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

OF INTEREST

CASE NO. CA 199/2023

In the matter between:

MINISTER OF HUMAN SETTLEMENTS, SANITATION AND WATER	Appellant
and	
BUHLE TONISE	First Respondent
ZAMA XALISA	Second Respondent
MZOLISI JOE SIKHOSANA	Third Respondent
TABISA WANA	Fourth Respondent
NKOSAZANA NOMXHOSA JONGILANGA	Fifth Respondent

FULL BENCH APPEAL JUDGMENT

HARTLE J

Introduction:

[1] The appellant was the incumbent Minister of Water and Sanitation when, on 25 March 2022, he exercised the power bestowed upon him in terms of section 35 (5) of the Water Services Act, No. 108 of 1997 ("*WSA*") to "*dissolve the Amatola Water Board,*" effectively terminating the terms of office of nine board members at the same time with one fell swoop.[1]

[2] The respondents, cited as the first to the fifth applicants, comprised almost one half of the erstwhile members of the Board affected by the fiat who approached the court below to review that course of action taken by him as well as his decision, evidently taken on the same day, to appoint an interim board of seven members in their place ("*the Interim Board*").

[3] The court below set aside both decisions by the appellant to dissolve the Board and to terminate their member appointments but in the opposite order of primacy.[2] It ordered the appellant "*to reinstate*" them "*as members of the Amatola Water Board with immediate* (as opposed to retrospective) *effect*" but made no pronouncement against the appointment of the Interim Board.

[4] The present appeal against the respective orders is with the leave of the court below.

[5] There is no counter appeal.

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[1] The tenth member, making up the full complement of the Board, resigned on 14 March 2002.

[2] The judgment of the first court has been reported by SAFLII as *Tonise and Others v Minister of Water and Sanitation and Others* (1274/2022) [2023] ZAECMKHC 68 (24 May 2023). The order reads as follows:

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

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

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

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

The prequel to the application:

[6] The broad essential facts hardly brook any contention.

[7] The respondents together with five other erstwhile members were simultaneously appointed as members of the governing board ("*the Board*") of the Amatola Water Board ("*Amatola Water*") by the previous Minister of Water and Sanitation, Ms. L N Sisulu, during March 2021 following the dissolution of a previous interim Board. Their appointments were for a four-year period.

[8] Their term of office was upended on 28 March 2022 as a result of the appellant's decisions aforesaid.

[9] On 15 March 2022, prior to making his decision(s), the Appellant issued a standard notice to each of the members advising them of his primary intention to "*dissolve the Amatola Water Board*" (sic),[3] thus terminating their appointments as members of the Board. The notices were predicated on the fact that the Department of Water and Sanitation had received "*numerous correspondences indicating governance challenges at Amatola Water*". To this the Minister added the observation that since its inauguration the Board "*has experienced several*

[3] Section 28 of the WSA provides for the establishment and disestablishment of a water board as an entity/institution in itself, evidently on the basis of need, to provide water services to other water service institutions within its service area. (See section 29). According to the definition of "*water board*" in section 1 of the WSA, it is an organ of state established or regarded as having been established in terms of the WSA to perform, as its primary activity, a public function. Section 31 of the WSA provides in turn that a water board is a body corporate that exists to perform its primary activity and other activities contemplated in section 30 of the WSA. A water board, in terms of section 31, once established, is governed by a board which consists of a chairperson and such other members as the Minister may appoint from time to time, this according to section 35 (1) of the WSA. In the context of the Public Finance Management Act, No. 1 of 1999 ("*PFMA*") Amatola Water is classified as a public entity listed in Schedule 3 (under the mantle of "*Other Public Entities*") which concerns National Government Business Enterprises as defined in the PFMA. As such, it is the vehicle through which its core activity and others are carried out. The board consists of a chairperson and such other members as the Minister may appoint who are colloquially also referred to as the board of control. As a collective they are the responsible governing body and stand as the accounting authority under the provisions of the PFMA. For present purposes it is useful to simply distinguish between *"Amatola Water"* as the entity/institution, and its "*Board*" through which it governs its business activities, as the nomenclature can be confusing. Moreover, the disestablishment of a water board itself is a far more rigorous process per section 28 (2) and (3) of the WSA and self-evidently concerns itself with policy related considerations regarding their need to exist, if at all, subject to a ministerial review for the provision of water services as defined in delineated service areas falling within each entity's area of jurisdiction.

governance challenges, including alleged misconduct by some Board members, which has led to instability within the entity". He emphasized that this conduct (supposedly the misconduct by some Board members) was "*the opposite of the fundamental ethical standard and ha(*d*) the potential of subjecting the Amatola Water Board to disrepute*".

[10] He invited each member to furnish him with written reasons within seven days of receipt of his notice as to why he should not "*dissolve the Amatola Water Board*" (obviously a reference to the governing Board comprising of all of its members as opposed to the entity itself)[4] and thus terminate their appointments.

[11] The respondents took up this opportunity to make comprehensive submissions defending both their personal interests as individual members as well as the operational integrity of the Board.

[12] On 26 March 2022 it was announced in the media that the appellant had dissolved the Board and terminated the respondents' appointments. In a press statement dated 25 March 2022 the appellant attributed the reason to the fact that he was "*deeply concerned about the instability and governance challenges at Amatola Water as an entity, which had in turn, also affected the provision of water to communities in the Buffalo City Metropolitan area*." He further stated that water supply by Amatola Water had been far below the growing demand in various parts of the province, which situation was untenable for him.

[13] In further expanding on the appointment of an Interim Board, he expressed the hope that the new appointees would "*bring about stability to the water entity in terms of its finances and governance and would also extend the mandate of dealing with issues of water in the entire province.*"

[4] See footnote 3.

[14] It was further revealed in the press statement put out by him that he had appointed the seven-member Interim Board for a period of five months.[5] The letters of appointment issued to the new members forming part of the record of decision indicate to the contrary however that such appointments were "*until such time as a new Board is appointed*".[6] (The relevance of this fact has some bearing on the issue of the remedy which will be elaborated upon below.)

[15] The appellant's official letters of termination uniformly assert that he had considered the content of the members' input in response to his pre-termination notices that had heralded his intention to dissolve the Board but bore some nuances here and there.[7] However, they say nothing of the reasons for the wholesale dissolution of the Board (such as for example that which he had disclosed to the media) or indeed even suggest that the members' memberships had been terminated coincidentally as a result of his primary decision to relieve the entire Board. Instead, the appellant purported to persuade them, with reference to his pre-termination notices wherein he had requested them to provide reasons as to why their appointments should co-incidentally not be terminated, that he had considered each person's response and had decided nonetheless to terminate their individual appointments in terms of section 35 (5) of the WSA.[8]

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[5] The Minister apologised in his answering affidavit for the unfortunate happenstance that the respondents had learned of their fate through the media before being served with the official notices of termination of their membership of the Board.

[6] When the review application was launched on an urgent basis the parties moved a consensual order that, pending the final resolution of the review application, under Part B, that the Minister be interdicted against appointing any permanent board members to Amatola Water. The option was however left open to him in the meantime to take such steps to identify suitable candidates to be appointed in due course if the respondents' legal challenge was unsuccessful.

[7] The 6th respondent (as cited in the review application) resigned on 14 March 2022 (see footnote 1). The appellant's termination notice exceptionally confirmed his acceptance of the latter member's resignation instead. The 5th respondent was thanked for her "*elaborate response*". In response to the erstwhile chairperson the appellant noted her "*non-objection to any decision that* (he) *would take*." To the 9th respondent as cited in the review application the appellant noted her response and "*support for the dissolution of the Board in its entirety*." To the 4th and 12th respondents, he expressed the view that neither had "*not demonstrated reasonable grounds for* (their) *term of office to not be* (or not to be) *terminated*."

[8] The termination (as opposed to the pre-termination) notices oddly gave no indication that the appellant had decided to relieve the entire board, except in the header which reflects that each notice concerned the "*Termination of the term of office of the Board,*" this apart from their individual membership appointments.

[16] The termination letters were generated on 28 March 2022 and received by the second, third and fourth respondents on the same day. In the case of the first and fifth respondents, they were received two days after the appellant had been placed on terms by the respondents' attorneys to confirm their membership status and to provide reasons for the appellant's rumoured decisions under threat of the issue of the application for review.

[17] No additional reasons were forthcoming prior to the launch of the review application. Reading between the lines, it was this lack of transparency that provided the *raison d'etre* for the respondents' resort to the litigation and in my view legitimate concern that the appellant had not acted lawfully within the prescripts of administrative law. Indeed, the respondents contended that the lack of any clear reasons for the impugned decisions was in itself sufficient to establish that they were taken without good reason.[9]

<u>The respondents' founding affidavit:</u>

[18] The respondents asserted in their founding papers filed in the review application, that they were "*taken aback*" even by the appellant's pre-termination notices that to some extent hinted at why he was inclined to dissolve the Board pursuant to the provisions of section 35 (5) of the WSA. They, however, saw no reason for such action. Moreover, the appellant had not sought to engage with them or initiate any investigation into the alleged governance challenges or misconduct referenced in his pre-termination notices.

[19] Without the benefit of any reasons for his decisions provided even after the fact, they surmised that the appellant had taken reports from the erstwhile chairperson, Dr. Makgae, against them (going to the issue of the claimed "*governance challenges*") at face value without applying his mind as to what the problem was (if any) or what could be done to address the supposed concerns. In

[9] See *National Lotteries Board v SA Education and Environment Project* 2012 (4) SA 504 (SCA) at [27] in which the court held that the duty to give reasons is a central element of the constitutional duty to act fairly, and that the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable.

this respect they revealed that the latter had made certain representations to the appellant in an open meeting on 8 March 2022 regarding broad, generalized complaints against them which they had not been given any time to respond to, but even before this, the second respondent had addressed a comprehensive letter to the appellant dated 8 February 2022 seeking his intervention because, according to him, Dr. Makgae had acted unilaterally in respect of the implementation of a SIU report implicating Amatola Water staff and had ignored a request to convene a special meeting. The appellant had not responded to this communication.[10]

[20] A separate issue, which the first respondent surmised might have some correlation, concerned the process for the recruitment of a chief executive officer. After a special meeting called by her to discuss this and the SIU report which Dr. Makgae failed to attend, she had sent a letter to the appellant confirming that she and the respondents had been opposed to the appointment of the proposed CEO, which had somehow come to be sanctioned by him despite their disapproval. This communication too had gone unanswered.

[21] The respondents asserted that without having been given "*clear*" reasons for the impugned decisions (to the contrary they were given none at all), they were left in a quandary to understand why the appellant had decided as he did, given the vague reference to the claimed "*several governance challenges*" and the unspecified alleged misconduct in the appellant's notice anticipating the wholesale dissolution of the Board. She complained in any event that it had not been possible for them to respond in detail to the pre-termination notices as they lacked particularity.

[22] The first respondent offered the assurance that whilst it was true that Dr. Makgae had obstructed the discharge of the Board's duties through her unilateral decision making and refusal to participate in a special board meeting, which difficulties they appeared to accept constituted "*governance challenges*" at their

[10] The first respondent averred that Dr. Makgae's presentation was not shared with the Board after the open meeting. She apologised that there was no copy to attach to the affidavit, neither minutes of the meeting. The formal memoranda addressed to the appellant dated 21 February 2022 ostensibly informing the basis for Dr. Makgae's complaints at the open meeting appears not to have ben made available to the respondents until after the review record was filed. The complaints raised against the respondents in it are certainly not generalised, but quite specific.

worst, they were not aligned with the thought that these were of a nature that justified the drastic action of dissolving the entire Board. She further emphasized the fact that any governance issues within the Board arose as a result of the chairperson's obstructive conduct.

[23] They criticized the blanket approach adopted by the appellant ultimately, despite the lack of adherence to principles of good governance by only a few individuals (indeed their discontent lay essentially with Dr. Makgae and the twelfth respondent), as "*erroneous if not outrightly irrational*".

[24] In justifying the basis for the review of the appellant's decisions (absent any official reasons having been advised to the individual members by the date of the launch of the review application), the respondents contended that the course of action adopted by him had been particularly "*drastic*" (demonstrative on its own of an unlawful and irrational decision) whereas it had been open to him also to have invoked his powers in terms of the WSA to investigate whatever allegations there were against any individual Board member or to have issued directives to the Board.[11]

[25] Certainly, as far as they were concerned, none of their group had made themselves guilty of any misconduct or otherwise unethical behaviour (with reference to the Board's Charter), but even if there had been a basis to complain against any of their number, so they averred, they had not been properly informed of any accusations or been given an opportunity to respond. Further and in any event, so they opined, the essential provisions in the Board Charter relating to the termination

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[11] The respondents referenced section 41 of the WSA in this respect, but these directives seem to relate to the undertaking of a specific activity or the Ministers power to direct that a water board desist from a specific activity, as opposed to a Board's primary activity referenced in section 29. "*Other activities*" are suggested in section 30. An "*activity* "in terms of the WSA appears therefore to relate to the essential or other work or projects carried on by a water board. The Minister does however have the power in terms of section 73 (1) (h) to issue guidelines to "*water service institutions*" (which by definition includes a "*water board*") on performing their functions in terms of the WSA. The Minister is also authorised to investigate the affairs and financial position of a water board pursuant to the provisions of section 45 of the WSA. It appeared to be common cause that other than an earlier investigation by a firm of attorneys commissioned by the appellant's predecessor, no other contemporaneous investigation had been undertaken beyond the appellant's *ad hoc* intervention taken closer to the date of his impugned decisions to hold a meeting with the Board members.

of office of a Board member's appointment had to inform the interpretation of the appellant's powers in section 35 (5) of the WSA.

[26] In particular, and with reference to clause 9 (a)(iii) thereof, a member of the Board may cease to hold office through, *inter alia*, a request for termination that has been approved by the Minister in line with section 35 (5) of the WSA. The clause goes on to provide that this may be passed by a 2/3 vote of the Board on the grounds of unethical or obstructive behaviour, an accusation concerning them which they absolutely abjured. (As an aside it appears to me that this provision of the Board Charter applies in the unique context of the Board initiating a request to the appellant to terminate the membership of one of them on the stated grounds, which scenario is entirely distinguishable from a situation where the Minister independently exercises his power in terms of section 35 (5) of the WSA without reference to any such a request.)[12]

[27] They also lamented the fact that the appellant had further in any event ignored their written representations before making his decisions especially since these were notably absent from the record of decision disclosed by the appellant in response to their notice filed in the review application in terms of Rule 53 (1).[13] Had each of these been properly considered, they contended, the appellant would surely not have proceeded with the termination of their membership and the wholesale dissolution of the Board.

[28] With regard to the Code of Ethics for Board Members they highlighted the fact that in the event of a chairperson being implicated in a breach, such a matter was to be reported to the Minister for purposes of section 45 of the WSA, read together with sections 84 and 85 of the Public Finance Management Act, No. 1 of 1999 (the

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[12] Reading between the lines it was the rumblings of the respondents against the complaints of Dr. Makgae concerning them that seems to have motivated the appellant to have adopted the course of action which he did, but neither "*faction*" formally requested the termination of membership of the other in terms of the Board Charter.

[13] The appellant insisted in his replying affidavit that he had had regard to these. The court below appeared to accept the appellant's say so to this effect which would have been the correct approach to have followed on the basis of the *Plascon-Evans* Rule. The fact that they were absent from the record of decision hardly provides a basis on its own to conclude the opposite because there were other documents also referenced here and there that were not in the "*record*." The respondents themselves remarked upon the fact that the record was incomplete and or its compilation selective.

"*PFMA*"), thus they contended that the appropriate course of action to be followed was to have initiated an investigation to determine what remedial measures were required, this in respect of the complaint of the governance challenges especially. (As an aside it was not evident that the respondents formally complained to the appellant of any breach of the Code by Dr. Makgae. She, conversely, raised their conduct in undermining her authority as chairperson to call a special meeting of the board and in seeking to frustrate her chairmanship as a *prima facie* breach of clause 9 of the Board Charter that forbids unethical and obstructive behaviour. Dr Makgae also contended that they were in breach of section 38 (2) of the WSA that legally obliges board members to perform their duties with honesty, care and diligence.)

[29] Thus the respondents approached the court below to review and set aside the decisions against the background of the prevailing legal framework principally on the basis that these decisions to terminate their membership of the Board and to dissolve it, fell to be challenged on the several bases made provision for in sections 6 (2)(c), 6 (2)(e)(iii), 6 (2)(e)(vi), 6 (2)(f) and 6 (2)(h) of the Promotion of Administrative Justice Act, No. 3 of 2000 ("*PAJA*"), alternatively on the common law grounds of illegality and irrationality.[14]

The Record of decision and reasons advanced by the Minister for his impugned decisions:

[30] The record of decision filed in response to the respondents' notice of application to review the appellant's decisions revealed a raft of various documents. Some by their very nature hint to a reader of a possible basis for the appellant to have relieved the entire Board,[15] but nay a firm reason was expressed by him

[14] The subsections of PAJA relate, in the order of their being listed, to decisions that are procedurally unfair; taken because irrelevant considerations were taken into account and/or relevant considerations were not taken into account; were taken arbitrarily or capriciously; are irrational; and/or are unreasonable.

[15] Such as for example, a Request prepared by the Director General for the appellant's benefit suggesting a course of action ultimately taken by him in the form of placing the members on terms to provide reasons as to why their appointments should not be terminated. This "*request*" was premised upon the Department having received numerous communications between January 2021 to March 2022 indicating governance challenges at Amatola Water. Because the appellant failed to engage with this document in his affidavit or give it any context at all, or identify what communications it concerned, it merely hovered as something in the ether.

personally in the plethora of documentation for having come to this drastic outcome, except in a letter addressed to the Provincial Secretary of SAMWU dated 18 March 2022 written in response to a petition filed by the union regarding certain matters. In it he revealed that what had stood out for him in his recent engagements with the Board and management on key projects, was the "*instability*" of Amatola Water, evidenced by the lack of a duly appointed Chief Executive and a Chief Financial Officer and "*other internal strains amongst the Board members*". He remarked that despite interventions made by the Ministry in 2021 to address these issues *"the situation ha*(d) *continued unabated,"* which grievous concerns he was *"attending to"*. He qualified that the Minister's intervention had been on behalf of the Ministry and the Department as a shareholder in Amatola Water and not as an "*Employer*", that it had been informed by the context aforementioned, was aimed at stabilizing the entity, and would last until stability was reinstated. With regard to an issue about a 13th cheque that had interposed itself, the appellant ventured that the Ministry was concerned that the stability within the Board had generally impaired its ability to make "*sound decisions*", including those of a financial nature.[16]

[31] As an aside, the appellant simply annexed the "*whole of the record*" to his answering affidavit without relating what in it bore pertinently on his decision-making except to the extent indicated below.

[32] Leaving aside what the media reported based on the Department's press release, his own voice in the whole scenario leading up to his dissolution of the Board was muted until he gave context, in his answering affidavit, to some of the documentation in the record as justification for why he responded to the perceived crisis as he did.

[33] Surprisingly, the appellant set store, firstly, by dated reports filed pursuant to an earlier investigation by an attorney commissioned by his predecessor into complaints of misconduct against the first respondent (founded on anonymous letters by two whistle-blowers and a letter authored by the Secretary of SAMWU

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[16] The appellant did not flag this letter to SAMWU in his answering affidavit either as a relevant document bearing upon his impugned decisions. It just so happened to be amongst the documents comprising the record of decision.

Amathole Region) that he claimed had caused him concern even having had regard to the first respondent's affidavit provided in response to the serious allegations against her which she had provided at the time of the investigation.[17]

[34] The complaints that had formed the subject matter of the attorney's investigation implicated the first and second respondents in allegations of acts of corruption and unethical conduct. They also implicated the fourth respondent in her capacity as chairperson of the Human Resource Committee but by reason of her "*lack of proper qualifications within the area of human resources*."

[35] Also relied upon was a letter dated 29 April 2021, addressed by SAMWU to the Ministry raising objections to the appointment of executive managers.

[36] These letters, according to him, were seeking the Ministry to address issues of unethical conduct on the part of the named members. One such complaint concerned the first respondent encouraging board members to shift from the fundamental objectives of Amatola Water to advance her own interests and implicated bullying tactics on her part by undermining other board members during virtual meetings. The appellant repeated verbatim the attorney's words lifted from the latter's 2021 investigative report as if they were his own that, "*whether true or not*", these allegations were very serious in nature.

[37] He related a further allegation that the first respondent had irregularly appointed the Executive Manager : Planning and Development Director, one Mr. Koyo, without consulting other board members, despite accepted policy that the appointment of the Chief Executive Officer was to have preceded Mr. Koyo's appointment. This according to him was a cause for concern because "*it allegedly validates the allegation that* (the first respondent) *was or is pushing her own agenda and not that of Amatola Water*".[18]

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[17] In this respect a *"Final Report*" suggesting the termination of the 1st and 4th respondents' membership, on prior notice to them, was dated 26 July 2021.

[18] These sentiments are those of the attorney once again who conducted the earlier investigation and are evidently not the appellant's original thoughts.

[38] He added that the first respondent had in fact responded to these allegations in an affidavit but his takeaway from her input given at the time is that its contents, apart from implicating the then chairperson and the second respondent in allegations of misconduct, was tantamount to making herself guilty of a contravention of section 3 (a) of the Prevention and Combatting of Corrupt Activities Act, No. 12 of 2024 ("*PRECCA*") by having received "*gratification*" (as defined in the PRECCA), and of overlooking unlawful and corrupt acts by both the then chairperson and the second respondent, criminal knowledge of these actions having been imputed to her on the basis contemplated by section 2 of the PRECCA.[19]

[39] Without explaining what had happened going before, he related that he had *"re-appointed"* the first respondent with the belief that she was "*fit and proper for the position*" but added the rider that "*her behaviour is, without a doubt, a cause for great concern*" and that he had "*lost confidence in her ability to execute her duties, as expected of a board member.* This too is an observation from the 2021 investigative report that the appellant owned as his independent view of the issues concerning the first respondent. In the report the attorney had noted as follows:

> "The Minister appointed Ms. Tonise with the belief that she, as someone who is legally qualified and trained, is a fit and proper person for the position, but her behaviour is, without a doubt, a cause for a great concern. In light of the foregoing, the Minister would be entitled to lose confidence and trust in her ability to execute her duties, as expected of her."

[40] He concluded that the first respondent had *"failed to conduct herself in a manner that reflects Good Corporate Governance and to uphold the law*".

[41] As an aside, it is common knowledge that the outcome of the attorney's investigation conduced to the first respondent's membership being terminated at the time, but subsequent thereto the appellant himself reinstated her as a member of the Board. It appears further that despite her having sought to accuse the second respondent of certain misconduct in the affidavit filed in response to the investigative

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[19] Again these were thoughts expressed by the attorney in the investigative report.

report, she asserted in an affidavit filed in the review application that in a meeting held with the appellant on 22 October 2021 "*any concerns in relation to the second respondent, including the allegations set out in the Minister's answering affidavit, were resolved to the satisfaction of all attendees."*

[42] One would have expected some explanation from the appellant as to why the first respondent especially had been absolved and reinstated in spite of the very serious allegations against her, but true to her claims, in separate letters dated 14 October 2021 the appellant had written to both her and the fourth respondent as follows: "*I have considered the termination of your board membership to the Amatola Water Board by the former Minister. As a result, I have decided to reinstate your membership to enable you to serve as a member of the Amatola Water Board in terms of section 35 of the Water Services Act, 1977….".*[20]

[43] In the light of the appellant self-evidently having absolved and reappointed the first respondent, it appeared curious that he had elevated these complaints against her to established facts, as it were, of charges of serious misconduct against her at the time of his impugned decision making. Further of relevance is the fact that the attorney himself, in making his report, had qualified that it was by no means a final report.

[44] Be that as it may, the appellant further added to the raft of supposed misdemeanors against the first respondent the significant allegation that she had had a personal relationship with Mr. Koyo who she had interviewed for the position of Executive Manager : Planning and Development and had failed to disclose this relationship in contravention of clause 4.4.2 (b) of the Board Charter.[21]

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[20] The first respondent clarified in her affidavit that she and the fourth respondent had been reinstated "*upon* (their) *termination being challenged*." One would certainly have liked to know more about that to understand why the appellant had capitulated by reappointing them, but it remained a mystery on the papers.
[21] To this allegation, seemingly not raised as an issue in the investigative report, the first respondent pleaded a denial. No further detail was however forthcoming from either the appellant or her regarding the complaint.

[45] Concerning the second respondent, the appellant noted that he had also attracted complaints of misconduct in the earlier investigation alluded to raising concerns "*around acts of corruption*" when he was the acting chairperson of the Board; irregular interviews undertaken a year before in the pursuit of appointing executive officers; and, more recently, relating to the unauthorized use of a rental motor vehicle for Board business that had subsequently been involved in a motor vehicle accident.[22] Whilst the latter fact was acknowledged by the second respondent and he had offered to pay for the damages,[23] it bears mentioning that the outcome of the attorney's formal investigation against him in July 2021 had been concluded on the basis that:

> "There is no evidence to support the allegations against Mr Xalisa, Mr M…and Mr T….. The allegations are baseless and … were probably raised with malicious intent to tarnish the character and image of those 'implicated' thereby."

[46] Despite the significant sequel to the investigation, the appellant yet asserted that "(f)*rom the foregoing*" (that would entail the complaints of misconduct against the first and second respondents arising from the investigative report)[24] it was "*clear*" that the erstwhile Board was dysfunctional.[25]

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[22] In effect the appellant reopened the allegations against the second respondent which had as a fact being found to be baseless by the investigator appointed by his predecessor. Not surprisingly, the first respondent opined that it was wholly inappropriate and impermissible for the appellant to have relied on these allegations after they had been investigated and were established to be untrue.

[23] It appeared to be common cause that he had not been asked for an explanation neither was the matter referred for investigation in terms of clause 6.10 of the Code of Conduct and Ethics for Board Members.

[24] This would no doubt have included the allegations against the fourth respondent mentioned in the investigative report that evidently trailed into nothingness.

[25] Lest one might be mistaken that this is what the appellant meant, namely that what had been the subject of the attorney's investigation conduced to the claimed present day dysfunctionality warranting the wholesale dissolution of the Board, it was repeated in counsel's submissions upon appeal that it was clear "*from the investigative report*" that the erstwhile Board was dysfunctional, this as opposed to the allegations of misconduct raised against the respondents by Dr. Makgae in her memorandum to the appellant dated 21 February 2022. One would have expected the appellant to have distinguished between the two bases for termination and to have focused on the governance challenges as the predominating issue because this was essentially the foremost reason why the appellant seemed intent, in his pre-termination notices, on dissolving the entire Board.

[47] Forward tracking in time to the date of his impugned decisions, the appellant also complained (in essence as a secondary concern to that of the alleged misconduct of the three members aforesaid) that Board members were said to be "*making allegations at each other*".

[48] He cited the example of the fourth respondent having "*used defamatory statements*" against Dr. Makgae, in an email communication dated 1 February 2022, in which she had equated her to "*Verwoed.*" [26]

[49] He also cited as a "*glaring*" indication of the Board's dysfunctionality (speaking closer in time to the date of his impugned decisions) the fact that the first respondent had called an urgent special meeting on 20 February 2022 to discuss the same aspects that were on the agenda for a regular meeting scheduled for 25 February 2022 arising from the significant release of the SIU report and the process of recruitment of the chief executive officer whereas in his view the chairperson had had this very much under her control at the time and would have dealt with it in the ordinary course. In this regard the appellant was especially informed by the memorandum of Dr. Makgae dated 21 February 2022 in which she had particularized various complaints of "*misconduct*" against Board members relating to governance issues which the appellant drew attention to amongst the documentation making up the record of decision.[27]

[50] He further remarked upon the tenor of correspondence exchanged between board members (samples of which had been attached to Dr. Makgae's memorandum dated 21 February 2022) that gave the impression that they were divided into two factions, one group comprising the respondents, and the second group the remaining five members. He expressed the view that given the stark positions taken by the members on the issue of the timing and supposed need for the special

[26] Dr. Hendrik Frederik Verwoed was a notoriously known apartheid era Prime Minister. The Supreme Court of Appeal has found that to label a person with such a moniker is tantamount to an offensive and actionable racial slur. See *Pringle v Mailula* (773/23) [2024] ZASCA 146 (25 October 2024) at [28].

[27] As an aside the first respondent denied its contents.

meeting to discuss the SIU report that they would not be able *"to continue working together*".

[51] Elsewhere he alluded to their "*infighting,*" and a "*pulling in different directions"* by the two groups of members*.*

[52] He thus concluded that the Board was "*unstable*," which, so he purported to explain at last, had prompted him to call for reasons why he should not dissolve it.

[53] Following his consideration of the attorney's 2021 investigative report, which he sought to emphasize the members were also fully aware of; the nature of the "*complaints*" against them; memoranda from the chairperson (which included the report against the second respondent concerning the motor vehicle accident by Dr. Makgae dated 21 January 2021 and the "*Verwoed"* complaint); as well as the representations he had received from each member, he claims to have been moved to dissolve the Board.[28]

[54] In justifying his decision to disband the entire complement of members as rational under the circumstances he purported to reason that the Board could not have continued to be dysfunctional at the expense of the residents of the Eastern Cape Province to whom Amatola Water is constitutionally mandated to provide access to water. He adverted in this respect to his constitutional duty to ensure that the Board is functional and can fulfil its statutory mandate which it was precluded from doing effectively at that point in his view given the governance challenges at play.

[55] He denied that there was a less drastic measure that he could have taken to "*rescue the dysfunctional Board*" repeating his concern that there were two groups making accusations at each other and refusing to work together. As for the suggestion that he should have initiated investigations before jumping to the

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[28] It is certainly curious that the primary motivating factor for the wholesale dismissal of the Board flowed from the dated investigative report that had in effect been given a pass by the appellant in October 2021 when he reinstated the 1st and 4th respondents who had been on precautionary suspension pending the investigation.

wholesale dissolution, he adverted to the fact that this had in fact already been done in the form of the two earlier investigative initiatives undertaken at the behest of his predecessor which had yielded up the damning reports referred to above implicating the first and second respondents respectively in, *inter alia*, criminal acts.[29]

[56] As for both his decisions to terminate the term of office of all the Board members and the appointment of the Interim Board members he pointed to his "*unfettered*" powers in terms of section 35 (5) of the WSA which he categorized as an executive function (concerned with the setting of policy as opposed to the implementation of legislation) especially insulated from scrutiny under the mantle of PAJA.[30]

[57] However, inasmuch as the decisions were in his view executive ones, he yet defended them as legal having regard to the authority bestowed upon him in terms of section 35 (1) and (5) of the WSA both to have appointed the Interim Board and to have terminated all the member's appointments. He also contended, in respect of his primary decision under scrutiny, that his decision to have relieved the whole board was rational having regard to the relevant information at his disposal that formed the basis for his response.

The members' case in response to the allegations of "dysfunctionality" leading to instability:

[58] The respondents entertained a different perspective of the members' poor interrelations and the impact of this on the Board to properly carry out its mandated governing function.

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[29] This proposition is simply illogical because the substance of the governance challenges only came to the fore long after the attorney's investigation.

[30] This was couched in the form of a legal submission. His answering affidavit heralded that it would be argued at the hearing of the review application that the exercise of "*this kind of power by the Minister*" constitutes executive action and not administrative action. It was promised that reference would be made to the "*relevant judgment of the Constitutional Court*" which, so it was later revealed, is that of *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) *("Motau").*

[59] Despite the acknowledged "*serious difficulties*" with Dr. Makgae, as noted in their founding affidavits, they asserted that her refusal to work with the rest of the members of the Board had not affected its ability to continue with its business. Indeed the first respondent emphasized that they had been largely successful in discharging its mandate and had made substantial progress in resolving "*historical difficulties*" that have plagued Amatola Water. (As an aside, the appellant did not gainsay this affirmation of their collective endeavours as members of the Board or that they had achieved the successes claimed by them.)

[60] In a supplementary affidavit filed after delivery of the review record the respondents opined that that there was in any event no conclusive evidence amongst the documents disclosed to support the appellant's anticipated reason for the impugned decisions foreshadowed in the pre-termination notices.

[61] Whilst I do not agree with the first respondent's observation that there was no evidence in the record of decision to support the appellant's concern about the issue of governance challenges at least, an aspect I will discuss further below, there was self-evidently nothing in the record of decision documenting the claimed causal instability that was the reason offered to the media and SAMWU for the appellant's supposed concerns for the failure of the Board and its abrupt dissolution.

The member's case in response to the allegations of their claimed misconduct:

[62] Whilst acknowledging that the record contained allegations of misconduct against their number, the respondents pointed out that these were untested and unsubstantiated. They challenged the fact that the attorney's investigative report was on its own qualified and provisional in the sense that it emphasized that those carrying on the investigation were not in receipt of all the information necessary to make final findings and conclusions and that their report was not intended to equal the weight of a proper forensic investigation of the Board's affairs and management. In any event the sting of these allegations had also been removed and had culminated (after the first and fourth respondents' suspension) in their memberships being reinstated. In the case of the second respondent the investigation had concluded in his favour.

[63] The respondents in any event pertinently denied all the negative allegations in the record of decision pertaining to themselves and lamented the fact that they had not been given a proper opportunity to challenge these under the circumstances in which the allegations had resurfaced and had come to be top of mind for the appellant as a reason why he considered it deserving of collapsing the Board in March 2022.

The approach of the court below:

[64] In respect of the argument that the appellant had exercised an executive function in making the decisions which thus precluded any scrutiny under the provisions of PAJA, the court below found against the appellant. It also concluded that there was no merit in his submission in any event that the discretion which he had exercised was "*unfettered*" or "*unbridled.*"

[65] Although accepting in the respondents' favour that the impugned decisions amounted to administrative action, the court below concluded that the respondents' complaints as to how the appellant had fallen short, at least in respect of the requirements contemplated by section 3 of the PAJA, did not equate to procedural unfairness.

[66] The court then proceeded to consider whether the appellant's decisions met the standard of rationality, although it is unclear whether it did so under the mantle of PAJA or under the legality principle.[31]

[67] Concerning the factual premise upon which it based its determination, the court considered that the height of what had been established in the evidential material before it concerning the dysfunctionality contended for by the Minister is that

[31] In paragraph 4 of the judgment in respect of the application for leave to appeal, the court below states that: *"(t)he Minister's decision was reviewed in terms of the Common Law, in particular the principle of legality which requires that every exercise of public power must be rational."* In par 23 of the judgment in the review application it is implied that the court had entertained the alternative argument before it that the decisions were reviewable on the basis of the principle of legality despite its ostensible finding that a PAJA review was implicated.

there was at most "*disharmony*" or "*disagreement*" amongst the members of the Board, but it concluded that these shortcomings, which it labelled only as "*governance issues within the Board,*" had in any event not been at the expense of residents of the Eastern Cape Province. The court appeared to have accepted as "*farfetched*" the appellant's conclusion to the contrary that the trouble within (conversely labelled by him as "*dysfunctionality*") had indeed come at such expense.

[68] It found instead, on an acceptance of the respondents' averments in this respect, that whatever the sticking points had been, the members had risen above the conflict concerned and had achieved progress in the Board's primary activity. This finding was consistent in its view with the absence in the record of decision of any suggestion of a negative impact on the delivery of water services in the Eastern Cape and the lack of any denial by the appellant to the respondents' averment in their papers that they had (notwithstanding the accepted troubles) contributed substantially to the reliable provision of water services to the people of the province.

[69] The court contemplated that a further blow to the Minster's submission that the dysfunctionality and its supposed impact rendered his impugned decisions rational is that in his pre-termination notices there had been no mention that "*instability within the entity*" had been at the actual expense of residents of the Eastern Cape.

[70] On the issue of the separate ground of misconduct against the first and second respondents the court appears to have remarked generally that there was no evidence that they had breached any of the legal instruments determining their duties.[32] Further, whilst keeping these complaints that dated back to the time of the appellant's predecessor in the forefront, the court observed that the application was less about whether there was merit in them against the implicated respondents arising from the earlier investigation, but that it was more about the manner in which the impugned decisions had been taken in March 2022 and the reasons given by the appellant therefor.

[32] These would relate to the provisions of section 29 of the WSA concerning the primary activity of a water board, the duties set out in section 38 of the WSA, the Board Charter, and the Code of Conduct and Ethics for Board Members by which members are bound.

[71] These factual conclusions parlayed to the court's conclusion ultimately that it was not persuaded that the decision to dissolve the Board, which gave rise to the ancillary decisions, was rationally connected to the purpose sought to be achieved thereby.

[72] On the issue of the remedy which the court thought appropriate it reasoned that it would not be just and equitable not to order the "*reinstatement of the Board*" at least from the date of its judgment because the acceptance by a person of an appointment to the board of a state entity "*presents a risk to one's personal brand and professional image*." With reference to the relief sought by the respondents that they be reinstated retrospectively, the court observed that no facts had been brought to its attention regarding the efficacy of an order in such terms.

The appellant's grounds of appeal:

[73] The grounds of appeal relied upon by the appellant are in essence that the court below should have followed the principle adopted by the Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others ("Motau")*[33] to the effect that the decision to remove board members of a state owned entity constitutes an executive decision whereas the court below had determined that the decision under scrutiny by it amounted to administrative action within the meaning contemplated under the provisions of the PAJA.

[74] Allied to this contention is that the court below breached the *stare decisis* principle ("*to stand by previous decisions*") by not bringing to bear the proper standard of scrutiny against the appellant's decision to dissolve the Board and by failing to recognize that his power in this respect was not inhibited or restrained by any provisions contained in the WSA.

[75] Further contended on behalf of the appellant is that having determined that the appellant's decisions under scrutiny by the court below constituted administrative

[33] 2014 (5) SA 69 (CC).

action, its conclusion that the respondents failed to persuade it that there were "*sufficient reasons to review the decision taken by the Minister in terms of PAJA*" should have resulted in a dismissal of the application.

[76] Further asserted is that the court erred in failing to find in any event that the appellant's decision for the reasons given by him was not justified on a legality rationality basis. This was especially so based on the complaints of serious misconduct against the relevant Board members investigated at the Department's behest and reported instances of the Board's dysfunctionality and/or instability.

[77] Also under challenge on appeal is that the court below failed to properly apply the *Plascon Evans* Rule[34] to the facts before it. There were two strands to this supposed misstep. The first is that the court should have accepted the appellant's evidence that the Board had been facing several governance challenges which led to instability within the entity especially since the respondents had supposedly not denied the existence of challenges facing the Board. The second part of this ground, which was not well articulated in the notice of appeal, is that the court minimized the serious nature of the allegations made against the Board members in the attorney's investigation report, accepting the respondents' version instead as to the purported absence of any serious cause for concern by the appellant warranting the drastic step taken by him of dissolving the Board.

[78] Allied to the second part, it was contended on behalf of the appellant that the court should have found that his "*decision*" (evidently to remove the respondents as Board members) was rational, having regard to the serious allegations made against "*the Board members*" in the investigative report, which factual premise the court ought to have accepted if proper regard was had to the principles set out in *Plascon-Evans*.[35]

[34] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

[35] With hindsight this is confusing because the primary decision entailed dissolving the Board as a collective for the misconduct of two of the respondents. Concerning the application of *Plascon-Evans,* these principles dictate that material disputes of fact in applications for final relief are, as a general rule, resolved on the basis of the facts as stated by the respondent, together with the admitted facts in the applicant's affidavit.

[79] Finally, it was contended on behalf of the appellant that even accepting the pretext that his decisions fell to be reviewed and set aside and that the erstwhile Board had to be reinstated retrospectively, such a remedy was irreconcilable with the fact that the appointment of the Interim Board in the meantime stood, had legal effect according to the *Oudekraal* principle,[36] and produced valid legal consequences that could not be ignored.[37]

Preliminary Observations:

[80] By and large some of the grounds raised above fall to be discounted for obvious reasons. For one, the court below self-evidently did not conclude that the respondents had not persuaded it that there were "*sufficient reasons to review the decision taken by the Minister …*" which should therefore, according to Mr. Erasmus who appeared for the appellant, have resulted in a dismissal of the application. To the contrary the court below found definitively that the course of action adopted by the appellant was unlawful (by whichever standard of scrutiny) and that it was not persuaded that the primary decision to dissolve the Board, which in turn gave rise to the ancillary decisions, was rationally connected to the purpose sought to be achieved (by the empowering provision).

[81] In this regard the following passage in the judgment under appeal came to be criticised:

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[36] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (2004 (6) SA 222 (SCA)*

[37] In the court's judgment in the appellant's application for leave to appeal it was noted as follows:
"[7] To the extent that I may have erred by not setting aside the Minister's decision to appoint an Interim Board thereby offending the principle enunciated in the matter of Oudekraal Estates (Pty) Ltd v City of Cape Town and Others (2004 (6) SA 222 (SCA), there once again I am unable to say there are no reasonable prospects of the Minister succeeding on this point. Even though I was of the view that such an order would have been superfluous in the light of the order I made that applicants in the matter (now respondents) be re-instated as members of the Amatola Board. This also in view of the fact that the term of the Interim Board was for five months, which period had already expired."
[8] In the Oudekraal matter it was held that until such time that an invalid administrative action is set aside by a court in proceedings for judicial review, it exists in fact and has legal consequences."
The application for leave judgment is reported as *Minister of Water and Sanitation v Tonise and Others (1274/2022) [2023] ZAECGHC 84 (12 September 2023)*.

> "I am not persuaded that the appointment and termination of a Board is an executive decision. The respondent does not say why the taking of the impugned decisions amounts to executive decisions/ action. It certainly cannot be said to amount to a policy or formulation policy decision/s. Therefore, (it) must be an administrative action. Be that as it may, there are prescribed requirements for administrative action to be procedurally fair as laid out in PAJA in particular *Section 3*. Applicants do not say in what way these requirements were not met. Their qualm, as I understand their case is that the Minister took the allegations against them at face value and acted in the manner he did based on incomplete and untested allegations. Furthermore that he did not engage the applicants especially those against whom allegations were made, treated the allegations as established facts, and did not apply his mind to the said allegations. I'm not persuaded that these are sufficient reasons to review the decisions taken by the Minister in terms of PAJA."[38]

[82] Ms. Stein who appeared for the respondents contended in this respect that on a correct reading of the paragraph in the context of the judgment as a whole, the court below did not find that none of the PAJA grounds of review relied upon by the respondents in their papers had been established, as was suggested by the Mr Erasmus to the contrary. Whilst the paragraph was prone to attract some confusion, I agree that the court's comments therein were confined to the question of procedural fairness as contemplated in section 3 of PAJA and the respondent's failure in its opinion to have established in what way these requirements had not been met. It is clear in my view that the court below merely declined to set aside the appellant's decisions on the basis that they were procedurally unfair.[39]

[83] Concerning the factual premise upon which the court below made its determination of irrationality, there was ostensibly some misconception between the parties as to what had been before the appellant at the time of his decision-making

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[38] At paragraph [22].
[39] Although I do not agree with this finding, at least from the perspective of process rationality, there was no cross appeal before us on the subject of procedural fairness.

to have motivated him to act as he did and what the court should have concluded in this respect.

[84] The appellant seemed to have been under the mistaken impression when the matter was argued in the court below that the respondents had always conceded or acknowledged the "*dysfunctionality*" referenced by him, but far from it.[40] What they had contrarywise placed before him for his intervention was their concern with Dr. Makgae's claimed unilateral and highhanded board leadership which they themselves complained posed a risk to the entity's stability. Despite their concerns for her alleged questionable leadership, however, the impact thereby on the erstwhile Board's ability to operate normally or effectively was otherwise vociferously placed in contention by them.

[85] But even assessed from the appellant's perspective and leaving aside the notion of "*dysfunctionality*" employed by him in his answering affidavit, he too merely adverted to a "*risk*" of instability within the entity arising from the claimed governance challenges which he failed to elaborate on in any detail.

[86] The court below was correct in my view to accept that there was no evidence adduced by the appellant neither was it apparent from the record of decision that there was any negative impact to the delivery of the Board's operational mandate by the conflict between the respondents on the one hand and Dr Makgae on the other concerning the issues or differences in approach to handling the affairs of the Board that arose between them. Neither indeed did the appellant's pre-termination notices hint at the claimed instability being at the expense of residents of the Eastern Cape Province even though the appellant was quoted by the media as stating that instability and governance challenges at Amatola Water had affected the provision of

[40] The appellant hardly articulated how the concept of dysfunctionality ought to have been understood, but one gets the impression that he was focused on a causal effect. What he appeared to suggest is that whatever instability was apparent it was, or had, as a fact, rendered the Board as a mandated governing body serving a designated purpose in terms of the WSA unable to attain that purpose effectively, in essence the rational *causa* for his primary decision. Such a drastic factual finding is however not justified on the evidence and the court below was correct in our view to find as much.

water to communities in the Buffalo City Municipality area. This allegation was however completely unsubstantiated.

[87] The issue of the so-called “*governance challenges*” in the forefront of appellant’s mind was however certainly informed by correspondence in the record of decision made available to the respondents after the fact, in particular in memoranda by Dr. Makgae which the appellant specifically and pertinently adverted to in his answering affidavit.

[88] The respondents however maintained the view that they were facing generalized complaints about them raised with the appellant by Dr. Makgae. Their claimed nescience of the real issue at the heart of the crisis as perceived by the appellant could however not have been sustained after service of the Rule 53 record once they were apprised of what had been before him in the form of Dr. Makgae’s memoranda. In this respect they merely denied the contents of Dr Makgae’s memoranda rather than engaging in the detail or extent of her formal complaints against them that appear to have been strongly and forcibly made to the appellant at the time.

[89] As an aside it does appear to me to be anomalous that the respondents’ documented impression of what in their view had instead caused the difficulties or conflict[41] are notably absent from the record of decision (and were not responded to by the appellant) but again the objective fact of the existence of Dr. Makgae’s

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[41] There were two letters highlighting the challenges as perceived by them. In the first, the second respondent on 8 February 2022 wrote to the appellant of the refusal by the Chairperson to have called a special Board meeting to discuss the SIU report on procurement during or in respect of the National State of Disaster which begged his intervention to prevail upon her to call an urgent special meeting because of the sensitivity of the matter and the fact that Dr. Makgae was said to have been acting divisively and had begun to implement some of the SIU’s recommendations unilaterally without involving the Board. The second letter is dated 22 February 2022 in which the first respondent wrote to the appellant regarding the purported appointment of the chief executive officer after the special general meeting which they had held in the absence of Dr. Makgae, and its import in this respect. The first respondent conveyed the essential cause of the complaint which is that the chairperson had clandestinely written to the appellant to say that the Board supported the recommendation for the appointment of an executive officer whereas that was not the case. They especially wanted to distance themselves from whatever Dr. Makgae might have said to him in her personal capacity in this regard. These communications on their own would have made plain to the appellant that whatever Dr. Makgae had convinced him to the contrary they certainly had a different take on the matter that warranted closer inspection before jumping in to disband the Board.

complaint against them lodged with him cannot be overlooked. The memoranda prepared by her are what the appellant pertinently identified in the record as having informed his decisions at the time.

[90] Ultimately however the appellant did not dispute the respondents' criticism of him that he took what Dr. Makgae had said against them at face value without engaging with the allegations or any supporting evidence or applying his mind thereto. This in itself flies in the face of the requirement of procedural fairness as the respondents were not made aware even by the pre-termination notices of what Dr. Makgae had said against their interests that he considered to be damning in the circumstances.

[91] As for the issue of the claimed "*misconduct*" one gets the impression from the record that it was Dr. Makgae's concerns mentioned in the memoranda of 22 February 2022 which she labelled as misconduct that had singularly precipitated the perceived crisis within the appellant's contemplation at the time and which had galvanized him into action.[42] But instead, he adverted (in his answering affidavit and in purporting to explain his decisions after the fact) to the dated complaints of misconduct forming the subject matter of the earlier investigation by the attorney as having led to the instability.[43] This was the predominant reason for his primary decision which he gave in his answering affidavit yet he certainly failed to give any warning in his pre-termination notices that it was the claimed misconduct arising from the attorney's investigation in 2021 that had formed the basis for his concerns which in March 2022 had propelled him in the direction of collapsing the Board. Indeed, why would cold and dated misconduct investigations against two Board members (of which they had effectively been absolved) be a reason to relieve the entire Board in March 2022? Such a proposition needs only to be stated to realise its absurdity.

[42] The further fact that he was concerned by the absence of the appointment of the Chief Executive officer (and ostensibly hamstrung by the respondent's opposition to the appointment of his approved candidate) also suggests itself as a motive.
[43] It makes no sense that the misconduct charges related in the attorney's investigative report could have been what the pre-termination notices suggested "*has led to instability within the entity.*"

[92] Given how those complaints were dealt with and the peculiar sequel thereto, the court below was correct in my view to have treated them as having no traction in the decision making process. Whilst not being dismissive of the serious nature of those charges of misconduct, it fairly declined to determine whether there was merit in them. The court was further astute to read in that it was in fact the governance challenges as opposed to the unspecified misconduct allegations which the appellant clarified in his template pre-termination notices had *"led to instability within the entity"* that had ostensibly primarily motivated him at the time to want to dissolve the Board.

[93] A word should perhaps finally be said about the review record and its impact on the court's determination of what was before the appellant when he made his impugned decisions to dissolve the Board and prematurely end the members' terms of office.

[94] The appellant accused the respondents of not having extracted from the record provided what it needed for purposes of the review application nor had it certified these as true copies. In *Venmop 275 (Pty) Ltd & Another v Cleverland Projects (Pty) Ltd & Another*[44] the court set out the expectation of parties concerning the production of a record in a review application launched pursuant to the provisions of Rule 53 as follows:

> "Rule 53 of the uniform rules of court provides a mechanism for an applicant, in review proceedings, to obtain a record of the proceedings and to facilitate the presentation of the applicant's case in the review. Rule 53(1) provides for the notice of motion to call for the dispatch of the record of such proceedings to the registrar. Rule 53(4) provides the applicant with an opportunity, after having inspected the record, to vary the terms of the notice of motion and supplement the supporting affidavit. The provisions of rule 53(3) are quite clear. They require the applicant to "*cause copies of such portions of the record as may be necessary for the purpose of the review*" to be made. The purpose of the rule is equally clear. It is to provide an aggrieved applicant, who might not necessarily have all the evidence at his or her disposal, the

[44] (2014/14286) [2015] ZAGPJHC 176; 2016 (1) SA 78 (GJ) (3 August 2015) at [17].

opportunity to supplement the case made in the application by providing potential evidence in the full record of the review proceedings. Having been given such opportunity, it is the duty of the applicant to select what is relevant from the record to serve as evidence for the purpose of the review application. It is only what is *selected* by the applicant in terms of rule 53(3) that serves as evidence. *Should there be documents forming part of the record omitted, which in the view of the respondent are relevant, these can be introduced into evidence as annexures to the answering affidavit. Any other part of the record omitted which is necessary to rebut what is said in answer might similarly be introduced as an annexure to the replying affidavit*." (Emphasis added)

[95] In this instance the respondents clearly referenced what was relevant for their purposes and further lamented what was not in the review record.

[96] The appellant on the other hand, although attaching the entire record to his answering affidavit, in the end only referenced a few of the documents in it which he claims bore on his decision making.

[97] The first was the attorney's 2021 investigative report in support of the allegation that the first and second respondents had made themselves guilty of serious misconduct. Secondly, there were three letters written by Dr Makgae to him. One concerned the second respondent's accident with the rented motor vehicle. Another concerned the complaint by her against the fourth respondent that she had defamed her by equating her to "*Verwoed*", thus allegedly making herself guilty of unethical behaviour. In this letter there was a tagged on complaint against the second respondent that he was "*sending emails on matters that are unfounded, copying management and really putting the Board in disrepute*" which, so Dr Makgae claimed, amounted to "*an attempt to undermine* (her) *from executing her duties*." The last one was the seminal memoranda of 22 February 2022 in which she accused the respondents of misconduct in calling the separate special meeting to discuss the SIU report and of undermining her authority and blocking attempts to take decisions, hold management accountable and to investigate matters of concern.

[98] Beyond what the appellant owned as relevant to explain what motivated him at the time he made his decisions, there was indeed no obligation on the court below (neither on this court) to have rummaged through the record to determine on its own from unreferenced documentation what was essential to the enquiry whether he had responded rationally in the circumstances by relieving the entire Board.[45]

[99] In my opinion the court below was therefore correct to have concluded on a factual basis, with the admissible evidence at its disposal, that the appellant had not established the dysfunctionality contended for by him and in accepting that whatever the divide was between the respondents and Dr. Makgae, this had not in fact caused any negative impact to the Board delivering on its mandate. Indeed this would provide the only compelling reason why, as a collective, the Board's ability to function in accordance with the law and its statutory mandate could be called into question.

[100] On another point of contention, the respondents seemed to misunderstand that the appellant in emphasizing his "*unfettered*" discretion to terminate members' appointments to the Board and attempting to place it in the category of executive rather than administrative action did not mean thereby that his decisions were not subject to any oversight by the courts at all. While the taunt ostensibly offended the respondents, it was ultimately clarified that he merely implied thereby that there was no threshold placed on his authority to appoint and remove Board members by the

[45] One such unreferenced document was a departmental recommendation which the appellant did not own as bearing on his impugned decisions. Mr. Erasmus during argument, in countering Ms. Stein's submission that the appellant had concocted reasons after the fact, laid down the gauntlet: "The record speaks for itself (and) here it is, this is what the Minister had!" and yet in advancing reasons for his dissolution of the Board the appellant clearly went beyond the essence of the recommendation to focus on the dated complaints of misconduct against the first and second respondent as the primary reason for his decision. A litigant who can't be bothered to give proper context to documents serving in the record of decision as being of particular significance to the subject matter of the review should not complain when it is ignored by the court in its determination. As was lamented by the court in *Venmop* at [18], practitioners universally ignore the provisions of Rule 53 (1) in review applications but do so at their own peril. The court remarked further in [19] as follows in respect of the perfunctory approach adopted by practitioners: "*The idea that more is better and that it is wiser "to put everything before the judge" belongs to the lazy and the insecure. It ignores the sentiment expressed in Phambili, Van Zyl, Zuma, Dunkel and McKesson. Litigants who deluge a court with a welter of irrelevant and unnecessary material, which hides and confuses what is relevant, ought not to be heard to complain about the quality of the judicial determination they receive. When representing applicants utilising the provisions of rule 53, practitioners ought to take heed of the provisions of rule 53(3) and apply their minds to what is relevant"*.

empowering provision. This was but a factor conducing to the contention put forward on his behalf that this put his impugned decisions into the category of executive action that in the end attracts a different level of scrutiny by the courts.[46] He acknowledged however that whilst the empowering provision provided legal authority for his dissolution of the Board, it did not give him a free pass, as it were, to do as he wished or to hire and fire members of the Board on a whim.

[101] Indeed, as correctly observed by the court below with reference to *Hoexter* and *Penfold* in their publication "*Administrative Law in South Africa*", [47] the suggestion of an unfettered discretion is a misnomer:

> "(I)t is important to realise that the holder of discretionary power never has a completely free hand. First, to act with discretion means to act wisely and after due reflection; And so while discretion can be very wide, it is never completely "free", "unfettered", "absolute" or "arbitrary", notwithstanding the frequency with which these and similar adjectives have been used by the courts. Baxter rightly describes an "unfettered discretion" as a contradiction in terms. Secondly, the idea of uncontrolled or unguarded discretion is hopelessly at odds with contemporary constitutionalism. In the South African context, our Constitution requires that there be some constraints on broad discretionary powers. As the constitutional court has explained, that is not only to minimise the danger of a violation of rights but also "so that those who are affected by the exercise of the broad discretionary powers will know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision'."

The Constitutional Court's decision in Motau and other judgments of relevance:

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[46] That distinction between administrative and executive action is of considerable significance as was highlighted and discussed in *Motau* at [27], [33] – [35] and [44], read with footnote 28 in particular. Answering this question is important says the Constitutional Court. If it amounts to administrative action, it is subject to a higher level of scrutiny in terms of PAJA. If it is an executive action, it is subject to the less exacting constraints imposed by the principle of legality.

[47] 3rd Edition at page 65.

[102] The Minister of Defence and Military Veterans argued in *Motau*, as was contended on behalf of the appellant *in casu*, that the power to appoint and dismiss members of the board of a state owned entity for the effective pursuit of government business through the entity constitutes executive action as contemplated in the Constitution which falls outside of the administrative law purview of PAJA and does not invite the court's scrutiny under its provisions.[48]

[103] Indeed, PAJA expressly excludes from its remit "*executive powers or functions of the National Executive*".[49] In addition to this general exclusion, section 1 *(aa)* lists particular executive powers that are excluded. This list includes those powers bestowed upon the National Executive in terms of section 85 (2) (e) of the Constitution.[50]

[104] Section 85 of the Constitution, which is concerned with the "*Executive Authority of the Republic,*" provides that:

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

[48] It is one of the appellant's chief grounds of appeal that the court below erred in law and on the facts in finding his decision under review to be an administrative one. Even though the classification of the decision one way or the other does not impact the issue of the rationality of the appellant's decision (the requirement for a decision to be rational is the same whether assessed under the provisions of PAJA or the common law), and despite the well-established principle that an appeal lies against an order and not its reasons (*SeeTavakoli and Another v Bantry Hills (Pty) Ltd* (1251/2017) [2018] ZASCA 159; 2019 (3) SA 163 (SCA) (28 November 2018), the judge formed the opinion that the appeal would have reasonable prospects of success on this particular point. It appears from *Motau* and other judgments cited therein that the distinction is a very important one and therefore falls to be properly made on appeal. Firstly it determines the level of scrutiny that will be brought to bear in the review process which for obvious reasons will also impact the relief that ought to be held to be appropriate in the peculiar setting if the review succeeds. Further, since the starting premise is that a litigant seeking to assert a constitutional right (in this instance to fair and just administrative action) should seek his/her recourse in or based on any legislation enacted to regulate the right in question (in this instance PAJA), as opposed to the Constitution itself, *Motau* confirms the necessity to "*make a positive decision in each case whether a particular exercise of public power…is of an administrative character*" to bring it within the remit of PAJA. The further requirement in the definition of administrative action in PAJA itself that it must not fall under any of the listed exclusions propels a reviewing court, so the Court observed in *Motau*, to undertake a close analysis of the nature of the power under consideration. [33 -34] It is therefore not a moot consideration what distinction applied *in casu,* the issue of accountability in a similar fact setting also, by parity of reasoning, being "*a matter of great public importance*" [24] and entailing "*important questions for any democracy that takes seriously the values of accountability and good governance."* [1]
[49] Section 1 *(aa*) of PAJA.
[50] *Motau* at [30].

(2) *The President exercises the executive authority, together with the other members of the Cabinet, by—*

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

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

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

(Emphasis added)

[105] In *Motau* the High Court[51] reviewed a decision by the Minister of Defence and Military Veterans to remove two leaders from the board of directors of the Armaments Corporation of South Africa (SOC) limited ("*Armscor*"). It granted judgment in their favour setting aside the decision of the Minister on several grounds premised upon the provisions of the PAJA, holding that her decision was administrative rather than executive.[52] On appeal from the High Court, the Constitutional Court considered the question to what standard of performance a minister in his or her capacity as the responsible member of the executive may hold the leadership of a state owned entity that falls under his/her supervisory control to account, and further to what standard a court should hold that minister when he/she

[51] *Motau and Another v Minister of Defence and Military Veterans and Another*, North Gauteng High Court, Case No: 51258/13, 18 September 2013.

[52] The High Court concluded that the Minister's decision was administrative rather than executive action because the decision met the positive requirements of the administrative action definition in PAJA and because it was not expressly excluded from the ambit of the PAJA as are some other forms of conduct by members of the National Executive. See in this respect the definition of "*administrative action*" in section 1 (i) with its seven definitional elements that constitute the threshold for engaging in administrative law review.

exercises her powers of oversight in relation to that state owned entity in the particular context of service dismissals.

[106] It did so in recognition of the fact that Armscor is a wholly state owned entity regulated by the Armaments Act[53] and cognisant of the fact that the state exercises ownership control of Armscor through the Minister as its sole shareholder.[54] It concluded for reasons that I will shortly elucidate that the power in question constituted executive action.

[107] In that legislative setting Armscor's affairs are managed and controlled by its Board comprising nine non-executive members and two executive member[55] in the same way that Amatola Water and other water boards established under the WSA are governed by boards of control.[56] Amatola Water, including other water boards established in terms of the WSA, are listed as National Government Business Enterprises under Schedule 3 (Part B) of the PFMA. Although Armscor is listed under Schedule 2 of the PFMA as a "*Major Public Entity*" and is registered under the

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[53] This is a reference to the Armaments Corporation of South Africa Limited Act, No. 51 of 2003.
[54] This is expressly provided for in section 2 (2) of the Armaments Act.
[55] Section 6 (1) of the Armaments Act.
[56] Section 35 of the WSA, although it is implied rather than pertinently stated. (The powers and duties of water boards and their members are fleshed out in sections 31 and 38 which give context to the expectation of how the entity's affairs are to be carried on.) . These provisions are conveniently stated here:
"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.
(3) When appointing a member, the Minister must have regard to-
(a) the objects of the water board;
(b) the need for the board to be representative of-
(i) the water services authorities to which it provides water services;
(ii) the other interests served by the water board; and
(iii) the broad population;
(c) the expertise required for the board to function effectively; and
(d) the desirability or otherwise of executive employees being members of the board.
(4) The extent to which relevant water services authorities should be represented on a water board must be determined by the Minister after consultation with every relevant organisation representing municipalities having jurisdiction in the service area.
(5) The Minister may terminate the appointment of any or all the members of a water board.
(6) ….."
Section 4 of Schedule 1, relevant to dismissals, merely states the obvious circumstances under which a member of a board ceases to hold office as a Board member including when his or her appointment has been terminated in terms of the provisions of section 35 (5).

Companies Act as a state owned company,[57] the appellant stands in a similar position to the Minister of Defence and Military Veterans. He (or *she* with reference to the current incumbent) is similarly the representative shareholder of these entities over which the state exercises ownership control and supervision over the members making up the boards of control.

[108] Does that mean therefore that the power exercised by the Minister of Water and Sanitation in the same capacity as representative shareholder and overseer of the corporatised entities under his/her charge to terminate a board of control or the services of any of its members also equates to the discharge of a political or more closely policy related function by virtue of these basic similarities?

[109] The spontaneous answer to this question is, not necessarily so, for as Ms. Stein correctly pointed out, *Motau* does not support the conclusion that *all* decisions regarding *all* removals of *all* board members of a state owned entity constitute executive action *per se*. On the contrary, *Motau* confirmed a case-by-case approach in classifying the nature of the power under review consistent with our jurisprudence. In this respect it reaffirmed the principle that "(t)*he determination* (that assists a court in making the difficult distinction between executive and administrative action) *needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula"*.[58]

[110] While the determination is one that must be made on the specific facts of each case and against the background of the relevant legal framework underpinning the power in contention, the following guiding principles as set out in *Motau* (and more recently endorsed by the Constitutional Court in *Mncwabe v President of the*

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[57] The court observed in *Motau*, firstly, that Armscor falls within the definition of a "*state owned company*" in terms of the Companies Act. Secondly it pointed to the fact that it is listed in schedule 2 of the PFMA as a "*major public entity*" and that it is registered under the Companies Act. Thirdly, section 9 of the Companies Act deals specifically with the statute's application to the affairs of state owned companies. The effect of that provision is that state owned companies are, for all intents and purposes, to be treated as public companies, unless a Cabinet member has procured an exemption (in whole or in part) from the obligation to comply with the Companies Act.

[58] *Motau, Supra* at [36]. *President of the Republic of South Africa and others v South African Rugby and Football Union and others* 2000 (1) SA 1 (CC) at 143 ("*SARFU*"). See too *Molefe and others v Minister of Transport and others* (17748/17) [2017 ZAGPPHC 120 (10 April 2017) ("*Molefe*") in which the court classified a decision by the Minister of Transport to dissolve the Board of Control of PRASA as administrative, and not executive. (at paragraphs 32 and 37).

Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others)[59] are instructive and led the court in *Motau* to determine that the Minister's decision in that case to terminate the services of the two members in the leadership of the Armscor Board amounted to the performance of an executive function in terms of section 85 (2) (e) of the Constitution, rather than the implementation of national legislation in terms of section 85 (2) (a) which would have fallen within PAJA's remit.

[111] Firstly, one has to have regard to the nature of the function or power exercised, as opposed to the position of the functionary. In this respect the Constitutional Court highlighted the executive power's different utility and application:

> "[37] Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another. By contrast, "[a]dministrative action is ... the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals." Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example. The verb "implement", which also appears in section 85(2)(a) of the Constitution and distinguishes it from section 85(2)(e), may serve as a useful guide: administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation."

[112] Secondly, one has to consider the source of the power being exercised and how closely it relates to the formulation of policy, on the one hand, or its application, on the other. Regarding the latter, the Constitutional Court observed that:

[59] 2023 (11) BCLR 1342 (CC) at 120.

"[38] In determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative."

[113] Regarding the source of the power, it noted the tricky nature of this feature of the categorization:

"[39] As further assistance, a number of pointers can be extracted from previous decisions which are helpful in assessing the nature of a particular power. First, it may be useful to consider the source of the power. Where a power flows directly from the Constitution, this could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation. In *Masetlha* [60] Moseneke DCJ held that the President's power to dismiss the Director-General of the National Intelligence Agency was sourced in and flowed from section 209(2) of the Constitution. This was partly the basis for the conclusion that the power under consideration was an executive power as contemplated in section 85(2)(e) of the Constitution, despite the fact that section 209(2) had an analogue in national legislation.

[40] Special care must, however, be exercised when reliance is placed on this factor. While administrative powers more commonly flow from legislation, PAJA's definition of administrative action expressly contemplates that the administrative power of organs of state may derive from a number of sources, including the Constitution. Conversely, and as borne out by section 85(2)(e) of the Constitution read with section 1(i)(aa) of PAJA, an executive power may be sourced in legislation. This feature of a power is thus only useful in this context, if at all, as a tentative signpost: constitutional powers are often wide-

[60] *Masetlha v President of the Republic of South Africa and Another* (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007) *("Masetlha")*

ranging and direction-giving, while statutory powers are generally more narrow and the concretisation of formulated policy."

[114] Thirdly, the degree of discretion afforded to the functionary in the exercise of the power is significant. Again the Constitutional Court expressed caution in relying on such factor as follows:

> "[41] Second, the constraints imposed on the power should be considered. The fact that the scope of a functionary's power is closely circumscribed by legislation might be indicative of the fact that a power is administrative in nature. In *Ed-U-College*[61] this Court considered the nature of a Member of the Executive Council's power to determine a formula for the payment of subsidies to independent schools. It was persuaded that the power was administrative by, among other things, "the constraints upon [the] exercise [of the power]", as well as its relatively restricted scope.
>
> [42] Again, caution is required when reliance is placed on the absence of constraints or the level of discretion afforded to a functionary. This factor's utility is that, when a discretion is particularly broad, it suggests that the exercise of the power is akin to the formulation of policy. However, while the presence of a wide-ranging discretion is often indicative of a broad policy-making power, it may equally be an incident of the subject matter on which it is brought to bear. A functionary may, for example, be afforded a considerable discretion in the exercise of a certain power simply because its exercise is heavily dependent on the factual circumstances that obtain in a particular case. Context is thus crucial in assessing the relevance of this factor."

[115] Lastly, it should be considered whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under the provisions of PAJA. So for

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[61] *Permanent Secretary of the Department of Education of the Government of the Eastern Cape Province and Another v Ed-U-College(PE)(Section21)* (CCT26/00) [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) (29 November 2000). The Constitutional Court referenced par 21 in this respect.

example in *Motau* the court observed that it may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject matter or policy matters for which the courts should show the Executive a greater level of deference.[62]

[116] In applying those principles in the unique setting of the Minister having exercised her powers of oversight in relation to Armscor over which she exercised ownership control on the state's behalf (under the legal framework imposed by the Armscor Act *inter alia*),[63] the court in *Motau* determined that she was "*charged with the high-level supervision of the corporation to ensure that it discharges its statutory mandate and operates in the national interest.*" It noted in particular that this was a "*different*" power (operating at a different level),[64] more closely related to the formulation of policy, that formed a constitutive part of the Minister's power to supervise high-level public office-bearers in the performance of their official duties, as opposed to a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state, which is in the ordinary remit of administrative law.

[117] The Constitutional Court's seminal reasoning in answering the question what level of scrutiny had to apply is fully set out below:

> *"Was the Minister's decision administrative or executive action?*

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[62] *Motau* at [42]. See also *Masetlha* at paragraph 77.

[63] Although under a separate discussion concerning the procedural constraints on the exercise of the Minister's section 8 (c) power, the Court recognized that both the Armaments Act and the Companies Act apply to Armscor's governance and corporate affairs [74] and must have been intended to apply concurrently otherwise it would be operating without any statutory guidance over a wide range of areas. [77] It also recognized the application of the provisions of the PFMA, but only co-incidentally related the fact of Armscor being listed "*as is required*" in terms of Schedule 2 as a "*major public entity*." [74] It may have been useful to have mentioned the peculiar context in which the Minister's ownership control and supervisory powers derive from the provisions of the PFMA. Unfortunately the Court did not go into the source of the political responsibly resting upon the Minister to supervise the Board leadership of the Board of control in greater detail to understand the different level power that in its view set apart the Minister's power to dismiss as constituting the performance of an executive function in terms of section 85 (2) (e) of the Constitution rather than the implementation of national legislation in terms of section 85 (2) (a).

[64] At paragraph [49].

[45] In order to determine the nature of the Minister's section 8(c) power, we must have regard to the legal framework imposed by the Armscor Act. The Minister's powers under the Act are fairly broad. For example, she "exercises ownership control ... on behalf of the State"; imposes such conditions on Armscor's interactions with foreign states "as may be necessary in the national interest"; appoints the non-executive members of the Board and designates the Chairperson and the Deputy Chairperson from their number; is consulted by the Board in its selection of the CEO; determines Armscor's share capital; and approves the formation and disposal of subsidiaries. She is also empowered to make regulations stipulating "conditions or restrictions subject to which the Board must manage and control the affairs of the Corporation".

[46] The business of military procurement, on the other hand, is left to the Board. Thus, while it is Armscor's responsibility to see to the practical aspects of procuring defence matériel in order to meet the needs of the SANDF, the Minister is charged with the high-level supervision of the Corporation to ensure that it discharges its statutory mandate and operates in the national interest. This, in turn, must be understood in the context of the Minister's political responsibility and constitutional duty to see to the defence of the Republic, its territorial integrity and its people.

[47] In the light of the foregoing and for the reasons that follow, I am of the view that the Minister's decision is executive rather than administrative in nature. First, the Minister's section 8(c) power is an adjunct of her power to formulate defence policy. In terms of this power, the Minister formulates policy on, among other things, the acquisition and maintenance of "air navigation systems" and "arms, ammunition, vehicles, aircraft, vessels, uniforms, stores and other equipment". Of course, this is policy in the broad sense: overarching and direction-giving, with the *minutiae* of individual procurement decisions left to Armscor.

[48] As is apparent from the scheme of the Armscor Act, the Minister does not provide direction through interventions in individual projects or by prescribing

particular procurement policies. Rather, she discharges her political responsibility to ensure that the Department's procurement agency meets its statutory obligations by appointing and dismissing leaders who have the "knowledge and experience which ... should enable them to attain the objectives of the Corporation". The Minister must have in mind the Department's policy aims when selecting Board members, including the Chairperson and Deputy Chairperson. She must select people who are capable of carrying out those aims and who share the Department's policy vision. Similarly, the Minister arrests the failure to follow proper policy by terminating the directorships of people who have not assisted Armscor to discharge its statutory functions. The formulation of defence procurement policy and the appointment and dismissal of people who will supervise the implementation of that policy are thus closely linked. While the appointment and dismissal of Board members is not the formulation of policy as such, it is the means by which the Minister gives direction in the vital area of military procurement and is therefore an adjunct to her executive policy formulation function.

[49] Second, and relatedly, the exercise by the Minister of her section 8(c) power is not a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state, which is the ordinary remit of administrative law. Rather, it operates at a different level, for the section is a constitutive part of the Minister's power to supervise high-level public office-bearers in the performance of their official duties. She does so by means of the corporate relationship that she has with the Board members. They are the directors she has selected, in accordance with her policy dictates, to manage the Corporation – and thereby determine defence procurement policy.

[50] Third, under the Armscor Act the Minister need only demonstrate good cause in order to justify the termination of the services of a Board member. She does not have to satisfy a list of jurisdictional requirements before she can take the decision or need to demonstrate that a particular ground such as incapacity or misconduct exists. The Minister thus has a level of discretion in

> determining when directors should be removed, which points to the fact that her power under section 8(c) is executive in nature. The fact that the power is sourced in legislation is, as noted above, not in itself determinative, and thus does not dilute the force of the other considerations canvassed.
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> [51] For these reasons, I am persuaded that the impugned decisions are not subject to review under PAJA. Because section 8(c) of the Armscor Act is an adjunct of the Minister's power to make defence policy, and thus more closely related to the formulation of policy than its application, the decision to terminate the services of Board members amounts to the performance of an executive function in terms of section 85(2)(e) of the Constitution, rather than the implementation of national legislation in terms of section 85(2)(a)."

[118] It is evident that in getting to this conclusion and resolve of the nature of the Minister's power to have relieved the leadership of the Armscor Board of Control, the Court had regard to the legal framework imposed by the Armaments Act, and cited her various powers, mostly quite broad but at least specific in relation to the role played by her specified in section 2 (2) (b), namely that she exercises ownership control over the corporation on behalf of the state. It consciously noted what was in the domain of the corporation on the one hand, which is "*the business of military procurement...left to the Board,*" and what fell to her charge on the other. In this respect it recognized her political responsibility and constitutional duty to see to the country's defence (as provided for in section 201 (1) read with section 200 (2) of the Constitution) through the exercise of *all* her powers including ownership and supervisory control over the corporation (which in turn embraces the power both to appoint and discharge members of the Board of Control) with a view to ensuring that it discharges its statutory interest and operates in the national interest.

[119] It recognized that this ownership control begins with the Minister having in mind the Department's policy aims in selecting the board's members and leaders and effecting such a choice based on her satisfaction that the persons selected are capable of carrying out those aims and share the Department's policy vision. Her

power to dismiss, a recognized corollary of the power to appoint,[65] entails her "*arresting*" the failure to follow proper policy by terminating the directorships of people who have not assisted Armscor to discharge its statutory function. The formulation of defence procurement policy and the appointment and dismissal of people who will supervise the implementation of that policy are thus closely linked. While the appointment and dismissal of board members is not the formulation of policy as such, so the court explained, it is the means by which the minister gives direction in the vital area of military procurement and is therefore an adjunct to her executive policy formulation function.

[120] It dubbed the latter power as "*high level*" given its significance in my view of the model of the state owned entity, the peculiar niche that it occupies in the domain of the developmental state, the cabinet minister's role as representative shareholder faithful to the relevant department's ownership policy and aims, and her bespoke corporate relationship with the entity's board members.

[121] I digress briefly to discuss this feature. That state owned entity is generally defined as a legal entity created by it in order to partake in commercial activities on its behalf.[66] They are public enterprises and although owned by the state as the majority or sole shareholder, as the case may be, the ownership is on behalf of the public. Government is thus expected to be accountable to the public in respect of their function. The public interest in the functioning of state owned entities is safeguarded by two essential layers of accountability. The first is through the entity's board of control that is notionally expected to be independent and whose members are obligated to aspire to good corporate governance in accordance with their fiduciary responsibilities. The second layer comprises the monitoring and supervision by the executive authority accountable to Parliament, which as described in *Motau*,

[65] *Masetlha*, *Supra*, at par 77.

[66] The summary set forth in this passage and those following on the subject is derived from several helpful research papers in the domain of the Dullar Omar Institute for Constitutional Law, Governance and Human Rights (University of the Western Cape) that has conducted extensive research into and advocacy on the issue of the appointment and dismissal of board members of state owned entities, as well as problems arising therefrom. See, for example, Muntingh, L (2019) *Appointing directors to the boards of state-owned enterprises: A proposed framework to assess suitability*; Wandrag R (2018) *The legal framework for the appointment and dismissal of SOE board members';* Wandrag R (2019) *Appointment and Dismissal of Board Members and Executives of Eskom, Prasa and the SABC*, all accessible at www.dullahomarinstitute.org.za.

also entails the consideration of policy dictates according to which members are appointed and dismissed. It involves in my view a special category of appointment especially conferred on the shareholding minister for the effective pursuit of government business. It is also significant in my view that the model of the state owned enterprise largely mimics that applicable to profit companies in which realm directors serve at the behest of the company's shareholders who elect them and in which setting it would be entirely permissible to terminate directorships antithetical to companies' commercial objectives or vision statements by an ordinary shareholder resolution adopted at a shareholder's meeting.[67]

[122] With regard to state owned entities there are three legal frameworks that must be considered. The first is the PFMA that is always applicable. The entity's creation is recognised by its being listed in the schedules to the PFMA. It is however established by the relevant constitutive/ founding legislation that applies to its being. The second is the Companies Act which is not always applicable. (Indeed it will apply only to those state owned entities registered as companies in terms of its provisions. It was held to be applicable in *Motau* but does not apply in *casu*.) The third framework is the specific legislation establishing the relevant state owned entity.

[123] The PFMA does not provide any details, standards or procedures on the appointment of board members but it locates the power to appoint both the member of board and its executive head within its definition of ownership control exercised by the National Executive through the relevant cabinet minister. Where the Companies Act is applicable, the minister (usually being the sole shareholder) will appoint the directors unless the state owned entity's Memorandum of Incorporation or Articles of Association provide for a different procedure. Invariably the applicable founding legislation regulates such appointments.

[124] When it comes to dismissals, as far as the PFMA is concerned the power to remove an executive (board member and Chief Executive officer) would again fall under the definition of ownership control.[68] The Companies Act, if applicable,

[67] Section 71 of the Companies Act, if applicable to the state owned entity under consideration.
[68] Section 1 under the relevant definition.

provides that it is the majority shareholder that may dismiss any director including the entity's chief executive officer.[69] In practise this means that the government, through the relevant minister, will do so. The Companies Act at least insists on prior notice and an opportunity for an embattled executive to state his or her case before this happens and a *sui generis* type of review avails such a person to challenge his/her dismissal.[70]

[125] In the case of entities not registered as companies, the founding legislation may regulate who dismisses executives and on what grounds. In the context of dismissals from service generally, which invariably involves prejudicial allegations being levelled against the dismissed person, this has been recognized by our courts as a decision that attracts the requirement of procedural fairness.[71] Our courts have insisted on procedural fairness for dismissals challenged under the institutional construct of a government enterprise through process rationality at least where the dismissal decision is found to constitute executive action. In instances where such decisions have been found upon review to constitute administrative action subject to the higher level of scrutiny in terms of PAJA, it follows that procedural fairness is a minimum subset of the right to just administrative action.

[126] In *Molefe and others v Minister of Transport and others*[72] the high court, in classifying a decision by the Minister of Transport to dissolve the Board of Control of the Passenger Rail Agency of South Africa, similarly a state owned entity, came to the contrary conclusion that such a decision was administrative rather than executive. It distinguished the case before it from *Motau* as follows:

> "The fundamental difference between the Modau case and the current case is that in the Modau case the Constitutional Court found that the Minister's powers were predicated on the provisions of the Constitution whereas in the current case the Minister's powers are anchored in statutory enactment. Her

[69] Section 71 of the Companies Act.
[70] Section 71 (5) of the Companies Act. See also *Pityana v ABSA Group Limited and Others* [2023] ZAGPPHC 342; 2024 (1) SA 491 (GP) (10 May 2023)
[71] *Motau*, at [83].
[72](17748/17) [2017] ZAGPPHC 120 (10 April 2017).

power to appoint and dismiss the Board of PRASA is sourced from the legislation and not from the Constitution. In removing the directors of the Board the Minister was wielding her statutory power which was conferred on her by the provisions of s 24 of the Legal Succession Act. She was not involved in the development of a new policy. I have accordingly reached a conclusion that the Minister's decisions are liable to be reviewed under the broad grounds provided for in PAJA. It will be recalled that in his argument Mr Labuschagne submitted that in deciding whether a decision was executive rather than administrative, the court should have regard to, inter alia, the source of the power, in other words, was it the Constitution or, if not so, was it statute?"[73]

[127] In *Reddy & others v Minister of Human Settlements, Water and Sanitation and Others*[74] ("*Reddy*") the court adopted a similar approach. In that instance it was asked to review and set aside a decision taken in terms of section 35 (5) of the WSA to disband the Umgeni Water Board. Rejecting the Minister's assertion that the court was bound by *Motau* to classify the decision as executive, the court held instead as follows:

> "In my view considering that the power to appoint originates not in terms of the Constitution but in terms of the Water Services Act that it is a function that the Minister performs which is granted to the Minister by the said legislation. In my view it is therefore administrative action that is reviewable in terms of PAJA. It is not as pointed out above a review by the Minister of the decisions of the previous Minister in which event in terms of Gijima it would indeed have been a legality review."[75]

[128] Mr. Erasmus in substantiating the chief ground of the appeal that the court below erred in finding that the appellant's decisions under scrutiny constituted administrative action (and that it was wrong not to follow the lead of the

[73] At paragraph [37].
[74] *Reddy and Others v Minister of Human Settlements, Water and Sanitation and Others* (5167/2020) [2021] ZAKZPHC 100 (21 October 2021)
[75] At paragraph [29].

Constitutional Court in *Motau* on the basis of the *stare decisis* principle), argued that the legal framework applicable in *casu* entailed the exercise of virtually the same kind of power as concerned the Minister in *Motau* (as representative shareholder) involving the supervision of high level office-bearers chosen by his predecessor with a view to ensuring (in this instance) that Amatola Water meets its statutory obligations through the identity of the selected members serving on the board who, according to the prescripts of section 35 (3) (c) of the WSA, are expected to have the expertise required for the board to function effectively for the duration of their term of office. He clarified that this does not entail the formulation of policy *per se*, but that it is the means by which the appellant gives direction to the vital areas of water and sanitation, and therefore is an adjunct to his executive policy formulation function.

[129] He noted further that the test resting on the executive in *Motau* was higher than that on the appellant. In terms of the provisions of Section 8 (c) of the Armaments Act the section dealing with the vacation of office by members of its board states that such a member "*must*" vacate office if "*his or her services are terminated by the minister on good cause shown*." The fact that no such threshold or jurisdictional requirement for the exercise of the power to dismiss is mentioned in section 35 (5) of the WSA, in contradistinction to *Motau*, was in his estimation an important consideration in determining on which side of the line the appellant's actions fell.

[130] He also urged upon this court to note the difference in treatment under the WSA concerning the dismissal of a chief executive officer as opposed to a board member. Section 36 (3) of the WSA requires that the termination of services of such an incumbent by a water board, as opposed to the Minister, must be "*for good reason*" (and subject to fair labour practices), whereas section 35 (5) states without any elaboration that the Minister may terminate the appointment of any or all the members of a water board. This too provides a significant signpost in his view that the dismissal of a board member under the provisions of the WSA constitutes an executive decision.[76]

[76] It bears highlighting that a different approach is also indicated in the WSA for the dismissal by the Minister of the services of a member of a water services committee established under Chapter VII of

[131] He referenced other general broad policy given directions vesting in the appellant to be gleaned from the provisions of the WSA, those apart from his powers to appoint, supervise control over and dismiss board members that flow from the import of his ownership control under the provisions of the PFMA, that in his submission, taken globularly, provide an indication of a high level power accorded to the Minister similar to that identified by the court in *Motau* which should have been given recognition by the court below.

[132] In this respect section 30 (3) empowers the Minister in consultation with the Ministers of Finance, Trade and Industry, and Public Enterprises by notice in the *Gazette* to determine the nature of activities a water board can perform outside the borders of South Africa and the countries in which such activities may be performed. It also provides that the Minister may dictate the maximum amount of capital that a water board can take out of the Republic when an activity contemplated in subsection (4) is performed.

[133] He also adverted to the provisions of section 39 (relating to a water board's obligation to prepare and adopt a policy statement) which ostensibly entitle the appellant to give policy direction although such policy is in the first instance formulated by the Board itself.

[134] Further, in terms of section 41, power resides in the Minister to issue directives to water boards, to the extent that it is reasonable, to undertake a specific activity at its own cost if it is financially viable, against full or partial payment, or to desist from a specific activity, if it is not in the best interests of the general population, in accordance with the parameters set out section 34 (1).

[135] Section 46 deals with the assets and liabilities of a board upon its disestablishment, again giving very wide and broad powers to the Minister.

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its provisions. Section 55 (4) provides that the Minister may terminate the membership of such an appointee *after* consultation with the members of the community served by that committee.

[136] Section 47 provides that one cannot litigate against a water board unless the Minister is served with the relevant court papers.

[137] Lastly, in terms of section 50, it is provided that the inclusion of Chapter VI (dealing with water boards as a subset) must not be construed as giving any executive or legislative power to any province in respect of water boards.

[138] Ms. Stein contended contrariwise that what supported the court *a quo*'s finding that it was concerned with administrative action is that the appellant's powers are firstly sourced in legislation and not in the Constitution; that the primary activity of the Board is to provide water services to other water service institutions within its service area[77] in accordance with the main objects of the WSA;[78] that the appellant's powers are circumscribed both substantively and procedurally by section 35 of the WSA[79] and, finally, that the Board expressly has no role to play in the formulation or prescription of policy, which is a function that must be exercised by the Minister and cannot be delegated.[80]

[139] She urged upon the court to follow the approach adopted by the courts in *Reddy* and *Molefe* in advancing the respondents' contention that the court below did not err in finding that it was concerned with administrative action.

Discussion:

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[77] Section 29.
[78] Section 2.
[79] Mr. Erasmus argued conversely that the appellant's powers were not circumscribed. On the issue of the Minister's power to appoint especially in terms of the provisions of section 35 read with section 3 of Schedule 1 to the WSA, he noted that there was no ostensible imperative on the incumbent to seek the assistance of a selection panel to recommend persons for appointment of members of a water board. He could do so if he wished, so the argument went, but was not obliged to follow such a process. This is ostensibly how the Interim Board members came to be appointed. He added that this free reign, as it were, that he enjoyed to appoint and dismiss board members subject only to the requirement of rationality was also an indicator that the appellant's power was executive in nature.
[80] In the latter respect she submitted that the national water policy is to be distinguished from the policy statement adopted by each water board in terms of section 39 of the WSA which the minister in *casu* is authorised to direct it to amend if the policy statement submitted by it to the minister is not in the best interests of the general population within the institution's service area or if it is not in accordance with the functions of water boards set out in section 34(1) of the WSA. I understood the submission to mean that the role played by the Board in this respect, even with the Minister's intervention, is not to be construed as closely related to the formulation of policy.

[140] In my view it appears that in both *Reddy* and *Molefe* the courts resorted to a simplistic appraisal of the power exercised by the Ministers in each case without considering the paradigm of the state owned entity and the wholistic legal frameworks of application, more especially the provisions of the PFMA that define and dictate the unique model of the state owned entity and its key features.

[141] In the case of *Reddy*, it is so that the Minister's powers to appoint and dismiss members of a water board are located in the provisions of section 35 of the WSA (as opposed to the Constitution) but the court undertook no examination of the state ownership control concept or its implications referenced in the PFMA. Indeed, it appears to me to be counterintuitive not to have explicated those powers in the exceptional context that the minister is the representative shareholder and has an oversight function in relation to the entity and supervisory control over its leadership charged with its corporate governance.

[142] I digress to highlight a few of those features apparent from the extended legal framework imposed by the PFMA, which apply in *casu* as well.

[143] The provisions of the PFMA, which in terms of section 3 (3) thereof provides that in the event of any inconsistency between this Act and any other legislation the Act prevails, firstly give an indication of the nature of Amatola Water as well as other water boards as government enterprises in terms of its provisions.

[144] Amatola Water Board amongst others is especially listed by name under Part B of Schedule 3 of the PFMA as a public national entity in the form of a National Government Business Enterprise under the mantle of "*other public entities*", distinguishing it from "*major public entities*".

[145] Such category of entity is defined in section 1 of the PFMA as follows:

> "**"national government business enterprise"** means an entity which—
>
> (a) is a juristic person under the ownership control of the national executive;

(b) has been assigned financial and operational authority to carry on a busines s activity;

(c) as its principal business, provides goods or services in accordance with ordinary business principles; and

(d) is financed fully or substantially from sources other than—

(i) the National Revenue Fund; or

(ii) by way of a tax, levy or other statutory money;"

[146] The further definition of "*ownership control*" is also necessary to mention. Such control is defined section 1 of PFMA as follows:

"**"ownership control"**, in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities:

(a) To appoint or remove all, or the majority of, the members of that entity's board of directors or equivalent governing body;

(b) to appoint or remove that entity's chief executive officer;

(c) to cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body; or

(d) to control all, or the majority of, the voting rights at a general meeting of that entity;"

[147] It is also necessary to advert to the provisions of section 63 of the PFMA that align with the object of the PFMA in section 2 which is to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the institutions to which the Act applies, inclusive of Schedule 3 entities:

"**63. Financial responsibilities of executive authorities.**—(1) (a) Executive authorities of departments must perform their statutory functions within the limits of the funds authorised for the relevant vote.

(b) In performing their statutory functions executive authorities must consider the monthly reports submitted to them in terms of section 39 (2) (b) and 40 (4) (c).

(2) *The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive.*" (Emphasis added)

[148] In the context of the appellant's supervisory and oversight function, the Board that manages the financial affairs of the public entity is designated in section 49 (1) and (2) of the PFMA as the responsible accounting authority for that entity. Section 50 be read in tandem since it lists the fiduciary duties of accounting authorities which align generally with a director's obligations arising under the common law.

[149] Although the provisions of the PFMA pertain especially to the fiscal aspects of public entities, the theme of the Act is consistent, namely that the various role players in giving effect to its object are accountable in the chain of command to the Executive that is accountable in turn to Parliament for the relevant public entity in whose portfolio it falls. The purpose for the necessary control and supervision over the board by the shareholder minister appears from the definitions above to be to "*govern the financial and operating policies of the entity in order to obtain benefits from its activities as government enterprises*."

[150] In terms of section 76 (2) of the PFMA the National Treasury may make regulations or issue instructions to departments concerning the establishment and control over trading entities,[81] reinforcing the state's overarching ownership and supervisory aims over such entities for maximum benefit flowing from the state's pursuit of business through them.

[151] This aligns with the preamble to the PFMA which introduces the reasons and intention of the Act as being "(t)*o regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith*.*"*

[152] In *Molefe*, other than referencing the fact that PRASA is a state owned entity listed as a National Government Business Enterprise under Schedule 3 of the PFMA and mentioning its obligations under its provisions relative to the irregular expenditure identified as one of the supposed bases for the wholesale dismissal of the board of control in that instance, the High Court similarly did not consider the Minister of Transport's power to dismiss members of the board of control in the unique context of its being as a state owned entity and having ownership control powers as defined in the PFMA.[82] It is again myopic to consider the power that vested in her in the narrow context of section 24 of the Legal Succession Act without regard to these provisions and to have compartmentalised the exercise of the power as administrative in nature on the simplistic basis that her powers to appoint and dismiss the board of PRASA are sourced in legislation and are not from the Constitution.

[153] To have stated further that the Minister was not involved in the development of a new policy by the exercise of her section 24 powers further misses the

[81] Subsection (c).

[82] No emphasis seems to have been placed on the significant fact that the Minister of Transport's notices of removal to the directors were premised not only on the direct empowering provision (section24 (1)of the Legal Succession to the South African Transport Services Act, No. 9 of 1989) but also on the fact that she was giving notice "*as the Minister designated as the shareholding Minister*". See paragraphs [6] and [7] of the judgment.

substance of the Constitutional Court's careful analysis in *Motau* of the issue of the accountability of a Minister in the setting where he/she is the responsible member of the Executive of a state owned entity (and shareholder representative) exercising the power to appoint and dismiss members of the Board of that entity as special features of his/her overall oversight responsibility and ownership control in relation to that state owned entity.

[154] To my mind this is a universal feature of a cabinet minister's role in relation to a state owned entity courtesy of the provisions of the PFMA that trump in the case of any conflict (whether the entity is constituted as an enterprise or a company) and which cannot be ignored in assessing the nature of a power to dismiss members of its board of control. So too what cannot be ignored is that state owned entities are constrained by the constitutional imperatives in section 195 of the Constitution to ensure the promotion of constitutional values and principles as set out in section 195(1), which includes the efficient and economic use of the state's resources.[83]

[155] In applying the relevant guiding principles as outlined above, the following features of the present matter commend themselves to me in support of a conclusion that the appellant's decisions under scrutiny were executive in nature.[84]

[156] Firstly, the nature of the appellant's power exercised and under consideration must be understood in the context of the universal features indicated above. When it comes to an analysis of the function or power exercised it is plain that although on the face of it the appellant derives his authority from the provisions of section 35 (5) of the WSA (read with section 4 of Schedule 1), this power must be seen in the context of his representative shareholding capacity and peculiar relationship to the members appointed by him as well as the rationale for the entity's existence and institutional structure given expression to in the provisions of the PFMA. We are concerned here with a special category of appointment especially conferred on the

[83] See section 195 (2) of the Constitution that renders the basic values and principles governing public administration applicable to public enterprises.
[84] In essence the only power under discussion is the appellant's power to dismiss board members since there is no counter appeal against the court a quo's failure to have made any order in relation to the appointment of the Interim Board's members.

Minister of Water and Sanitation for the express and effective pursuit of government business which also fits in with appellant's authority, unshackled by any jurisdictional requirements stated in section 35 (5) of the WSA, to "*arrest the failure to follow proper policy*" (to borrow the phrase employed in *Motau*) by terminating membership appointments of people on boards of control who do not assist the entity to discharge its statutory function. Whatever service delivery is the subject of the entity's commercial objectives or mandate hardly matters, as the model for state owned enterprises remains essentially the same.

[157] Although stated in the context of an analysis of the President's powers, the judgment in *Masetlha* provides an important reason why it would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action:

> "These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security. In *Premier, Mpumalanga*,[85] this Court has had occasion to express itself on whether to impose a requirement of procedural fairness in the following terms:
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> > "In determining what constitutes procedural fairness in a given case, a court should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively (a principle well recognised in our common law and that of other countries). As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the Executive to act efficiently and promptly."[86]

[158] In *Masetlha* it was held that the authority in section 85(2)(e) of the Constitution is conferred in order to provide room for the President to fulfil executive functions

[85] Premier, Province of Mpumalanga and Another v Executive Committee of the Association of Governing Bodies of State Aided Schools: Eastern Transvaal (CCT10/98) [1998] ZACC 20; 1999 (2) SA 91; 1999 (2) BCLR 151 (2 December 1998) ("*Premier, Mpumalanga")*

[86] At paragraph [77] of *Masetlha*.

and should not be constrained any more than through the principle of legality and rationality.[87] The same applies in my view in the context of the state owned entity paradigm of which ownership control is a central feature. The court in *SARFU*[88] also recognized the different range of functions that the Executive is concerned with that do not necessarily directly involve administration:

> "It can be seen from these provisions that members of the executive in the national and provincial spheres have a range of responsibilities: for preparing and initiating legislation; for developing policy; for co-ordination of government departments; for implementing legislation and for implementing policy. A similar range of responsibilities is conferred upon the executive councils of municipalities. One of the tasks of the national and provincial executives (and municipal executives) is therefore to ensure that legislation and policy are implemented. The process of implementation is generally carried out by the public service. Members of the executive, of course, have other functions as well, such as the development of policy and the initiation and preparation of legislation, which are not directly concerned with administration."[89]

[159] The Constitutional Court in *Motau* has found that the similar power to dismiss a chair and deputy chairperson respectively of a board of control of a state owned entity resorts within that unique niche of power referenced in section 85 (2) of the Constitution that puts it outside of the threshold for engaging in administrative law review. There is in my view no difference in the subject matter with which this court is concerned and one does not have to strain to pigeon-hole it in any other manner.

[160] In conclusion, on this ground of appeal I am satisfied that the approach adopted in *Motau* finds application here and that the appellant's power to have dismissed all the members of the Board in *casu* amounted to executive action.

[161] This does not really shift the success in favour of the appellant for present purposes as the real question (regardless of the categorization of the power either

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[87] At paragraph 78 of the judgment.
[88] *Supra*
[89] At paragraph [139].

way) turns on whether the court below was correct in determining that the impugned decisions were rationally connected to the purpose sought to be achieved by the empowering provision. By the empowering provision we are for present purposes only concerned with the appellant's power in terms of section 35 (5) of the WSA to dismiss all or any single member of the Board within the unique context described above.[90]

Was the appellant's decision to dismiss the board members rationally connected to the purpose sought to be achieved thereby?

[162] The principle of legality requires that every exercise of public power, including every executive act, must be rational.[91] For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given.[92] It is also well established that the test for rationality is objective[93] and distinct from that of reasonableness.[94]

[163] The analysis in *Motau* gives a clear indication that the purpose behind the power to dismiss directors or members of a board of control of a state owned entity is to remove such appointees who do not assist the entity to effectively discharge its statutory functions. [95]

[164] A brief overview of the expectations that the appellant would have had of the board members and the Board itself are indicated in various provisions of the WSA referenced below, as well those provisions of the PFMA that have been highlighted above.

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[90] The power to appoint is not in contention although the power to dismiss is an essential corollary of the former. The issue of the appointment of the Interim Board is also not the direct subject of the appeal since the respondents did not file a counter appeal against the court's failure to have pronounced upon the validity of its members' appointments.

[91] Motau at [69]; *Democratic Alliance* at para 27; and *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 85.

[92] Motau at [69] and *Pharmaceutical Manufacturers* at para 85.

[93] Motau at [69] and *Democratic Alliance* at paras 14-26.

[94] Motau at [69] – [71] (where the Court found that the exercise by the Minister of her section 8 (c) power was properly used, in the exercise of her oversight function, to abate the problems that had set in at Armscor) with reference also to the observations made by the Court in footnote 101.

[95] At paragraph [48].

[165] Amatola Water amongst other water boards is an entity established in terms of section 28 of the WSA. It has as its primary activity the obligation to provide water services to other water service institutions, including municipalities in its service area.

[166] Its powers set forth in section 31 entail its basic obligation and wherewithal to carry out its primary activity and "*other activities*" mentioned in section 30, to set and enforce general conditions, including tariffs, for the provision of water services, to delegate some of its functions, and to limit or discontinue water services or other services provided to water services institutions, consumers or users.

[167] From a governance perspective, it is authorised to set up advisory forums, establish committees consisting of board members and other persons and to determine how they function, alongside determining how the Board of control operates from a procedural point of view. A water board may, for example, determine the procedure for convening and conducting meetings of its board and the section concludes with the requirement that the quorum for any meeting of a water board is one half of its members.

[168] A water board's principal duty is to give priority to its primary activity.[96]

[169] The parameters for its functions are set out in section 34 of the WSA which appear standard for any public government entity which is expected to strive for financial viability, the attainment of its stated objects and delivery of its constitutional mandate.

[170] Section 38 provides for the duties of water boards and their members in repeating the expectation of it to ensure that its functions are performed within the parameters set out in section 34 (1) and to promote its policy statement and business plan and to ensure that these are implemented.

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[96] Section 32.

[171] In the latter respect, a water board is required to adopt a policy statement that may be amended from time to time but must be revised at least every five years. It must, not later than one month before the commencement of each financial year, also prepare and adopt a business plan relating to the following five years. It bears an obligation to have the accounts of the entity audited and must, within four months after the end of each financial year, issue audited financial statements. It must adopt an accounting policy consistent with generally accepted accounting practices. It must annually issue a report open to the public on the activities of the entity with sufficient details to permit stakeholders to assess the performance of the water board. Section 45 also compels a water board to give the minister or any person authorised by him such information as is reasonably required on the affairs and financial position of the water board, and reasonable access to such books, accounts, documents and other assets of the waterboard as are reasonably required.

[172] Apart from these fundamentals, section 38(2) notes the peremptory obligation on members to perform their duties with honesty, care and diligence and to disclose any conflicts of interest and abstain from voting on any resolutions proposed in connection with contracts or dealings in respect of which they would be conflicted.

[173] Section 35 provides that a water board consists of a chairperson and such other members as the minister may approve from time to time, who must each fit the professional criteria required for the Board "*to function effectively*" and meet the other objects of their appointment so as to ensure that the particular water board is able to discharge its obligations in terms of the WSA.

[174] The Board collectively must also meet the mandate imposed upon it by the relevant provisions of the PFMA to be efficient and effective financial managers of the entity's affairs entrusted to it.

[175] Given that no threshold is stated in section 35 (5) the WSA one needs to consider a yardstick against which to measure whether the appellant's decision to have dissolved the Board and terminated the appointments of the members thereby was rational. Considering the legal frameworks of peculiar application the proper question might be whether circumstances existed that posited the opposite of what is

expected from such appointees to have warranted their dismissal by the Minister before the expiry of their terms of office, either in their qualifications or conduct, or their "*failure*", as it were, singularly or collectively to have assisted Amatola Water to discharge its statutory functions in the various respects outlined above. The main requirement it seems is that a Board must "*function effectively*"[97] and meet its statutory mandate.

[176] There is also the related aspect of process rationality that applies.[98] It is a trite principle in this respect that both the process by which an executive decision is made, and the decision itself, must be rational.

[177] In *National Energy Regulator of South Africa and Another v PG Group (Pty) Ltd & Others*[99] the court noted as follows regarding the approach to be adopted by a court in this respect:

> "[48] I do not believe that we can separate process rationality and substantive rationality in the way the second judgment purports to. The relevant question for rationality is whether the means (including the process of making a decision) are linked to the purpose or ends. To my mind, rationality necessarily, whether found in PAJA or anywhere else, must include some evaluation of process. If not, then we are simply asking whether a decision is right or wrong based on *post hoc* reasoning."

[178] It is a natural and inescapable denouement that the process leading to a decision "*must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred*". As stated in *Democratic Alliance*:

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[97] Section 35 (3) (c) of the WSA.

[98] *Albutt v Centre for the Study of Violence and Reconciliation and Others* (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC) (23 February 2010) ("Albutt") at paragraphs [49] – [50]; *Democratic Alliance at paragraph [34]; 2018 (1) SA 200 (SCA) at [82].*

[99] (CCT131/18) [2019] ZACC 28; 2019 (10) BCLR 1185 (CC); 2020 (1) SA 450 (CC) (15 July 2019).

> "The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitutes means towards the attainment of the purpose for which the power was conferred."[100]

[179] In *Zuma v Democratic Alliance & Others; Acting National Director of Public Prosecutions & Another v Democratic Alliance & Others*[101] the Court noted that a rationality review also covers the process by which the decision is made which includes an assessment of whether the means (including everything done in the process of taking the decision) links to the end. Problems found in the process used to reach a decision can be very useful evidence or illustration of a faulty rational link. How far that evaluation of process goes depends on the facts of a particular case.

[180] I have dealt above with the issue of the factual premise of the court below which cannot in my view be faulted.

[181] Applying those facts against the legal expectations imposed upon the board members by the relevant legal frameworks there was in our view no imperative on the appellant to have addressed any supposed failure on the part of the erstwhile Board to have followed proper policy by the grand scale termination of all of its members.

[182] As for the belated reasons offered for his decisions, firstly, the complaints of misconduct against the first and second respondents were dated and ostensibly resolved as between themselves, however serious their nature as vaunted by the appellant. Inasmuch as the appellant might have purported to revive them in March 2022, it appeared to be commonly accepted that the attorney's investigative report dated in July 2021 could by no means be recognized as final or of any value from a forensic point of view.

[100] At paragraph [36].
[101] 2018 (1) SA 200 (SCA) at [82].

[183] In any event the appellant's reliance on these allegations was not foreshadowed in the pre-termination notices by any stretch of the imagination. So too the appellant's reliance on the so-called misconduct of the fourth respondent in offending the chairperson by likening her to "*Verwoed*," and the second respondent in damaging a hired motor vehicle, was not heralded with any clarity in the notices for them to respond meaningfully to. Indeed, even the claimed governance challenges, based on "*numerous correspondences*", were not outlined with any particularity for the members to derive an understanding of why the appellant felt motivated to dissolve the entire Board.

[184] The exercise of the appellant's power to have dissolved the entire Board, which was the primary decision under review, as a purported response to the claimed misconduct of two members certainly makes no sense.[102]

[185] Even upon a consideration of the appellant's decisions individually assessed in the case of the members especially implicated it does not appear to me to be a rational response to have terminated their membership. I have said before that the court below was justified in not treating the complaints that formed the subject matter of the attorney's investigation against the first and second respondents as being a legitimate issue in March 2022.

[186] Concerning the claims of misconduct that quite ostensibly arose latterly, the second respondent was not charged with "*misconduct*" relating to the unauthorized use of the rented motor vehicle that was subsequently damaged in an accident or even called upon to respond to the taint of unethical behaviour against him, neither was the fourth respondent made aware that her Verwoerdian slur against the chairperson might cost her her board membership. It therefore appeared strained for

[102] The nature of the power to dismiss board members on a wholesale basis, as suggested by *Motau*, at [66] warrants a cautious approach focused on the need to maintain the institutional integrity of the board which has crucial obligations to fulfil, so as to keep it functioning rather than dissolving it in its entirety, leaving it "*disabled and completely rudderless*" thereby. In *Molefe* the court also remarked upon the wholly disproportionate decision of the Minister to effect the wholesale removal of the Board in circumstances where she appeared to have given no consideration to the "*serious and prejudicial impact*" of her decision on PRASA's interest. [At 56] It follows that the decision to relieve a board of control in its entirety is of momentous impact and harmful to the entity's very core.

the appellant to have attributed his primary decision to these allegations of misconduct after the fact when the members implicated had not been called to account for their so-called misconduct before at all. Procedural fairness required that they be provided with the appropriate information relevant to his proposed decision before their dismissal and a chance to respond to it.[103]

[187] That leaves the appellant's claim of the dysfunctionality of the Board, which by obvious import suggests a Board unable to operate effectively and meet its statutory mandate. It is not inconceivable that a board labouring under such a severe deficit might rationally warrant an outcome of its wholesale dismissal but in this instance, there was no such evidence established. In fact, the appellant failed to take the court into his confidence at all concerning his intervention meeting with the Board on 8 March 2022 and seemed resigned to accept that he had taken the chairperson's complaints at face value. In this respect he ought to have warned the respondents that he intended to act on her complaints (which appear to have come to the attention of the respondents only after the review application was launched) and to have given them an opportunity to respond to their substance. Clearly, he did not.

[188] The court below in our view correctly found that whatever the issues were between the respondents and the chairperson in particular, the "*instability within the entity*" had not compromised the operational efficiency of the Board or affected Amatola Water's service delivery mandate, neither did the pre-termination notices suggest as much. Indeed, the Board remained able to effectually discharge its statutory mandate despite the admitted challenges that had arisen.

[189] In the result there was no valid reason for the termination of the respondents' services,[104] no real adherence to the *Audi alterum* principle by the pre-termination notices, and the absence of any rational connection between the bespoke purpose

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[103] See Du Preez and Another v Truth and Reconciliation Commission (426/96) [1997] ZASCA 2 (18 February 1997), in which the SCA held that procedural fairness demands not only that a person implicated be given reasonable and timeous notice of the hearing, but also that he or she is at the same time informed of the substance of the allegations against him or her, with sufficient detail to know what the case is all about. What is sufficient information would depend upon the facts of each individual case.

[104] Self-evidently no reasons were offered at the time of the dismissals and the reasons which came forth later were properly found not to be justified on the evidence.

for which the appellant is permitted to remove any or all its members and the wholesale dissolution of the erstwhile Board. It appears to the contrary that the exercise of the discretion afforded the appellant in section 35 (5) of the WSA for its unique purpose and design was impetuously taken by the appellant without fair and proper reflection.

[190] We are satisfied that the court a *quo*'s finding of irrationality was well made, leaving only the question whether the remedy of reinstatement resorted to by the court below was (and indeed *is* because the consideration remains a live one) appropriate in all the circumstances.

The "issue" of the standing of the Interim Board and appropriate relief:

[191] Although the court below ostensibly kept in mind that the respondents' membership was co-incidentally terminated as a result of the appellant's wholesale dismissal of the Board, it set aside their individual terminations (as primary relief) and ordered that they (the five of them) be reinstated from the date of the court's order. [105]

[192] Mr. Erasmus contended on behalf of the appellant that since the court below failed to pronounce on the appellant's related decision to appoint the Interim Board, the well-established *Oudekraal* principle applies, which means that the appointment of these members stands, has legal effect and can be taken to have produced valid legal consequences. He argued that absent the relief having been granted to the respondents as prayed for in this respect to set aside the "*decision to appoint an interim Amatola Water Board*", this would result in there being two parallel boards if the reinstatement order is confirmed upon appeal. [106]

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[105] This is an awkward aspect of the order. By setting aside the erstwhile Board all the members comprising its number would effectively be back in the saddle as a natural consequence of such an order although some of them had indicated to the Minister that they would accept his termination of their services. The reinstatement of five only would also in itself be a cause for concern because the erstwhile Board comprised the essential complement of the bespoke ten members chosen by his predecessor.

[106] The challenge under appeal was oddly framed. There was however no suggestion that this court was required to address the glitch in the absence of an order by the court below on the issue of the

[193] Mr. Erasmus' submission regarding the application of the *Oudekraal* principle might well be correct, but is this court required to address the perceived anomaly by the present day threat of the Interim Board existing alongside that of the erstwhile Board comprising of the five reinstated members?

[194] Ms. Stein argued that it was unnecessary for the court below to have made any finding on the issue of the appointment of the Interim Board members and that it deliberately omitted to grant the order pronouncing on the lawfulness of the appellant's decision in this respect because the tenure of the Interim Board had expired by natural effluxion of time after five months.[107] It is evident from the appointment letters themselves however that the terms of the members of the Interim Board are expected to endure until such time as a new board is appointed. That has obviously not yet happened neither could it have because, in terms of the consensual interim relief granted by the high court, the appellant accepted that he was interdicted from appointing any permanent board members pending the final resolution of the review application that was in effect delayed by the present appeal.

[195] Mr. Erasmus assured us from the Bar that the Interim Board still existed. Even though there is no evidence before this court as to whether it has in fact continued in place during the interregnum, it would be absurd to imagine that Amatola Water operates today without a governing board. Therefore, for better or worse, the fact of its existence, until a permanent board is appointed, remains a feature that this court must have regard to in considering the question whether the court *a quo*'s remedy of reinstatement consequent upon the setting aside orders can be given practical effect to.

[196] The appellant's ground of appeal and contention on this final aspect is that in the event of this court finding that the court below was correct in issuing its orders reviewing and setting aside the dissolution of the erstwhile Board and the members'

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appointment of the Interim Board members by making a pronouncement on its validity. Rather the concern was about the effect of the reinstatement order in practical terms.

[107] The respondents appear to have accepted as evidence in this regard what was stated in the media forum, rather than what the official appointment letters actually say.

appointments respectively, that this court should not uphold the order reinstating the respondents upon a true assessment of what relief would be just and equitable in all the circumstances. It was argued on his behalf that a mere declarator that his conduct was unlawful would have, and ought to (especially having regard to the present day circumstances entailing the practical difficulties), suffice.

[197] Mr. Erasmus adverted to the example in *Motau* in which the Court declined to reinstate the leadership of the Armscor Board despite finding in their favour that the Minister had failed to comply with sections 71 (1) and (2) of the Companies Act in dismissing them, contenting itself instead with a declaration sufficient to address the flaws in the Minister's conduct. The Court emphasized the usual approach in granting appropriate relief (which is the expectation once a declarator has been made in a legality review that conduct is inconsistent with the Constitution and falls to be reviewed as such) that would follow from a finding that the dismissal was procedurally defective and did not comply with the relevant legislation, but also explained why a declarator constituted a just and equitable remedy in the peculiar circumstances of that matter:

> "[85] To grant appropriate relief, we must determine what is fair and just in the circumstances of a particular case. The various interests that might be affected by the remedy should be weighed up. This should at least be guided by the objective to address the wrong occasioned by the infringement; deter future violations; make an order which can be complied with; and which is fair to all those who might be affected by the relief. It also goes without saying that the nature of the infringement will provide guidance as to the appropriate relief. And the right to be heard has value both instrumental and intrinsic. One cannot excuse an unfair process because it led to the right result.
>
> [86] So the setting aside of the Minister's decision and the reinstatement of the aggrieved parties or an award of compensation would usually follow from a finding that a dismissal was procedurally defective and did not comply with the relevant legislative prescripts. But the very exceptional circumstances of this case mean that it would not be just and equitable for this Court to award such remedies here. A declaration is sufficient to address the flaws in the

Minister's conduct, and to draw her attention to the importance of complying with the **Companies Act and** adopting a fair process in making such decisions. Limiting the relief to a declaration would, at the same time, vindicate the Minister's efforts to address the dereliction of duty by General Motau and Ms Mokoena.

[87] First, the Minister, on a number of occasions, had expressed her dissatisfaction with their conduct. The Minister convened three meetings with the Board to address various governance issues. None of these was attended by General Motau whilst Ms Mokoena failed to attend the last of the meetings. And General Motau's response to the Minister's letter in which she registered her disapproval of his nonattendance was insouciant, reminding her that Board members had other jobs and obligations. So General Motau and Ms Mokoena were certainly on notice of the Minister's dissatisfaction and her wish to reconstitute the Board."

[198] Mr. Erasmus' submission that a mere declarator was apt in the present instance was however based on his misunderstanding that the evidence had established that the erstwhile Board was in fact dysfunctional and that this aspect had been acknowledged by the respondents. He argued in tandem that the court a *quo*'s reinstatement of the respondents rather than allowing the appointment of a new board was counterintuitive since the erstwhile members "*can clearly not work together*" and should not have been made.[108] Whilst an irreparable breakdown in relationships might usually invoke concern in considering a reinstatement order in such a scenario,[109] it does not apply in *casu* given the court a *quo*'s factual decision on the issue, which we accept.

[108] See footnote 105. Implied in his submission is the expectation that if the court a quo's setting aside of the erstwhile Board was confirmed on appeal, the ten members, minus the member who resigned contemporaneously, would be expected to resume working together as the collective they comprised before.

[109] See *Motau* at paragraph [90] where the court held that the reinstatement order had to be set aside also in circumstances where it was evident that the relationship between the Minister, on the one hand, and General Motau and Ms Mokoena, on the other, had "*disintegrated irreparably*".

[199] He significantly pointed out however that the Interim Board had managed the affairs of the board for a lengthy period since the dissolution of the erstwhile Board and should for this reason be allowed to continue to serve its purpose in the short term while the Minister goes about the appointment of a new permanent Board. Because the remaining term of office that would have applied in the ordinary course but for the respondents' dismissals only extends to February 2025, reinstating them for such a short period, so his argument went, would surely wreak instability.

[200] Ms. Stein argued conversely that it would not be just and equitable to preclude the respondents from resuming their positions as members of the Board as this would deprive them of their right in terms of section 34 of the Constitution to effective relief for a breach of their rights. She emphasized that the unlawful dismissals had not only occasioned them reputational harm, but that they had made themselves available to serve as members of the Board and had done their utmost to discharge the mandate of the Board despite the governance challenges. The reinstatement of the respondents by the court below had in her view been entirely appropriate relief and warranted no interference by this court.

[201] The facts of this matter and nature of the infringement under scrutiny are notably distinguishable from the circumstances in *Motau.* The appellant's decisions not only fail the requisite standard of rationality but also suffer from process rationality deficits and the reasons advanced for them were patently disconnected from the reality. But there is no one size fits all approach to be adopted as *Motau* and other judgments of our courts clearly demonstrate. Once the court has determined the unlawful nature of the decisions, that is not the end of the matter. The consequence of a declaration of unlawfulness is that it must then be dealt with under s 172(1)*(b)* of the Constitution, which requires a careful consideration of all the factors and a balancing of competing interests (where such arise) to determine an appropriate remedy.[110]

[110] Section 172(1) of the Constitution provides in this respect that:
'When deciding a constitutional matter within its power, a court-
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including-
(i) an order limiting the retrospective effect of the declaration of invalidity; and

[202] There is however merit in Mr. Erasmus' submission that the two features highlighted by him certainly militate against awarding any reinstatement of the dismissed board members. The first concerns the fact that the respondents' term of office will indeed shortly come to an end as he correctly pointed out. In *Motau* the Court pronounced upon the disadvantage that it faced in circumstances where General Motau and Ms. Mokoena's terms of office had come to an end by the date of its order, observing that it could not reinstate them for this reason.[111] The same obstacle applies in *casu* given that the terms of office of the respondents will expire in just a few weeks.

[203] The second aspect concerns what has happened up to the present time since the dissolution of the erstwhile Board and its replacement by the appointment of the Interim Board that was up and ready to run contemporaneously with the appellant clearing the deck as it were of the old order. This court is somewhat hampered by the fact that it is not its place to question the appellant's power or propriety to have appointed an Interim Board in the crisis situation precipitated by his own doing and in circumstances where the respondents have, not unreasonably so, cried foul. Indeed, the contention on their behalf is that the latter appointments by cascading impact, and following on their unlawful dismissals, should automatically be reckoned as unlawful as well.

[204] Whilst we can make no findings in respect of the appointment of the Interim Board members, it is worth mentioning that in *Molefe* the court found that the Minister's decision to appoint new members of the Board of directors before the conclusion of the prosecution of the application to review her decision to have dissolved the Board of Control of PRASA by removing the erstwhile members was invalid[112] and in fact amounted to "*constructive contempt of court*". Perhaps a more certain result could have been achieved if the interim order in *casu* had interdicted the appellant from forging ahead with his purported appointment of the Interim Board

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[111] *Motau* at [88].

[112] At paragraph [59].

pending the hearing of the review application, but we are here now, with this collateral challenge having interposed itself into the mix. We must also deal with the reality that Amatola Water cannot function without a board of control.

[205] If regard is had to the public's interest in the continuity of the affairs of Amatola Water, it strikes me as a matter of practicality that an order of reinstatement will indeed wreak havoc. In *Motau* the Court recognized a threat to the institutional integrity of Armscor by a wholesale dissolution of its Board of control for the failures of its two leaders only rather than being allowed to continue to function with its desired institutional knowledge and wherewithal to attend to matters the subject of its service delivery without compromise to its service goals.[113] This sensitivity applies equally in our view to the standing of the Interim Board that should, despite whatever reservations may exist concerning its validity and its undecided status, be permitted to continue with full operational capacity pending the appointment as soon as possible of a permanent board of control subject to the necessary rigours and safeguards in place ostensibly made provision for in section 35 (5) of the WSA, read with Schedule 1 thereof.[114]

[206] In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*[115] the Constitutional Court suggested the approach to be adopted in situations where factual certainty might require some amelioration of legality given collateral challenges intervening in the presenting circumstances of a matter and the impact of colliding interests:

[113] At [66]. See also Molefe and the court's observations regarding the prejudicial nature of a wholesale dissolution of a board of control.

[114] In *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013)* the Constitutional Court emphasised the importance of an appropriate order in terms of section 172 (1)(b) of the Constitution in order to account for any unjust or impractical consequences of a declaration of invalidity. The circumstances of that matter however allowed for an order suspending the invalidity to allow the defect to be corrected, by ordering a "rerun" of an impugned tender process, allowing the invalid contract to continue essentially by judicial warrant in the interim. Given that in the present matter the respondents did not seek an interim order that the appointments of the interim board members be put on hold pending the hearing of the review application but tailored a different order that has received judicial warrant so to speak, that arrangement should be tolerated in determining an appropriate remedy.

[115] (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010).

“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.

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 involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.” [116]

[116] At paragraphs [84] - [85].

[207] In *Chairperson: Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others ("Sapela")*[117], in relation to a PAJA review challenge, although the court was satisfied as to the invalidity of an impugned tender, it was constrained by the fact that time had worn on since the application for review had been launched and questioned whether, given the inevitable effluxion of time and the extent of the work performed by the successful tenderer between the launching of proceedings and the granting of judgment, the relief sought contemporaneously, and granted, was, by the time of granting its order on appeal, capable of practical implementation. It observed that the order of the court *a quo*, if implemented, was likely not only to be "*disruptive*" but also to give rise to a host of problems not only in relation to a new tender process but also in relation to the work to be performed.[118]

[208] Thus, it confirmed, with reference to the seminal dictum in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[119] (namely: *'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'*) that in appropriate circumstances (a typical example being the case where an aggrieved party fails to institute review proceedings within a reasonable time) a court will decline, in the exercise of its discretion, to set aside an invalid administrative act.[120] It ultimately concluded that the circumstances of case before it were such that it fell within the category of those cases where "*by reason of the effluxion of time (and intervening events) an invalid administrative act must be permitted to stand*." [121]

[209] *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others*[122] concerned the award of a tender to certain firms of attorneys challenged under a PAJA review in which the court concluded that the Fund acted irregularly in awarding

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[117] (511/2004) [2005] ZASCA 90; 2008 (2) SA 638 (SCA) ; [2005] 4 All SA 487 (SCA) (26 September 2005)
[118] At paragraph [27].
[119] *Supra*, at paragraph 36.
[120] At paragraphs [27] and [28].
[121] At paragraph [29].
[122] (3191/2013) [2014] ZAECPEHC 19; [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP) (25 March 2014)

it. Contrary to *Sapela* the court noted that it was not the type of tender in which relief should be withheld because "*too much water has flowed under the bridge by the time the review is decided*." Indeed, a relatively short period of time had ensued from when the new panellists were appointed to the hearing of the review, distinguishing the matter from the typical situation where an irregularly awarded tender is allowed to stand because the work concerned has all but been completed by the time the review is heard.[123]

[210] In acknowledging the onerous obligation on it to carve out an appropriate remedy, the court was not satisfied that a declarator, on its own, would remedy effectively the unlawful administrative action that had been taken in the matter. That can only be done, so the court reasoned, by setting it aside which, in the case of the Fund's situation, would have resulted in it having to conduct the tender process again in order to appoint a panel of attorneys. It was however constrained by the recognition of the effect of the setting aside of the award of the tender and that it would have profound effects on all of the parties. In this regard, the Fund would no longer have a panel to do its litigious work. It would not be represented in the courts. The new panellists would no longer be panellists. The old panellists would also not be panellists because their contracts with the RAF had been terminated. It considered the problems that would manifest themselves in the courts such as, for example, the plaintiffs taking default judgments against the unrepresented Fund and matters being postponed indefinitely, thus frustrating the rights of those plaintiffs who have legitimate claims with good prospects of success. Both of these scenarios, so the court emphasized, would undermine the public interest.[124]

[211] It concluded, in a careful weighing in of the circumstances and competing interests, that it was therefore necessary to temper the setting aside of the tender in a way that minimises the negative effects as follows:

> "I intend to suspend the order reviewing and setting aside the tender so that something remains in place, imperfect as it may be. I intend giving the RAF

[123] At paragraph [101].
[124] At paragraph [104].

what I consider to be a reasonable period within which to start and complete a new tender process. It will, however, have to work with expedition to complete the process timeously. I have been guided by the time it took the RAF from the publication of the request for proposals (on 13 July 2012) to the anticipated finalisation date (31 March 2013) as stated in the RAF's letter dated 28 February 2013 to old panellists terminating their contracts. Adding time at the beginning of the process and reducing time to an extent during the process, I consider it reasonable to expect the RAF to initiate and finalise the new tender within a period of eight months. I shall therefore suspend the order setting aside the tender for roughly eight months."[125]

[212] A third case of *Minister of Mineral Resources and Energy and Others v Sustaining the Wild Coast NPC and Others*[126] concerned the grant of exploration rights by the Minister of Mineral Resources and Energy (the Minister) to Impact Africa Limited (Impact) to be exercised by Shell Exploration and Production South Africa B.V. and the fourth appellant, BG International Limited (BG) (collectively referred to as Shell) as well as two consecutive renewals thereof. The high court set aside the relevant decisions. The Supreme Court of Appeal was satisfied there had been a failure by the Minister to take relevant considerations into account and that the decision was reviewable under section 6(2)*(e)*(*iii*) of PAJA but interposed itself to deal with the consequence of the declaration of unlawfulness that is required under section 172(1)*(b)* of the Constitution.[127]

[213] The SCA affirmed that courts have the widest possible remedial discretion as well as their need to be pragmatic in crafting just and equitable remedies in the exercise of its extensive remedial powers. It emphasised that a just and equitable remedy must be proportionate; fair and just in the context of the particular dispute; ample and flexible; and should place substance above form.[128]

[125] See paragraph [106] together with the order issued by the court.
[126] (58/2023; 71/2023; 351/2023) [2024] ZASCA 84; 2024 (5) SA 38 (SCA) (3 June 2024).
[127] At paragraph [26].
[128] At paragraph [27].

[214] It acknowledged in the peculiar circumstances of the matter that there had been an almost eight-year delay between the granting of the exploration right and the review and that, acting in reliance on the validity of the decisions, there had been significant financial expenditure in the region of R1.1 billion, dating back to 2012 when Impact applied for its technical co-operation permit (which preceded the exploration right). Since two renewals of the exploration right had already been granted, it recognized that there would be only one more opportunity to renew the exploration right. A moratorium placed on exploration rights over the entire South African coast was also taken into account, meaning that Shell and Impact might never get the opportunity to exercise the right. The court further acknowledged the adverse consequences for the public in whose interests the decision-maker purportedly acts. Shell and Impact provided evidence of the economic and social benefits that would fail to materialise without the exploration being undertaken. So too the court recognised public interest in the finality of administrative decision-making and that the degree or materiality of the irregularity or that the long delay and lack of legal certainty may well have a chilling effect on foreign investment. It took account of the appellants' contention that all of these factors could be mitigated by the possibility of directing that measures be implemented, including that a further public participation process be undertaken.[129]

[215] With reference to Plasket J's resolve in *Joubert Galpin Searle Inc*[130] that it was necessary '*to temper the setting aside . . . in a way that minimises the negative effects' and to 'suspend the order reviewing and setting aside . . . so that something remains in place, imperfect as it may be'* the Court concluded that there was much to commend such an approach in the matter before it. Having established that Impact and BG had timeously submitted an application to the Petroleum Agency of South Africa on 21 July 2023 to enter into a third renewal period as permitted by section 81(4) of the Mineral and Petroleum Resources Development Act[131] allowing for the exploration right to remain in force until the third renewal application had been granted or refused, the court reckoned that it was within its power to direct that as part and parcel of a proper consideration of the third renewal application, a further

[129] At paragraphs [28] and [29].
[130] *Supra*. See also paragraphs [209] - [211] of this judgment.
[131] No. 28 of 2002.

public participation process be conducted to cure the identified defects in the process already undertaken. This was especially so as the parties who claimed to have an interest in the matter had been identified and the matters warranting consideration had been fully canvassed in a 19-volume record consisting of some 4000 pages. In crafting appropriate relief the court of appeal thus suspended the orders setting aside the granting of the exploration right and each of the two renewals to meet the practical exigencies of the situation.

[216] Given the tricky dynamics and the various interests that stand to be affected in the present setting, I am inclined to conclude that it would not be appropriate to confirm the setting aside orders and related reinstatement of the respondents which go hand in hand. Some tempering is called for to minimize the negative effects. The erstwhile Board has not operated for a lengthy period. Even in the short term, it should not be revived (whether comprised of five or nine members)[132] to compete with the Interim Board that has ostensibly been responsible for the effective operation of Amatola Water since the members' removals in March 2022. It is the Interim Board that enjoys the confidence placed in it by the ministry which, as stated above, is important in the context of the dynamic of the state owned entity. To use the oft repeated metaphor referenced in similar settings where time has marched on since the review of the impugned decision and changes have taken effect that are better left un-interfered with, one cannot unscramble the proverbial egg.[133]

[217] In my view and in the unique circumstances of the matter a declarator will have to imperfectly suffice and will by way of obvious import censure the appellant for his brusque unlawful termination decisions and the significant flaws in the process adopted by him. The respondents will also by obvious import be vindicated by such an order.

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[132] It is evident that the members other than the respondents (except the 12th respondent) have made their peace with their removals as members of the Erstwhile Board.

[133] See in this regard *South African Property Owners Association ("SAPOA") v Council of the City of Johannesburg Metropolitan Municipality & Others* 2013 (1) SA 42 (SCA)*SAPOA Supra* at [70] - [71], *Borbet South Africa (Pty) Ltd & Others v Nelson Mandela Bay Municipality 2014 (5) SA 256 ECP* [104] - [110], and *Kalil N.O. & Others v Mangaung Metropolitan Municipality & Others* 2014 (5) SA 123 (SCA) at [14] where the court observed metaphorically that "*a great deal of water has flowed under the bridg*e" with reference to a year having passed between an impugned budget resolution and the date of the court's order setting it aside in circumstances where the municipality was already considering its next annual budget.

[218] Since the respondents did not ask that the issue of the costs order granted by the court below be revisited or substituted by an order of punitive costs against the appellant, which may to a small extent have vindicated the violation of their "*personal brand and professional image*" as board members by their removals (which "*risk*" to them by the appellant's unlawful conduct was acknowledged by the court below), this aspect of the order of the court below will remain in place.

[219] As for the costs of appeal, the real success remains with the respondents in opposing the matter and they should be awarded their full costs. Any other costs order would be tantamount to rewarding the appellant for his unlawful decisions and condoning the situation that has come to prevail in the Department's favour by the *de facto* situation currently in place concerning the tenuous position of the Interim Board.[134]

Order:

[220] In conclusion the following order is made:

1. The orders of the court below are amended and substituted as follows:

[134] Concerning the Minister's power to appoint members of the Board under normal circumstances pursuant to the provisions of section 3 of Schedule 1 to the WSA, Mr. Erasmus emphasized that he/she is not compelled to require of a water board to constitute a selection panel to recommend persons for appointment as members of a water board. He/she might decide to do so, so it was contended on behalf of the appellant, but was not obliged to. This facile argument if correct means that the minister may proceed to appoint persons as long as the period of office implicated thereby does not exceed for years, without having required of it to constitute a selection panel for recommendation of members to be so appointed as must have happened in the circumstances of the appointment of the Interim Board which has ostensibly been responsible for the operation of Amatola Water since the dismissals in contention. The use of the word "*may*" in section 3 (1) of the Schedule ought perhaps to be construed as "*must*" in line with other rigours of the appointment process of board members mentioned in the rest of the section but this is not an aspect that this court needs to decide, especially in view of the fact that there is no real challenge before us on appeal regarding the court *a quo*'s omission to have pronounced upon the validity of the appointment of the members of the Interim Board, well at least not on the merits. The fact that the existence of the Interim Board has interposed itself in this manner does however raise interesting questions: Does the Minister have the autonomy to bypass a selection process through a panel envisaged in section 3 of Schedule 1 to the WSA? And how must the word "*may,*" directing his steps in section 3 (1) of the schedule be interpreted in the light of the peremptory injunction that he "*must*" take other steps in the process? It appears to me to be the exact kind of concern sought to be counteracted by the National State Enterprises Bill [B1-2024]awaiting the approval of Parliament. (See in this respect the Memorandum on the Objects of the Bill.)

“(a) It is declared that the first respondent acted irrationally and unlawfully in taking the decision on 25 March 2022 in terms of section 35 (5) of the Water Services Act, No.108 of 1977 to dissolve the entire erstwhile Board of control of the Amatola Water Board, thereby terminating the applicants’ appointments as board members thereby.

(b) Despite the declarator in prayer (a), the first respondent’s decision to dissolve the entire erstwhile Board, thereby terminating the applicants’ appointments as board members thereby, is not set aside.

(c) (deleted).

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

2. Save to the extent indicate above, the appeal is dismissed.

3. The appellant is directed to pay the costs of the appeal.

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B HARTLE

JUDGE OF THE HIGH COURT

I AGREE,

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N GQAMANA

JUDGE OF THE HIGH COURT

I AGREE,

I BANDS

JUDGE OF THE HIGH COURT

DATE OF APPEAL	:	3 June 2024
*DATE OF JUDGMENT	:	20 January 2025

Appearances:

For the appellant: Mr. C Erasmus SC together with Mr.M Vimbi instructed by Lulama Prince Inc., Makhanda (ref. Ms. L Prince).

For the respondents: Ms. N Stein instructed by B B Nyanda Attorneys c/o Mabeca Tilana Inc., Makhanda (ref. Ms. Tilana Mabeca).

Watching Brief on behalf of Amatola Water: Mr. Sokutu of Siyatemba Sokotu Attorneys Inc, East London.

Judgment delivered electronically on this date by email publication to the parties.