay the costs of both parts A and B of the application.

<u>Summary of the dispute between Minerva and SAMSA regarding the scope of the approval</u>

<u>Nomenclature</u>

[16] Minerva's case is that it provides marine fuel and related services to ships in the ports. The services it provides include marine bunkering and ship-to-ship cargo transfers.

[17] "Bunkering" refers to the supply of "bunkers" (marine fuel oil) from an outside source such as a fuel tank situated onshore or a floating bunker tanker or bunker barge into a ship's fuel tanks for use by that ship.

[18] A ship-to-ship cargo transfer refers to the transfer of fuel oil cargo (bunkers) between two ships where the recipient ship does not utilise the fuel that is transferred for its own consumption. This occurs when a tanker ship transfers fuel oil to an anchored "mothership" that stores the fuel oil and later transfers that fuel oil to a bunker tanker or bunker barge and where the fuel oil is thereafter transferred from the bunker tanker or bunker barge to a third-party vessel for its own consumption.

Minerva's contentions

[19] Minerva submits that a ship-to-ship cargo transfer has three legs, namely:

19.1. the first leg which entails the replenishment of a mothership's supply of marine fuel oil from a tanker;

19.2. the second leg which involves the transfer of marine fuel oil from a mothership into bunker tankers or bunker barges that are smaller vessels which are used to transport fuel oil to third-party vessels; and

19.3. the third leg which relates to the transfer of fuel oil from the bunker tankers or bunker barges into the fuel tanks of third-party vessels for their consumption.

[20] Minerva's contention is that the approval covers all three the abovementioned legs. It says, further, that SAMSA's conduct for some seven years supported

this contention and only in the latter half of 2022 SAMSA first suggested that the approval was limited to the third of the three legs and that individual approvals were required for the other two legs.

SAMSA's contentions

[21] SAMSA submits that a distinction must be drawn between bunker transfers and cargo transfers, as follows:

21.1. a bunker transfer occurs where fuel oil is pumped into the receiving ship's fuel tank for use by that receiving ship (essentially the third leg described in paragraph 19.3, above); and

21.2. a cargo transfer happens where fuel oil is pumped into the cargo tanks of the receiving ship and the receiving ship will then transport that fuel oil (essentially the first and second legs described in paragraphs 19.1 and 19.2 respectively, above).

[22] SAMSA's case is that its permission is required for all cargo transfers, wherever they occur, for all bunker transfers outside a harbour and for all bunker transfers inside a harbour in circumstances where certain regulatory provisions (to which I shall revert later) do not apply.

[23] SAMSA says it grants approval for bunker transfers (i.e. leg three described in paragraph 19.3, above) on a conditional blanket basis and grants approval for cargo transfers individually (i.e. legs one and two described in paragraphs 19.1 and 19.2 respectively, above).

[24] In short, it is SAMSA's case that the approval only covers the third leg described in paragraph 19.3 above, namely the transfer of fuel oil from bunker barges or bunker tankers into the fuel tanks of third-party vessels for their consumption.

Relevant statutory and regulatory provisions

The MPA

[25] This Act has as its objectives:

"To provide for the protection of the marine environment from pollution by oil and other harmful substances, and for that purpose to provide for the prevention and combating of pollution of the sea by oil and other harmful substances; to determine liability in certain respects for loss or damage caused by the discharge of oil from ships, tankers and other offshore installations; and to provide for matters connected therewith."

[26] SAMSA was introduced as the principal regulatory authority in terms of the Act, with effect from 1 April 1988.

[27] Sections 21 and 22 of the Act provide as follows:

"**21 Authority's permission required for transfer of certain harmful substances or for certain other acts in respect of ships or tankers**

(1) No person shall-

(a) outside any harbour of which Transnet Limited has become the owner in terms of section 3 of the Legal Succession to the South African Transport Services Act, 1989 (Act 9 of 1989), or a fishing harbour as defined in section 1 of the Sea Fishery Act, 1988 (Act 12 of 1988), and within the prohibited area, render any ship having oil or any other prescribed harmful substance on board (whether as cargo or otherwise), or any tanker, incapable of sailing or manoeuvring under its own power;

(b) within the prohibited area transfer any oil or other prescribed harmful substance from any ship or tanker to any other ship or tanker or to an offshore installation or from such offshore installation to any ship or tanker,

except with the permission of the Authority and in accordance with the provisions of this Act.

(2) In giving its permission for the performance of any act referred to in subsection (1), the Authority may impose any conditions subject to which such act shall be performed, and such conditions may include the obligation to obtain the services of one or more tugs, spray boats or other vessels to stand by during a period determined by the Authority.

22 Powers of Authority in case of default by master or owner

(1) If-

(a) the master or owner of a ship or a tanker refuses or fails to perform, within the time specified by the Authority, any act which he has in terms of paragraph (a), (b), (e), (f), (g) or (h) of section 4(1) been required to perform;

(b) the master of an offshore installation refuses or fails to perform, within the time specified by the Authority, any act which he has in terms of paragraph (a), (g) or (h) of section 4(1) been required to perform; or

(c) any person refuses or fails to comply with a condition imposed by the Authority in terms of section 21(2),

the Authority may cause such act to be performed or such condition to be complied with, and for that purpose may cause steps to be taken which may include the taking over of control of such ship, tanker or offshore installation.

(2) All expenses reasonably incurred by the Authority by virtue of the provisions of subsection (1), shall be deemed to be costs referred to in section 9(1)(b)."

[28] Sections 21(1)(b) and 21(2) form the statutory bases for the approval and the conditions attached thereto. Section 22, in turn, vests SAMSA with certain powers in the case of a refusal or failure to comply with conditions imposed by it in terms of section 21(2). These provisions will receive further attention later.

[29] The "*prohibited area*" referred to in section 21(1)(b) is defined by the Act to mean:

"… the internal waters, the territorial waters and the exclusive economic zone and, in relation to an offshore installation, includes a sea within the limits of the continental shelf."

The National Ports Act, 12 of 2005 ("the Ports Act")

[30] All ports, as defined in the Ports Act, fall under the jurisdiction of the TNPA, by virtue of the provisions of section 10 of the Act. Those ports include the two ports concerned in this application.

[31] Section 11 of the Act sets out in detail the functions of the TNPA in imposing on it the duties to own, manage, control and administer ports to ensure their efficient and economic functioning. In terms of section 11(1)(g)(vi) its functions include the duty to regulate and control pollution and the protection of the environment within the port limits.

[32] Section 69(1) of the Act provides that the TNPA must in the performance of its functions ensure that a fair and reasonable balance is achieved between the

protection of the environment and the establishment, development and maintenance of ports.

[33] In terms of section 74(3) of the Act the Harbour Master is the final authority in respect of all matters relating to the movement of vessels within port limits including, in terms of section 74(3)(b)(iii), controlling the manner in which fuel is taken on by vessels in port limits.

The regulations promulgated under the MPA (published under GN R1276 in GG 9277 of 29 June 1984, as amended) ("the regulations")

[34] Chapter V of the regulations is entitled "TRANSFER OF OIL FROM SHIP OR TANKER TO ANOTHER SHIP OR TANKER". The chapter (regulations 13-21) deals with and regulates applications for the transfer of oil and matters ancillary to that process.

[35] Regulation 13 of the regulations reads as follows:

"**CHAPTER V TRANSFER OF OIL FROM A SHIP OR TANKER TO ANOTHER SHIP OR TANKER (regs 13-21)**

13 Application of chapter

The provisions of this Chapter shall not apply to-

(a) a ship, tanker or warship used exclusively in the service of a State for other than commercial purposes and, in the case of another State, present in the prohibited area with the consent of the Government of the Republic;

(b) a ship or tanker based in a harbour within the prohibited area and transferring oil obtained from such harbour into the fuel tanks of another ship or tanker for the latter's own use;

(c) a ship or tanker to which oil is transferred in the manner referred to in paragraph *(b).”*

[36] It is common cause that oil transfers falling within the parameters of regulations 13(a) and (b) (“regulation 13 transfers”) are under the exclusive control of the TNPA and the Harbour Master and that SAMSA has no jurisdiction over these transfers.

<u>The respective roles of SAMSA and the TNPA</u>

[37] Minerva’s principal contentions in this regard can be summarised, as follows:

37.1. regulation 13 transfers fall outside the jurisdiction of SAMSA;

37.2. its ship-to-ship transfers in the nature of the activities referred to in paragraph 19 above are conducted within port limits and therefore fall under the sole purview of the TNPA. To that end the TNPA issued them with bunkering licences in respect of both ports concerned, with which they comply; and

37.3. in any event, the approval covers the entire ambit of its activities and is not limited, as suggested by SAMSA.

[38] Under this heading I shall deal with the contentions summarised in paragraph 37.1 and 37.2, above. Under a separate heading, below, I shall deal with the interpretation and ambit of the approval.

[39] In respect of regulation 13 transfers, I accept the submission advanced by SAMSA that regulation 13 is of limited application and applies only to situations where the transferring tanker is based in the harbour, the oil being transferred as bunkers has been obtained from the harbour, and the oil is transferred into the fuel tanks of the receiving ship for its own consumption. A contrary proposition was not seriously argued at the hearing of the application.

[40] In my view SAMSA and the TNPA do not have mutually exclusive roles but rather have mutually supportive roles. The TNPA's primary role is the management of ports, which includes ensuring that threats to the marine environment, such as pollution, do not occur within port limits. To the extent that the Ports Act enjoins it to regulate and control pollution and the protection of the environment within port limits that, by necessary implication, means that it must ensure that users of ports comply with legislation specifically dealing with these matters, such as the MPA. The port limits include the prohibited area, as defined by the MPA.

[41] My view in this regard is supported by the wording of the bunkering licences granted to Minerva which confirmed that the licences are issued subject to compliance with the provisions of the Ports Act and all other relevant legislation, as well as compliance with all other applicable legislation and generally the requirement to conduct its bunkering activities in accordance with the law.

[42] An illustration of the mutually supportive roles I referred to is to be found in the provisional approval, which made the granting of the bunkering licences to Aegean, and later Minerva, by the TNPA a condition of the final approval.

[43] SAMSA's jurisdiction covers the prohibited area which, as defined, includes all ports. Thus, its jurisdiction includes all ship-to-ship transfers, other than regulation 13 transfers, whether they occur inside or outside port limits. It has as its function the achievement of the objectives of the MPA and enjoys the powers conferred on it by that legislation to achieve these objectives.

<u>The approval - its interpretation and its ambit</u>

<u>The approval in principle</u>

[44] The approval in principle and the final approval clearly jointly constitute the approval.

[45] The approval in principle of 26 July 2013 reads as follows:

"

26 July 2013

Approval in principle to conduct ship to ship bunker transfers in Algoa Bay

The Marine Pollution (Control and Civil Liability) Act 6 of 1981 refers. Section 21, **Authority's permission required for transfer of certain harmful substances or for certain other acts in respect of ships or tankers.**

21. (1) No person shall-

(a) outside a harbour of which Transnet Limited has become the owner in terms of section 3 of the Legal Succession to the South African Transport Services Act 9 of 1989, or a fishing harbour as defined in section 1 of the Sea Fishery Act 12 of 1988, and within the prohibited area, render any ship having oil or any other prescribed harmful substance on board (whether as cargo or otherwise), or any tanker, incapable of sailing or manoeuvring under its own power;

(b) within the prohibited area transfer any oil or other prescribed harmful substance from any ship or tanker to any other ship or tanker or to an offshore installation or from such offshore installation to any ship or tanker, except with the permission of the Authority and in accordance with the provisions of this Act.

(2) In giving its permission for the performance of any act referred to in subsection (1), the Authority may impose any conditions subject to which such act shall be performed, and such conditions may include the obligation to obtain the services of one or more tugs, spray boats or other.

The South African Maritime Authority supplied, in writing, the conditions required to grant approval to the company to undertake these transfers in June

2012. These conditions were agreed to during the audit of Aegean Bunkering Services Inc, in Greece in July 2013.

The reasons we say in principle is twofold:

1. The appointment of the company that would combat any pollution issue is still work in progress; and

2. The training plan that would allow South Africa seafarers to receive the necessary experience to occupy the senior Officer positions on the tankers is to be agreed.

On completion of the above and other aspects of the regulatory process required by South Africa, such as the registration of the South Agrican subsidiary company, the required licence from Transnet National Ports Authority to undertake transfers within the ports of Port Elizabeth and Nqgura and the permission from the Department of Mineral and Energy Affairs to import the bunkers we would be able to move to the next phase of the approval process.

The next phase of the project, from a SAMSA perspective, would be the pre-registration survey of the two tankers to be brought onto the South African register and the public consultation process which although not mandatory is agreed as a necessary step to be open and transparent with the general public given the sensitivity concerning the environment.

Captain N.T. Campbell
Acting Executive Head: Centre for Shipping Services
South African Maritime Safety Authority"

[46] I point out the following in respect of the approval in principle:

46.1. the document states that SAMSA supplied, in writing, the conditions required to grant approval to Aegean to undertake ship to ship bunker transfers in June 2012. These conditions were apparently agreed to during the audit of Aegean Bunkering Services Inc, in Greece in July 2013; and

46.2. attached to the approval in principle is a document entitled "ANNEX 1 SAMSA REQUIREMENTS". No reference is made to this document in the letter confirming the approval in principle. The document is not framed in the form of conditions and only in paragraph 7 thereof, under the heading "Conditions of approval for transfer", is there any reference to conditions. The document itself is incomplete in that it refers to four annexures, none of which are present.

[47] SAMSA, without more, submitted in argument that the attachment reflects the conditions of approval, but this is not borne out by the approval in principle or the document itself.

The final approval

[48] The final approval reads as follows:

" 8 May 2014

Approval to conduct ship to ship bunker transfers in Algoa Bay

Our correspondence of 23 July 2013 refers.

At that stage the approval was granted in principle as there were two outstanding issues:

1. The appointment of the company that would combat any pollution issue is still work in progress; and

2. The training plan that would allow South African seafarers to receive the necessary experience to occupy the senior Officer positions on the tankers is to be agreed.

It is confirmed that the appointment of Drizit and the submission of the response plan and the submission and approval of the required training plan have met these requirements.

The next steps in the process are:

1. The pre-registration survey of both the mother ship and the bunker tanker. Application for these surveys should be undertaken at our Port Elizabet offices. The costs of these services area as prescribed in the Determination of Charges, Section 50, Government Gazette No. 36819, 6 September 2013. The survey of the mother ship will be undertaken by Mr G Dirksen, Chief Naval Architect and a Surveyor from the Port Elizabeth office. The survey of the bunker tanker will be undertaken by Mr G Dirksen.

2. One month prior to the intended commencement of operations the pollution response capability is to be demonstrated by undertaking a simulated Tier Three incident occurring at the designated anchorage area. The Department of Environment Affairs and the National Ports Authority are also to be involved.

The above assumes that all other regulatory issues required by South African law, outside the jurisdiction of SAMSA, have been complied with.

Captain N.T. Campbell
Acting Executive Head: Centre for Shipping Services
South African Maritime Safety Authority"

Interpretation

[49] The interpretation of documents is a unitary exercise, taking into account text, context and purpose. As stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at [18]:

"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the appellant purpose for which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual content it is to make a contract for the parties other than the one they in fact made. The '*inevitable point of departure is the language of the provision itself*,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

See also *University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) at [63]-[65] where the Constitutional Court endorsed the abovementioned approach.

[50] In applying the cited principles of interpretation, I have come to the conclusion that the approval applies to all three legs of ship-to-ship transfers postulated in paragraph 19, above, for the following reasons:

50.1. the provisions of section 21(1)(b) of the MPA do not preclude a blanket or long-term approval covering all three legs;

50.2. Aegean sought approval for all three legs of the transfer process. That much was understood by SAMSA in the person of Captain Campbell who, from the side of SAMSA, was integral to the approval process. He states clearly that it would have made no commercial sense for the approval to cover merely one leg of the transfer process as such a restrictive approval would effectively have left Aegean without approval to conduct its business;

50.3. a reading of the approval raises the question as to why there would have to be a pre-registration survey of both the mothership and the bunker tanker if cargo transfers were not envisaged;

50.4. SAMSA's interpretation of the approval would lead to an unbusinesslike and even nonsensical outcome. It is not disputed that the approval was fundamental to Aegean's decision to invest substantially (R200 million) into vessels to operate its ship-to-ship transfer business in the ports. The whole premise of Minerva's (and formerly Aegean's) business model is that it undertakes all three legs of ship-to-ship cargo transfers;

50.5. the conduct of the parties after the granting of the approval on 8 May 2014 is illuminating. From inception Aegean, and then Minerva, operated on the basis that the approval applied to all three legs of ship-to-ship transfers and was not sought to be enforced differently by SAMSA. SAMSA did not suggest that they were acting outside the scope of the approval until the 2022 events which preceded this application;

50.6. significantly SAMSA has not disclosed documentation to support its averment that Minerva applied for and was granted approval for specific ship-to-ship transfers during the period January 2020 to June

2022. Instead, it has rather referred to documents covering the period 2017 to 2019;

50.7. SAMSA, itself, referred to the approval as including all three legs of ship-to-ship transfer operations. In a memorandum to the SAMSA Board dated 7 November 2022 the first respondent stated as follows:

"SAMSA have informed Transnet National Port Authority of its intention to withdraw Minerva's bunker tanker approvals to conduct 'Ship to Ship' Oil Cargo Transfers and 'Ship to Ship' bunkering in the bay of Algoa Bay as at 4 November 2022."

50.8. in the marine information notices issued by SAMSA online in December 2022, pursuant to the withdrawal of the approval, the following is stated:

"SAMSA has withdrawn Minerva Marine Bunkering Services' approval to conduct Ship to Ship Bunkering and oil cargo operations in Algoa Bay with immediate effect."

50.9. if SAMSA wished to limit the scope of the approval it could and should have done so clearly in the document. Section 21(2) of the MPA entitles it to attach conditions to an approval.

Is the decision invalid, as contended by Minerva

The Constitution and PAJA

[51] In terms of section 172(1)(a) of the Constitution, when deciding a constitutional matter, a court must declare that any conduct that is inconsistent with the Constitution is invalid. The "conduct" referred to would include an administrative action.

[52] PAJA defines an administrative action as including any decision taken by an organ of state when exercising a public power or performing a public function in terms of any legislation.

[53] The correct approach in a matter such as the present application where the applicant seeks to review the decision, is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. Once a ground of review under PAJA has been established section 172(1)(a) of the Constitution requires the decision concerned to be declared unlawful. The consequences of the declaration of unlawfulness must be dealt with in a just and equitable order in terms of section 172(1)(b). Section 8 of PAJA, in turn, provides the detailed legislative content to the just and equitable remedy envisaged by the Constitution. *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (1) SA 604 (CC) at [25] and [28].

[54] Section 5 of PAJA deals with a party's rights which have been adversely affected by administrative action to be provided with reasons for the action. If an administrator has failed to furnish adequate reasons for an administrative action it may, in terms of section 5(4), in certain circumstances, be presumed that the administrative action was taken without good reason.

<u>SAMSA's "reasons" for the decision</u>

[55] Because of the conclusion I have reached in this matter I find it unnecessary to deal at any great length with Minerva's contentions that SAMSA failed to provide adequate reasons for the decision.

[56] Mr Ramugondo, the first respondent, in response to Minerva's contentions in this regard stated as follows in his opposing affidavit:

56.1. paragraph 47:

"The memorandum to the Board of the Second Respondent was authored by the previous acting chief executive officer of the Second Respondent, Ms Zamachonco Chonco. I respectfully refer to the facts set out in the memorandum and confirm that I also had regard to these facts when I took the decision to withdraw the Applicant's approval."

56.2. paragraph 48.1:

"I very clearly stated in my letter of 5 December 2022 that I took the decision for the reasons set out in that letter and in the preceding 30-day notice letter dated 4 November 2022: see paragraph 9 of my letter of 5 December 2022, a copy of which is attached to the original application marked "KA1."

56.3. paragraph 48.2:

"On Thursday, 8 December 2022, the Applicant's attorneys advised that the Applicant would be '*bringing review proceedings against this decision*' and requested the Second Respondent to provide adequate reasons as prescribed by PAJA."

56.4. paragraph 48.3:

"I am advised that I had 90 days to furnish reasons in terms of PAJA."

56.5. paragraph 48.4:

"The instant application was then issued on Sunday, 11 December 2022, and an order was granted by the above Honourable Court on 13 December 2022 following negotiations between the parties."

56.6. paragraph 48.5:

"There was clearly insufficient time for me to furnish any further reasons before the review application was served, there was no request in the original application for further reasons, presumably because my reasons are very clearly set out in the correspondence, and no further request for reasons has been received."

[57] The deponent's response quoted in paragraph 56.6, above is misleading. The original notice of motion in respect of part B of the application clearly requires of SAMSA to comply with rule 53(1)(b) of the Uniform Rules and to that end *inter-alia* to "*Despatch to the Registrar such further reasons as may be given for the making of the Decision*."

[58] The further reasons required by rule 53 were not provided by SAMSA. The provision of adequate reasons for an administrative action serves to promote administrative certainty and can be of great assistance to a court tasked with deciding an application for judicial review.

[59] In the so-called 30-day notice letter of 4 November 2022 SAMSA records that:

59.1. the approval was limited only to the conduct of ship-to-ship bunker transfers in Algoa Bay. No context is given to this subjective conclusion with reference to the approval. SAMSA says in its opposing affidavits that the approval was conditional. No attempt is made in the letter or the opposing affidavits to define those conditions and set out Minerva's breaches thereof;

59.2. it had been brought to SAMSA's attention that Minerva had been conducting ship-to-ship cargo transfers in Algoa Bay and that such transfers fell outside the scope of the approval. This conduct, according to SAMSA, entailed Minerva utilising the approval for conducting operations that were illegal and not permitted by law. Various examples of Minerva's alleged unlawful conduct were mentioned. Again this amounted to SAMSA's subjective interpretation of the approval;

59.3. Minerva had not complied with demands to remedy its alleged unlawful conduct; and

59.4. SAMSA had formed the intention to withdraw the approval.

[60] The "reasons" provided by SAMSA cannot be described as adequate. The import of the letter appears to be that because Minerva was conducting operations falling outside the ambit of the approval, SAMSA was withdrawing its consent to Minerva to continue with operations falling within the ambit of the approval. This is not rational. Significantly, the reasons furnished do not provide a statutory or regulatory basis which would allow SAMSA to revoke the approval.

[61] In its letter of 5 December 2022, revoking the approval, SAMSA in equally inadequate terms:

61.1. repeated its subjective interpretation that the approval was limited in scope and its allegations of unlawful conduct on the part of Minerva;

61.2. stated that it was not persuaded by the representations made by Minerva in response to the 30-day notice letter. The representations were not individually addressed and no reasons were furnished as to why the response was unpersuasive;

61.3. stood by the "reasons" provided in the 30-day notice letter, which I have already found to be inadequate.

[62] I am therefore unable to discern a rational basis for the decision from the reasons furnished by SAMSA

Was SAMSA empowered to revoke the approval

[63] In applying the PAJA definition of administrative action, set out above, SAMSA is an organ of state exercising public power or performing a public function in

terms of the MPA. Section 6 of PAJA, which sets out the power of a court to judicially review administrative actions, consistently requires administrators (in this case SAMSA) to act in accordance with an empowering provision. An empowering provision is, in turn, defined by PAJA as including a law, such as the MPA.

[64] The principal question to be answered in determining this application is whether the MPA afforded SAMSA the authority to revoke the approval.

[65] I have, above, set out in full the provisions of sections 21 and 22 of the MPA. Section 22 deals with SAMSA's powers in the event of a default by a master or owner of a vessel. Section 22(1)(c) provides that if any person refuses or fails to comply with a condition imposed by SAMSA in terms of section 21(2), SAMSA "*may cause such steps to be taken which may include the taking over of control of such ship, tanker or offshore installation*".

[66] Section 22 does not, in express terms, allow SAMSA to revoke an approval given in terms of section 21(1)(b) of the MPA in the event of a default. No other provision in the Act allows for this.

[67] The question then arises whether the MPA impliedly allows SAMSA to revoke approvals granted in terms of section 21. That depends on an interpretation of the statute. In *Private Security Industry Regulatory Authority v Anglo Platinum Management Services Ltd* [2007] 1 All SA 154 (SCA) at [27] it was held that:

"A provision can only be read into a statute when it is a necessary implication. The test for implying the provision, therefore, is whether it is necessary for the efficacious operation of the statute."

See also *Administrative Law in South Africa*, third edition, by C Hoexter and G Penfold at pp 385-6 under the authors' discussion of the application of the *functus officio* doctrine.

[68] I cannot see why the MPA cannot operate efficaciously without implying the power to revoke approvals granted in terms thereof, particularly as section 21(2) allows SAMSA to attach conditions to such approvals. Notionally such conditions could include the power to revoke an approval in specified circumstances such as the non-compliance with conditions attaching to the approval, the limitation of the duration of an approval, or the requirement that in respect of ship-to-ship cargo transfers for which long-term approval has been granted, SAMSA be given prior notice of such transfers, which would allow it to fulfil its monitoring function.

[69] SAMSA contends that the annexure to the provisional approval of 26 July 2013 sets out the conditions under which the approval was granted. Nowhere in this document does SAMSA reserve for itself the right to cancel the approval.

[70] On the principles of our *functus officio* doctrine, SAMSA's decision to grant the approval was final and also vested significant rights in Minerva. SAMSA, of late, adopted a subjective interpretation of the approval, which it had not hitherto applied. In this regard it is apposite to refer to the judgment of the Constitutional Court in *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* 2020 (4) SA 375 (CC) at [50]:

"……… . Imagine the spectre of organs of state and private persons ignoring or giving heed to administrative action based on their view of its validity. The administrative and legal chaos that would ensue from that state of affairs is unthinkable. Indeed, chaos and not law would rule."

[71] Thus, the withdrawal of the approval could not have occurred without an order from a court of competent jurisdiction. SAMSA appears to have recognised this requirement. In its letters of 5 July 2022 and 19 October 2022, addressed to Minerva, it threatens legal action in the absence of compliance with its requirements.

[72] In my view the decision is therefore reviewable in terms of PAJA, at least, on two grounds, namely:

72.1. SAMSA was not authorised by the empowering provision, i.e. the MPA, to make the decision to revoke the approval (section 6(2)(a)(i) of PAJA); and

72.2. the decision was materially influenced by an error of law (section 6(2)(d) of PAJA), namely that the MPA authorised SAMSA to revoke the approval.

[73] Accordingly, and in terms of section 172(1)(a) of the Constitution I am required to declare the decision to be unlawful.

[74] In view of the conclusion I have reached, it is unnecessary for me to consider the other grounds of review relied on by Minerva in respect of the decision. I must add that my conclusion is not dependent on an interpretation of the ambit of the approval. Thus, even if I was incorrect in my interpretation of the ambit of the approval, SAMSA still did not have the right to revoke it unilaterally.

[75] The decisions by SAMSA to issue admission of contravention notices depend for their validity on SAMSA's incorrect interpretation of the approval. It follows that these decisions are therefore also unlawful, because they have been materially influenced by an error of law.

Just and equitable relief

[76] Given my conclusion section 172(1) (b) of the Constitution provides that I may make any order that is just and equitable. In the context of PAJA, section 8 thereof is the statutory embodiment of this constitutional provision, which sets out the orders which can follow in proceedings for judicial review in terms of section 6(1).

[77] The only order which can follow from my conclusion, in my view, is to set aside the decision and to grant the relief sought by Minerva in terms of its amended notice of motion.

[78] The order I intend granting is also just and equitable in the circumstances where SAMSA has acted inconsistently with regard to its application of the approval and its interpretation thereof. Initially its conduct accorded with Minerva's interpretation of the scope of the approval but later, during the latter half of 2022, it clearly altered its position. It is trite that administrators must act consistently, as consistency promotes administrative certainty.

<u>Costs</u>

[79] It was not suggested to me that the usual principle that costs follow the result should not apply in this case. I therefore intend applying that principle.

<u>Order</u>

[80] Thus, I make the following order:

1. *The decision taken by the first and second respondents on 5 December 2022 to withdraw the approval granted to the applicant by the second respondent on 8 May 2014 ("the approval") to conduct ship-to-ship bunker transfers in Algoa Bay is declared to be unlawful and is reviewed and set aside.*

2. *The approval is reinstated.*

3. *The decisions taken by the first and second respondents to issue notices in terms of section 30(3) of the Marine Pollution (Control and Civil Liability) Act, 6 of 1981 on 28 June 2022, 29 June 2022, 1 July 2022, 28 July 2022, 26 October 2022 and 6 February 2023 as well as the said notices are declared to be unlawful and are reviewed and set aside.*

4. *The first and second respondents are directed to pay the applicant's costs in respect of part B of this application as well as the cost reserved for*

determination in respect of part A of the application, such costs to include the costs of two counsel, where so employed.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances: **Applicant: K. Pillay SC**

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First and Second Respondents: R.G. Buchanan SC and D. Niekerk

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Third Respondent: No appearance

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