



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

Case No: 107704/2023

(1) REPORTABLE: yes	
(2) OF INTEREST TO OTHER JUDGES: yes	
(3) REVISED:	
 SIGNATURE	18 August 2025 DATE

In the matter between:

LETLHOGONOLO NOGE-TUNGAMIRAI

Applicant

and

**MINISTER OF COMMUNICATIONS AND DIGITAL
TECHNOLOGIES**

First Respondent

**THE DEPARTMENT OF COMMUNICATIONS AND
DIGITAL TECHNOLOGIES**

Second Respondent

POSTBANK (SOC) LIMITED

Third Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 18 August 2025.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The Applicant, a former non-executive board member of the SA Postbank SOC Limited, the Third Respondent [Postbank], in her amended relief seeks to review and set aside the decision by the First respondent, the Minister of Communications & Digital Technologies [the Minister] to remove her from the board of directors of the Postbank [the impugned decision][review relief]. Over and above the review relief, the Applicant seeks to be reinstated with full benefits upon the appointment of the new board, a public apology from the Minister and costs.

[2] The Minister and Second Respondents, the Department of Communications & Digital Technologies [Department] [collectively the Respondents] oppose the review relief and the Postbank has filed a notice to abide.

[3] The Applicant in her founding papers contends that the impugned decision is not excluded from administrative-law scrutiny of Promotion of Administrative Justice Act 3 of 2000 [PAJA] alternatively, it is to be scrutinised against the principles of legality in that the Minister did not comply with section 71(1) and (2) of the Companies Act¹ when he exercised his power in terms of section 15 and 16 of the Postbank Act nor, did he comply with the shareholders compact agreement and as such, she was unlawfully and unconstitutionally removed her from office.

¹ Act 71 of 2008.

[4] The nub of the Respondents argument was that the Minister took the impugned decision in his capacity as a shareholder of the Postbank and as such the impugned decision is not reviewable. The Respondents contend that the impugned decision was not taken by the Minister as an act of public or executive power and as such, neither PAJA nor the principles of legality apply. They contend that the Applicant was lawfully removed from office in terms of section 71 of the Companies Act.

PRELIMINARY ISSUES

Applicant's Supplementary Affidavit

[5] Procedurally the Respondents did not answer to the Applicant's supplementary affidavit as it was filed without leave of the Court.

[6] The Applicant did not bring her review relief in terms of Uniform rule 53 as required. The reason for this, in all likelihood, was that the Applicant in her unamended notice of motion as her main relief sought final interdictory relief to secure her reinstatement to the board of directors and, only in the alternative, review relief. This would why no record was filed. Curiously though, and absent initiating the application by way uniform rule 53, the Applicant simply filed her supplementary papers and incorrectly contended that she as of right could do so as she challenging a decision she. In support of this right, her Counsel in argument relied on the *audi alteram partem* rule and made no mention of the adherence of uniform rule 6 nor uniform rule 53 as a means to be heard.

[7] Against this backdrop, the Applicant filed substantial founding appears, the content of which, without annexures, exceeded 96 pages and with annexures 431 pages. The Applicant too, sought to amend her notice of motion in terms of uniform rule 28 amendment. The nub of the sought amendment was to move for her review relief and to seek her reinstatement as remedial relief. The Respondents did not file an objection.

[8] The Applicant contended under oath that the purpose of the supplementary affidavit was to explain why she wished to amend her notice of motion. This is an unnecessary purpose, it is not catered for in the rules nor rule 28. In truth the purpose of the supplementary affidavit was to expand the reach of her review grounds catered for in her founding papers. This is not permissible and therefore no automatic right exists.

[9] No procedure elected by the Applicant on motion, nor factual basis relied on, provides the Applicant with an automatic procedural right simply to supplement her founding papers without first seeking leave of this Court. In contrast, uniform rule 53 provides that a supplementary affidavit, in review proceedings, is permissible but only triggered once a record has been filed. This rule caters for a litigant to expand the founding papers as a direct result of any new evidence which may arise from the filed record. This was not the case here.

[10] The Applicant's Counsel from the bar and in argument, at the hearing sought leave. This afterthought was done without having regard to the procedural fact that the Respondents had answered the allegations in the Applicant's supplementary papers and that if leave was to be granted, the Respondents would have been entitled to request a postponement in order to file an answer. Leave to be heard on this basis requires the *audi* principle to be applied to all the parties.

[11] Considering all the facts and the circumstances relayed above, this Court does not grant the Applicant leave and the set of filed affidavits, as catered for in uniform rule 6 and as foreshadowed in the Applicant's notice of motion are to be considered in the adjudication of the Applicant's relief.

[12] Flowing from that ruling which affidavits filed in terms of uniform rule 6 are to be considered? Before the Court was an application to condone the late filing of the Respondent's answering affidavit.

The late filing of the Respondents' answering affidavit

[13] The Respondents' answering affidavit was due on the 1 July 2024. The Applicant granted the Respondents an extension to file it as per their written request for extension by the 12 July 2024. Such indulgence was granted, by agreement.

[14] This answering affidavit was not filed as agreed. Therefore, on the 30 August 2024 the Applicant's attorney called upon the Respondents to file an application for condonation. Simultaneously and on the 30 August 2024, the Respondents file their answering affidavit. Thereafter, the Applicant filed her reply thereto but stated that the same was only filed *"To the extent this Court condones the late delivery of the Answering Affidavit, the purpose of this replying affidavit is to address the allegations made on behalf of the Respondent in the Answering Affidavit, - "*

[15] The Respondents filed a substantive application for condonation. This application is not opposed. The Respondents in their founding affidavit not only detail the procedural history of the matter up and until the date of their answer on the 12 July 2024 but, the entire period up and until the 30 August 2024.

[16] The nub of the explanation for their delay of a period just over a month [delay period] was dealt with having regard to two issues. The first issue was the effect, if any, of the self-review application brought by the Postbank under case number 132132/23. The effect of its content in relation the initial settled answering affidavit received from their Counsel on the 7 June 2024. The second issue was the time it took to get confirmation from the Minister's office, as the political head of the Department, for the deponent, the Chief Director: Legal Services of the Department, to obtain permission to sign his own affidavit, the answering affidavit. The deponent in the condonation application stated that he could not automatically go ahead and sign the final settled papers, even though the facts were in his knowledge, without the go-ahead from the Minister's office. This took time as the material facts concerned a period not all served by the Minister cited in these proceedings. Having regard to the explanation for the entire delay period the delay itself is not unreasonable and the explanation acceptable.

[17] This Court too has taken regard to the fact the Applicant, albeit on condition, has filed a reply to the Respondents' answer. Furthermore, that most of the material

facts to be considered are common cause and that no prejudice will be suffered by granting condonation. In exercising its discretion this Court grants the Respondents condonation as prayed for in their substantive application.

[18] Now that the preliminary issues have been considered, the facts pertaining to the main application require consideration. It is important to deal extensively with the facts, both the facts before and after the Applicant's appointment in 2022. Not only to obtain a clear picture of all the facts giving rise to the impugned decision but to consider the Applicants argument that this Court must have regard to the role she actually played before the impugned decision.

BACKGROUND OF THE SOUTH AFRICAN POSTBANK SOC LIMITED AND THE POSTBANK SOC LIMITED

[19] The SA Postbank is a public entity as defined in section 1 of the Public Finance Management Act 1 of 1999 [PFMA] and at the material time, was wholly owned by the South African Post Office SOC Limited [SAPO]. It operated as a division of the SAPO since its inception until 1 April 2019, whereafter it was incorporated as a separate legal entity in terms of section 6 of the Postbank Act, Act 9 of 2010, as amended [Postbank Act].

[20] In terms of the Postbank Act² read together with clause 1.3 of its Memorandum of Incorporation, the SA Postbank is a legal person whose aim it is to conduct the business of a bank and, in that way, to render banking services through the infrastructure of the SAPO. It is through the SA Postbank that millions of South African citizens receive social grants through cash payment points. In short, the SA Postbank delivers a public service by the payment of social grants.

[21] According to the provisions of the Postbank Act, the SA Postbank is controlled by a board of directors appointed by the Minister with concurrence of the Minister of Finance³. The board is the accounting authority which runs the SA

² Section 2 of the SA Postbank Act 9 of 2010.

³ Section 10 of the SA Postbank Act 9 of 2010

Postbank and the State, through the Minister is the executive authority. The Minister in terms of the Postbank Act is empowered to remove members of the board⁴ and until the SA Postbank is registered as a Bank, the Minister is empowered to take any action if the SA Postbank is mismanaged or if it fails to perform its functions effectively and efficiently. The Minister's powers include appointing an administrator to take over the relevant function of the SA Postbank, in certain circumstances.⁵

[22] In terms of the Treasury Regulation 29.2 an annual shareholders compact agreement is to be concluded between the accounting authority and the executive authority. The purpose of the shareholders compact agreement is to regulate the relationship between them and to confirm the key performance measures and indicators to be attained by the SA Postbank in that year. In the material year leading up to the 2023/24 financial year, the SA Postbank wished to finalise its migration to an independent entity and to acquire a banking license so that it could transition into a fully-fledged State bank.

[23] When the South African Postbank Limited Amendment Bill was signed into law on 29 September 2023 [Postbank Bill], its provisions catered for the transfer of shareholding from the SAPO into an independent entity, the Postbank in terms of the Banks Act, 1990. The Postbank is still not registered as a bank and, at the date of the impugned decision the State shares were held in n the SA Postbank a division of SAPO and not the Postbank.

RELEVANT FACTS

Before the appointment of the Applicant

[24] In 2018, SAPO and the South African Social Security Agency [SASSA] concluded a Master Service Agreement [MSA] for SAPO to facilitate the payment of social grants.

⁴ Section 15 of the SA Postbank Act.

⁵ Section 25(c)(i) of the SA Postbank Act.

[25] SAPO wished to have a banking system which was integrated that would enable SASSA beneficiaries to withdraw their social security grants from an ATM or make payments therefrom at a point of sale. To give effect to the MSA and the need for an integrated system, SAPO, in March 2018, entered into a licence agreement with FSS Technology South Africa (Pty) Limited [FSS]. The term of the licensing agreement was for a period of 5 (five) years for the use and maintenance of the Integrated Grant Payment System [IGPS]. In consequence the use of the IGPS was to endure until the end of March 2023. SASSA beneficiaries would now be able to withdraw their social grants or make payments at a point of sale if desired.

[26] The terms of the licensing agreement did not include the 'payment switch' (that which configures the requirements of the IGPS). The reason being that SAPO believed that its own payment switch, the 'postilion' would be compatible. Regrettably, this was not the position forcing SAPO to use FFS's 'pay switch' in order to comply with its obligations in terms of the MSA. Notwithstanding the mishap, FFS agreed to allow SAPO to use its "pay switch" for a period of 6 (six) months without raising a fee. The terms were agreeable as SAPO reasoned that within the 6 (six) months it could upgrade its own 'postilion'. The 6 (six) month period became 3 (three) years without payment to FFS.

[27] On the 7 January 2021, SAPO ceded its rights title and interest in the licencing agreement to SA Postbank. On the 13 February 2021, FFS now demanded payment from SA Postbank and due to non-payment, FFS suspended the switch services for 2 hours. The 2 (two) hours suspension affected 160 000 grant beneficiaries nationally. Following negotiations and an interim payment, FFS restored the payment switch service.

[28] Unfortunately, the consequence of the 2 (two) hour suspension caused financial loss to the SA Postbank which was further compounded by the terms of the MSA which provided that SASSA was entitled to impose a penalty of R17 million due to the contractual breach.

[29] There is no evidence on the papers that the SA Postbank had developed the postilion. Rather, on the 19 February 2021 it concluded a payment agreement with FSS for the continued use of its 'payment switch' now, per transaction. The payment agreement was that the payment agreement was not concluded following proper procurement processes in terms of PFMA. The payment agreement therefore required the National treasury's approval and/or condonation in order for any payments made in terms thereof to be regularised.

[30] In May 2021, FSS ceded its right, title, and interest under the licencing agreement to Electronic Connect. The payment agreement stood, and the SA Postbank now continued to honour it by paying Electronic Connect per transaction for the periods January 2021 to January 2022.

[31] On the 21 September 2021, a special board meeting was convened by the SA Postbank board. The board resolved that the payments to Electronic Connect would continue subject to receiving condonation from Treasury. The board only sought such condonation 3 (three) months later in December 2021.

[32] On the 23 February 2022, National Treasury declined the condonation application on the basis that there was no consequence management applied in accordance with the Irregular Expenditure Framework issued in terms of National Treasury infrastructure of 2019/2020. Electronic Connect did not receive payments for the months February and March 2022.

[33] On the 14 April 2022 the erstwhile Minister [Minister Ntshavheni] engaged with the SA Postbank board regarding an independent investigation into the FSS/Electronic Connect contract and payments to Electronic Connect since SA Postbank took over the contract.

[34] Four months later and in September 2022, the SA Postbank board commissioned KPMG to conduct a forensic investigation into the licencing agreement, it halted payments to Electronic Connect for the use of the 'payment

switch' pending the finalisation of the investigation. Electronic Connect threatened to terminate the use of the 'payment switch'.

Subsequent to the appointment of the Applicant

[35] The Applicant with effect from the 1 October 2022 was appointed as a non-executive member of the board of directors for a period of 5 (five) years by the then former Minister, Minister Ntshavheni.

[36] On the 24 November 2022 the SA Postbank was warned by FSS of Electronic Connects continual breach of their agreement. FSS informed SA Postbank that if Electronic Connect did not remedy the breach it would suspend advanced technical support pertaining to the IGPS modules and the 'payment switch'.

[37] On the 25 November 2022 Electronic Connect explaining its financial inability to cure the breach now demanded a reduced amount from the SA Postbank as negotiated in June 2022. It confirmed that it could not terminate the provisions of the IGPS and the 'payment switch' as it constituted an essential service and that terminating it would affect on those citizens who relied on grants. It however confirmed that non-payment would have the effect that they would not assist the SA Postbank to migrate from the IGPS system.

[38] On the 2 December 2022 Electronic Connect sent a settlement proposal to SA Postbank seeking payment of an amount exceeding 46 million rand, it reaffirmed its commitment to assist with the SA Postbank with its intended migration system but advised them only to pursue a partial migration as what they had tabled was technically complex and not feasible and that it would result in fruitless and wasteful expenditure as the project could would only be completed after the expiration of the licensing agreement in March 2023. It further informed that it had loaded keys to the payment switch and that this licence would expire on the 9 December 2022.

[39] Electronic Connect on the 7 December 2022 informed SA Postbank that it was not going to tolerate the free usage of the 'payment switch' and that its own settlement proposal was not signed by SA Postbank.

[40] On the 8 December 2022 the SA Postbank's team sought an urgent undertaking from Electronic Connect not to discontinue the service and an urgent meeting. Electronic Connect urged and advised the board to bring an urgent application for the relief is sought.

[41] The board did not, it rather only on the 14 December 2022 wrote to the office of the Chief Procurement Officer at National Treasury seeking condonation for the payment agreement of Electronic Connect to authorise future payments to electronic connect. The board did not seek regularisation of irregular expenditure incurred.

[42] On the 15 December 2022 the board resolved not to seek urgent relief and without the 'backing' of National Treasury, it on the 26 December 2022 concluded a written settlement agreement in which it admitted its indebtedness to Electronic Connect in an amount of R46,090,543.70 and agreed to make payment of 50% of the debt by the 31 December 2022. The remaining 50% was to be deferred until the finalisation of the final report by KPMG [settlement agreement]. SA Postbank paid the R23 million, and the services remained uninterrupted through the festive season.

[43] On the 6 March 2023, the Minister responsible for the impugned decision [Minister Mondli Gungubele] was appointed as the Minister of Communication, as a result of a Cabinet reshuffle.

[44] Five days after the Minister's appointment and on the 11 March 2023 Electronic Connect issued summons seeking payment from the SA Postbank in terms of the settlement agreement. SA Postbank defended the action.

[45] Notwithstanding the pending litigation, in March the SA Postbank wrote to Electronic Connect, advising that, given that the MSA had terminated by effluxion of time on the 15 March 2023, and to mitigate the risk to SASSA recipients, SA

Postbank was committed to continue working with Electronic Connect on the same terms and conditions as the “*expired*” licensing agreement, until a new contract was concluded, subject to obtaining necessary approval from Treasury.

[46] On the 20 March 2023, Electronic Connect responded by advising that if the SA Postbank sought to avoid a national disaster, SA Postbank must make up-front payment on or before the 31 March 2023 to enable it to load the necessary keys to extend the IGPS services for 12 (twelve) months, failing which Electronic Connect would allow IGPS and other connected services to lapse on the expiration date of the licencing agreement, 31 March 2023, without further notice to the SA Postbank.

[47] On the 22 March 2023, a report was tabled by the SA Postbank board in which it stated it would not renew the licensing agreement with FSS/Electronic Connect but rather intended to migrate to a UBS System, a new core banking system. Moreover, given that the migration and the decommissioning would be long and a complex process, it would require an extension of Electronic Connects contract until March 2024, by which time the SA Postbank will have a compliant financial switch.

[48] On the 8 May 2023, the Postbank board delivered a presentation to the Minister to apprise him of the rationale behind appointing Electronic Connect for a period of 12 (twelve) months beyond March 2023 as per the report and in so doing, presented a comprehensive plan to decommission the IGPS and acquisition and development of the new core banking system: a process which was already underway. Furthermore, to advise him that to discontinue the services of Electronic Connect will result in the SA Postbank not having a system to pay the grants to SASSA beneficiaries.

[49] However in that same month, in May 2023, the Minister was advised of the contrary by the board, he was informed of a foreseeable, namely that that the migration from the IGPS to the UBS system was not compatible and had to be halted, including the decommissioning of the IGPS. Foreseeable in that Electronic Connect in December 2022 had already prewarned the board of the consequence

of such a migration. In consequence, it informed the Minister that the board once again approved the appointment of Electronic Connect for a further period of 12 (twelve) months to ride the storm, ending 31 March 2024.

[50] As a result of the never-ending storm, and on the 14 June 2023, the Minister held a meeting with the board in the presence of Mr Khayaletu Ngema [Mr Ngema], who was not a member of the board. In the meeting the Minister wished to address the Electronic Connect/FSS findings. In this meeting he also asked each board member to account for the knowledge of the Electronic Connect contract.

[51] On the 17 July 2023, the Minister wrote to the SA Postbank board enquiring about the extension of the Electronic Connect contract and what steps had been taken by the board to ensure that the contract complies with section 217 of the Constitution given that the contract had already expired on the 16 March 2023.

[52] On the 25 July 2023, the Minister again wrote to the board advising that in a board meeting which was held in September 2021, the board resolved to continue making payments to FSS, without a contract and therefore it was unlawful, this is despite National Treasury refusing condonation. He therefore required a response from the board collectively and individually furnish him with a response why he should not institute consequence management against each individual director for their conduct in the matter.

[53] On the 31 July 2023, SA Postbank now brought an urgent application against Electronic Connect resulting from Electronic Connects refusal to give an undertaking not to switch off its services. This is in circumstances where the SA Postbank had not paid Electronic Connect owing to the fact that the payments of the outstanding amounts were invoices which were not authorised. Therefore, the SA Postbank sought authorisation to make the payment of the outstanding invoices and to interdict Electronic Connect from suspending the switch services, including review relief which was to be brought within 60 (sixty) days of the order. The former was interim and, was granted.

[54] On the 1 August 2023, the board and the Minister received the final report from KPMG, which, *inter alia*, confirmed that the payment agreement was unlawful and consequently the settlement agreement was unlawful and that further steps should be taken to regularise the usage of the pay switch to comply with the prescripts of law pertaining to procurement. The report also recommended that the SA Postbank recover certain monies paid to Electronic Connect for the usage of the pay switch.

[55] On the 15 August 2023, and after the Minister had considered the Department's review outcome for the year ending 31 March 2023, the Minister informed the board of the Department's concern with the recurrence of irregular expenditure. The Minister then urged the board to ensure that consequence management is taken to recover losses and to take appropriate disciplinary action and to submit quarterly reports setting out the plans implemented by the board. The Minister required a report dealing with the implemented audit action plans including the consequence managements steps taken regarding irregular expenditure. The Minister requested the report by the 30 November 2023.

[56] On the 21 August 2023, the board responded to the Minister and in short, it now wished to set aside the payment agreement and the settlement agreement by means of review relief but still wished to pay Electronic Connect for the pay switch to ensure the SASSA beneficiaries received their grants and that it insisted to be afforded an opportunity to regularise the payment switch matter. This was its case on how to address irregular expenditure.

[57] On the 22 August 2023, the Minister wrote to the board advising them that they individually now must advise him why they should not be removed from office in terms of section 15(2) of the Postbank Act because the urgent application which had been brought by them was an indictment on the board and it showed that the board had failed to ensure that there was valid and lawful contracts in place for the financial switch since 2021. Furthermore, notwithstanding his concerns about the invalid contract with Electronic Connect, the SA Postbank continued to pay FSS/Electronic Connect for the services to the turn of R140 million since 2021.

[58] On the 30 August 2023, the board reiterated the steps it was taking as advised on the 21 August 2023 and reminded the Minister that the SA Postbank inherited both the service provider and the service, being the payment switch, from the SAPO. Nevertheless, they reiterated that the SA Postbank made significant revenue from the use of this pay switch and that there was no financial loss. The Minister was urged to exhaust the shareholder compact process before resorting to any action contemplated in terms of section 15 the Postbank Act.

[59] On the 9 September 2023, the Minister wrote to the board advising that he had received the board members' representations and was ready to make his decision regarding the removal of the board at the AGM in terms of section 71 of the Companies Act.

[60] On the 12 September 2023, some members of the SA Postbank board, with the exclusion of the Applicant, wrote to the Minister giving notice of their resignation and reasons.

[61] On the 13 September 2023, the Minister wrote to the Applicant. The letter refers to, *inter alia*, "*NOTICE OF INTENTION TO REMOVE THE DIRECTORS OF THE BOARD*". In the letter he refers to her letter of the 25 August 2023. In this letter the Minister explains that he has taken into consideration that she is the chairperson of a critical committee, the social and ethics committee. That although she has alleged to be hands on with regards to the contract management and has raised certain governance related issues, he could not find any evidence from the time she was appointed that she ever objected to the SA Postbank's continued use of the service provider who was appointed on an irregular basis nor that she request further information. In that way to try and make a more informed decision on her way forward for the SA Postbank. In amplification, he stated that she had participated in meetings with Electronic Connect matters since the time of her appointment to the board in October 2022 and he reminded her that soon after her appointment Electronic Connect serviced a summons the SA Post Office. All of this

according to the Minister was an illustration of lack of oversight by a director with fiduciary responsibility to the SA Postbank.

[62] On the 14 September 2023, the Minister removed the entire board without hearing the Applicant.

[63] On the 14 September 2023, via the press release, the following *inter alia* was stated:

"In light of the forensic report, the Minister followed due process and indicated his intention to make his final decision at today's AGM in terms of section 71 of the Companies Act which sets out the process a shareholder must follow to remove directors (own emphasis). The Board of Directors tendered their resignation on the 12th of September 2023 ahead of today's AGM. The only remaining non-executive director was removed by the Minister at this morning's AGM in line with section 71 of the Companies Act (own emphasis).

As required by the Postbank Act, the Department has issued an advertisement for the appointment of a new Board of Directors and will seek the opinions of the relevant regulatory authorities on the stability of members to be appointed.

To avoid a vacuum in governance (own emphasis), and in accordance with section 25 of the Postbank Act. The Minister has appointed Mr Khayaletu Ngema as the administrator of the Postbank pending the appointment of the new board."

[64] On the 6 October 2023, the Applicant authored a letter to the President of the Republic of South Africa in which she, *inter alia*, asserted that she has a right to lawful administrative action. No response has been received from the office of the President.

REVIEW RELIEF

[65] Irrespective of the pathway to review relied on by the Applicant, the Respondents as dealt with, hold the view that the impugned decision taken by the Minister is not reviewable and that the Minister was exercising a power afforded to him as a shareholder in terms of the Companies Act.

[66] The Applicant, failed to specifically deal with the nature of the Minister's power in her founding papers also failed to specifically engage with the Minister's non reviewable point in reply save, to reaffirm the principles of legality *vis a vis* the impugned decision and left the non-reviewable point to legal argument. During argument though, it became clear that the Applicant sought the principles of legality to be applied by the Court. Notwithstanding the reliance, her Counsel failed to explain why the pathway to the review relief was based on legality principles when, if PAJA was applicable, PAJA must be applied. The complexities of such an enquiry and its relevance, was completely missed by the Applicant's Counsel. However, he, without dealing with the Respondents' non-reviewable point in argument, stressed that the Minister none the less did not comply with section 71 of the Companies Act and he therefore was precluded from voting.

[67] Irrespective of the pathway of the review and noting that no issue of delay in bringing the review relief has been raised, there appears to be no reason why this Court, if it finds that the impugned decision is reviewable, can't apply the principles of legality as raised in the Applicant's in so far as those papers grounds find application under PAJA too.

IDENTIFIED ISSUES FOR DETERMINATION

[68] The following determinable issues have crystalised, namely:

- 68.1. Is the impugned decision reviewable or is the Minister shielded by section 71 of the Companies Act as a shareholder?

68.2. Did the Minister need to comply with the prescripts of section 71(2) of the Companies Act to remove the Applicant lawfully?

68.3. Was the impugned decision rational?

DISCUSSION OF THE ISSUES

Is the impugned decision reviewable or is the Minister shielded by the provisions of section 71 of the Companies Act as a shareholder?

[69] The answer to this question is important because if the impugned decision is not reviewable it would mean that the Minister's decision would not be subject to any level of review scrutiny. The starting point is to determine which empowering provision provides the Minister with the power to remove a member of the board.

[70] It is common cause that on the on the 22 August 2023 the Minister wrote to the board advising them that they must individually advise him why they should not be removed from office in terms of section 15(2) of the Postbank Act.

[71] Section 15(2) of the Postbank Act provides the Minister with the power, subject to affording the member of the board concerned a reasonable opportunity to be heard, to remove a member from office if he deems that an applicable reason, as listed under subsection 15(2) (a) to (f), applies. In other words, the Minister's discretion to remove a member of the board must be exercised within the prescribed options listed under subsections of 15(2) of the Postbank Act.

[72] Section 15(2) (d) states that:

"15. (2) The Minister may, after having afforded the member of the Board concerned a reasonable opportunity to be heard, remove the member from office if that member-

(a)-(c) –

(d) *neglected to properly perform the function of his or her office;*"

[73] According to the Respondents: "*The Postbank Act empowers the Minister to act against members of the Postbank board of directors if they have failed to act in a manner provided for in the two instruments (the Postbank Act and the shareholder's compact"- own emphasis). The Minister did exactly that in this case and no case has been made to prove that there was no factual and legal basis for the Minister to act in the manner in which the Minister did.*"

[74] Flowing from that and from the Minister's intention to exercise his power in terms of section 15 to remove the member of the board in the letter dated the 22 August 2023, it is clear that the Minister was empowered to remove the Applicant in terms of section 15, he intended to remove her in terms of section 15 and, on his own version acted in terms of the Postbank Act as an instrument to remove her.

[75] Section 71 of the Companies Act on the other hand does not contain an empowering provision directed at the Minister but rather, its provisions set out a mechanism by which the Minister⁶, as a shareholder representing the State, can remove a director once he has already exercised his power. The means the Minister elected to use to assert his exercised power was, to vote so that a resolution to remove could be adopted.

[76] The process adopted by the Minister of section 71 of the Companies Act states that:

"(1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders

⁶ *The Minister of Defence and Military Veterans* (CCT 133/13) [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC) (10 June 2014).

meeting by the persons entitled to exercise voting rights in an election of that director, subject to the provisions of (2).

- (2) *Before the shareholders of a company may consider a resolution* (own emphasis) contemplated under subsection (1)-
- (a) *the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and*
 - (b) *the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote."*

[77] The Minister argues that because he wore his shareholder cap when he voted at the annual general meeting, the impugned decision is absolved from judicial review scrutiny. Other than making the allegation, the Minister nor his legal team fully explained or engaged with this contention. The Constitutional Court [CC] in the matter of The Minister of Defence and Military Veterans⁷ [Minister of Defence matter] however did, and did so by, *inter alia*, engaging with the interplay between two legislative instruments which were applicable, on the facts, at the time of a board member's removal in a State-owned entity. The two instruments were the Armscor Act and section 71 of the Companies Act. The CC found that nature the Minister of Defence's power to remove the members of the board was in terms of the section 8(c) Armscor Act and, that section 71(2) of the Companies Act prescribed the process to remove. The distinguishing feature is that in the Minister of Defence matter, the parties accepted that the Minister of Defence's decision to remove was reviewable, which is not the Minister's stance in this application.

[78] Flowing from the majority decision in The Minister of Defence matter section 15 of the Postbank Act gave the Minister the substantive criteria and power

⁷ *Ibid* 6.

to remove the Applicant. The Minister relies on the Postbank Act and there is little doubt that substantively, the Minister exercised his power in terms of the Postbank to remove the Applicant.

[79] Absent the empowering decision to remove in terms of section 15 of the Postbank Act, the resolution to remove referred to in section 71(2) of the Companies Act, would not have been tabled at the AGM. Absent the Minister at the meeting no vote rights could have been exercised in terms of section 71(1) of the Companies Act as State, through the Minister held 100% of the voting rights. Absent compliance of section 71(2)(b) of the Companies Act, the resolution to remove was the final decision to remove.

[80] It is common cause that the Minister at the meeting did not comply with sub section 71(2)(b) of the Companies Act by allowing the Applicant to be heard at the meeting. Without, at this stage, considering whether he was entitled, on those common cause facts to vote, this Court applying the CC's reasoning in the Minister of Defence matter to the facts in this application and on the facts as reasoned, finds that the impugned decision is reviewable and that the Minister's decision is not shielded from judicial scrutiny by the provisions of the Companies Act.

Review relief

[81] The Applicant contends that the Minister was not lawfully permitted to remove her having regard to his non-compliance of section 71 of the Companies Act and that he breached the provisions of the Shareholders.

Did the Minister need to comply with the prescripts of section 71(2) of the Companies Act to remove the Applicant lawfully?

[82] It is common cause that the Minister did not afford the Applicant a reasonable opportunity to make a presentation, in person or through a representative, at and to the meeting, before the resolution was put to a vote in compliance of comply with section 71(2)(b) of the Companies Act. The Minister however argues that the

Applicant received notice of his intention and the meeting and that he did give her an opportunity to be heard by virtue of his letter addressed to the board on the 22 August 2023.

[83] On the facts the letter of the 13 September 2023 addressed to the Applicant was headed "*FSS/ELECTRONOC CONNECT FINANCIAL SWITCH CONTRACT AND NOTICE OF INTENTION TO REMOVE THE DIRECTORS OF THE BOARD*" the Minister informs the board that he has applied his mind fully and will make his decision at the AGM meeting in line with section 71 of the Companies Act. Applying section 71 the decision can only be whether to vote or not to pass a resolution.

[84] The Applicant is not invited to make any further reasonable representations to the meeting in person or through a representative after considering the Minister's reasons to her in the 13 September letter. She is not then invited to apply her own mind to the reasons and to be finally heard.

[85] But what of the Minister's argument that the Applicant was provided an opportunity on the 22 August 2023 to show cause why he should not remove the board members from office does it suffer the same fate as the 22 September 2023 letter as reasoned? Is compliance of section 15(2) of the Postbank Act which speaks to a reasonable opportunity to be heard and not to representations in person or through a representative at the meeting itself as catered for in section 71 of the Companies Act sufficient compliance? An important question to be answered in that two legislative provisions relating to the removal of a director apply to the Applicant's removal and both speak to the *audi* principle.

[86] If simultaneous legislative arrangements applying at once when the Minister intends to remove a director of the board consideration must be had to ascertain which provisions of what act applies and why. None of the parties engaged with this issue even though the Minister in passing, when he contended, he had already complied with the *audi* principle, argued that he was absolved from the section 71 *audi* requirement. The CC in the Minister of Defence matter grappled with whether the right to be heard [*audi* principle] in section 71(2)(b) of the Companies Act applied

when the Minister of Defence, relying on the Armscor Act as the empowering provision to remove, argued that she did not have to comply as the Armscor Act did not require compliance of the *audi* principle. A similar argument in this matter except for different reasons, the Minister in this matter contends compliance of the *audi* principle through section 15 of the Postbank Act and that that is sufficient regarding section 71 compliance.

[87] Different legislative arrangements may, at times, cause conflict. Conflict in terms of the Companies Act when dealing with a State-owned company has been anticipated. Section 9(1) of the Companies Act states that, subject to section 5(4) and 5(5) of the Companies Act, any provision of the Companies Act that applies to a public company applies also to a state-owned company except to the extent that the Minister has been granted an exemption in terms of section 9(3) of the Companies Act. No evidence is before this Court that an exemption applies.

[88] According to section 27 of the Postbank Act, the provisions of the Companies Act don't apply to the company if there is a special or contrary arrangement made by the Postbank Act rendering such a provision inappropriate or inapplicable or if the Minister of Trade and Industry has issued a declaration under section 28. Whether a declaration had been issued is not apparent from the papers. However, a special arrangement, albeit a dedicated provision for the removal of a member of the board is catered for in section 15 of the Postbank Act.

[89] Section 5(4) of the Companies Act states that if there is inconsistency between a provision of the Companies Act and the provision of any other national legislation, the provision of both Acts applies concurrently to the extent that it is possible to apply and comply with the one of the inconsistent provisions without contravening the second.

[90] Applying section 27 of the Postbank Act, it cannot be said nor was it argued before this Court that the provisions of section 71 of the Companies Act did not apply, and that the special provision, of section 15, is inappropriate or inapplicable.

In consequence it appears that the Companies Act applies. But does the Minister have to comply with the audi principal section 71(2)(b) of the Companies Act?

[91] The application of the Companies Act having regard to section 15 of the Postbank Act is subject to the test set out in section 5(4) and (5). This test was applied and considered by the CC in the Minister of Defence matter.⁸ Applying the test to the substantive facts in this matter, both section 71 of the Companies Act, and section 15 of the Postbank Act require that the *audi* principle be applied. Presently such points to consistency between the legislative provisions. The Postbank Act is not listed in section 5(5) of the Companies Act and, both acts appear to have been intended to apply concurrently. However, section 71(2)(a) and (b) appears to place a procedural constraint on the Minister in that he can't unlock the procedure to remove whilst no procedural constraints exist in the Postbank Act. Notwithstanding this inconsistency logically, the Companies Act must apply concurrently to give guidance to the SA Postbank as a Company.⁹

[92] Applying section 5(4)(a) of the Companies Act, *"If there is inconsistency between the provisions of both acts, both acts apply concurrently, to the extent that it is possible to apply and comply (own emphasis) with the one of the inconsistent provisions without contravening the second.* Compliance with the *audi* principle in terms of section 71 does not contravene section 15 of the Postbank Act. In consequence both apply but if the Minister intended to vote, as he did he must have complied with the provisions of 71.

[93] Flowing from such none compliance and having regard to section 71(2) which states, in text that that:

"71(2) Before (own emphasis) the shareholders of a company may consider a resolution contemplated under subsection (1)-

(a) -

⁸ Supra footnote at para 72-78.

⁹ Sasol Synthetic Fuels (Pty)Ltd and Others v Lambert and Others [2001] ZASCA 133; 2002 (2) SA 21 (SCA).

- (b) *the director must be afforded (own emphasis) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote (own emphasis)."*

[94] Applying the provision of the Companies, the Minister was not in a position to unlock the process to remove, he could not consider his own resolution nor cast his vote, the process triggering the Applicant's removal process was unlawful and arbitrary.

[95] Furthermore, in so far as the Applicant attacks the lawfulness of her removal in terms of the shareholders compact agreement and in so far as the Minister relies on it as a substantive instrument to remove, the preamble to section 71(1) states that:

"(1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, (own emphasis) or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to the provisions of (2) (own emphasis)."

[96] The provisions of the shareholder's compact agreement, however applied by do not disturb the compliance of section 71 of the Companies Act.

[97] In so far as it is necessary to consider the rationality of the impugned decision itself: Was the Minister's decision rational?

[98] The Applicant in her founding papers relies on three reasons why the Minister's decision is irrational, the last two reasons are raised, in the alternative. The reasons are that:

- 98.1. the impugned decision was not rationally connected to the purpose for which it was taken and/or the objects of the Post bank;
- 98.2. as a result of the information before the Minister; or
- 98.3. for the reasons given by the Minister.

[99] For the impugned decision to meet the standard of rationality, it must be rationally related to the purpose for which it was given. The purpose for which it was given on the facts was to remove the Applicant as a member of the board of the Postbank¹⁰. It is an objective test and distinct from that of reasonableness. It is trite then the rationality enquiry has nothing to do with testing the decision itself but whether sufficient connection between means chosen and the objective sought to be achieved.

[100] In other words, did the Minister respond rationally to the final findings of the KPMG report which supported the removal of the board as a direct result of, *inter alia*, its engagement with, the conclusion of and to payments made in terms of unlawful contracts, its inability to without delay implement consequence management and its inability to follow proper legislative prescripts. Furthermore, whether his response was rationally connected to his concern of public knowledge of the boards failure to regularise irregular and wasteful expenditure timeously and within the legislative prescripts. His impugned decision is connected to his oversight function which had to be made in line with the objects of the SA Postbank and the function of the board bearing in mind the objective to be registered as a Bank, under the watchful eye of the Bank Regulator.

[101] The SA Postbank's board which included the Applicant, continued, even after her appointment not to operate and manage the SA Postbank according to

¹⁰ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 85.

legislative prescripts and therefore adversely affects the functioning of the SA Postbank. Objectively the Minister's decision was rational.

[102] Furthermore, as will be demonstrated the impugned decision was reasonable as against the Applicant. At the time of the Applicant's appointment the facts demonstrate that, the Applicant:

- 102.1. was aware of all the facts relating to the origin and reason of the unlawful agreements;
- 102.2. was aware of the need for the SA Postbank to obtain or develop their own payment switch/develop the postilion as soon as possible and, that such development existed as at the date of the licencing agreement. Such persisting when SAPO transferred its tights to the SA Postbank;
- 102.3. must have appreciated the gravity of the warning by Electronic Connect on 25 November 2022 of the complexities and feasibility of the envisaged proposed migration;
- 102.4. that the assistance of Electronic Connect to partially implement or implement the migration, would result in fruitless and wasteful expenditure as warned and confirmed by them in already in November 2022;
- 102.5. must have appreciated that the need for the board to apply for condonation without delay and correctly would be an action taken in the interest of the SA Postbank;
- 102.6. necessity for the board to comply with the prescripts of section 11, in particular 11(d) and (e) of the Postbank Act;¹¹

¹¹ "11. The Board-

102.7. was statutorily obliged to familiarise herself with and ensure compliance of the PFMA¹² as at date of her appointment; and,

that consideration of all such factors constitutes sufficient reasons for the impugned decision to be taken.

[103] From the facts, the Minister did take all information into account to achieve the objective. No further information or anticipated report in November 2023 called for in response to the Department's concerns, from the board would, rectify the already widespread knowledge and extent of the SA Postbank's unlawful dealings nor would it have cured their inability to regularise irregular expenditure relevant during that financial year nor that the USB system was halted. The targets according to the 2022/23 shareholder's compact had been compromised. Any comfort given to the Minister by the board on the 22 March 2023 of their actions was by May 2023 halted by the board for its inability to implement and with yet a further request to contract with Electronic Connect till March 2024.

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- (a) *must give effect to the corporate plan of the Company as contemplated in section 52 of the Public Finance Management Act in order to achieve the objectives of the Company;*
 - (b) *is the accounting authority of the Company;*
 - (c) *provides guidance to the managing director and personnel of the Company concerning the exercise of the functions of the Company;*
 - (d) *must notify the Minister immediately of any matter that may prevent or materially affect the achievement of the objectives or financial targets of the Company; and*
 - (e) *generally, must refer to the Minister any matter that may adversely affect the functioning of the Company."*

¹² Section 51(b)(ii) and 54(2) of the Public Finance Management Act, 1 of 1999:

- "51. (b) *must take effective and appropriate steps to-*
- (i) *-*
 - (ii) *prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity;*
54. (2) *Before a public entity concludes any of the following transactions, the accounting authority for the public entity must promptly and in writing inform the relevant treasury of the transaction and submit relevant particulars of the transaction to its executive authority for approval of the transaction:*
- (a)-(d) *-*
 - (e) *commencement of cessation of a significant business activity;"*

[104] On the 12 September 2023 all members of the board save for the Applicant had resigned. SA Postbank did not statutorily have the compliment of directors to manage and steer the company at that time.

[105] Considering all the factors, the impugned decision was rational and reasonable.

Reinstatement Relief

[106] The Minister acted rationally when he removed the Applicant, but he failed to comply with the prescripts of section 71 of the Companies Act. It follows that the Minister acted unlawfully in that regard. One cannot excuse unlawful conduct just because the decision was right. The Applicant seeks to be reinstated upon the appointment of the new board with benefits and a written apology from the Minister.

[107] In general, the appropriate order when an impugned decision is to be reviewed and set aside, is to remit the decision back to the decision-maker especially if such decision has been entrusted to another functionary. In this way the Court gives effect to the doctrine of the separation of powers by simply not, without considering other factors, grant substitution relief. It therefore stands to reason that substitution relief is only to be awarded in exceptional circumstances. The Applicant does not set out any circumstances which are exceptional.

[108] Of further consideration is that at the material time of the Applicant's appointment, board members are to be appointed and reappointed in terms of subsections 10(2) and 10(6)(a) of the Postbank Act which provides the Minister in concurrence with the Minister of Finance and the Post Office, at the time, appoints and re-appoints board members. The requirement of the consent the Minister of Finance, albeit conditionally, persists under the SA Postbank limited amendment Act, 2022. This Court cannot usurp the functions of the executive members in this way. The Minister of Finance is not even cited in the proceedings, to the extent, as he/she may have an interest in the re-instatement relief.

[109] As a result of this Court's finding that Minister's decision was right, it is also unclear whether the Applicant will qualify to be re-instated and a determination of her qualification under section 14 of the Postbank Act is not for this Court to determine. Considering all the relevant factors this Court is not in as a good position as the Minister or the Minister of Finance, to justify the reinstatement relief in the interest of justice¹³ and as such her prayer must fail.

[110] This Court considering its finding that the decision was right and that the Minister, on two occasions, afforded the Applicant an opportunity to be heard after notifying both her and the board of his intent to remove them. The Court too notes that the Applicant only responded to the invitation after the second call on the 22 August 2023. Notwithstanding, the Minister considered her response before the 14 September 2023. The unlawfulness of the Minister's is not substantive but procedural and, in consequence the impugned decision should not be set-aside.

Written apology

[111] No legal basis is set out for the apology. None is given and based on the finding that the decision was rational, the relief is not granted.

Costs

[112] The Applicant in her notice of motion prayed for costs of suit to be paid by any party opposing the application. This remains unamended. However, in her founding papers she asks this Court to consider awarding punitive costs *de bonis propriis* against the Minister personally for his egregious conduct. The Minister's conduct, against the Court's findings even, against its finding that the process of removal was unlawful, does not support egregious conduct. Compounded to that is the consideration of the application of the *audi* principle by the Minister did provide

¹³ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another 2015* (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at para 46-49.

her, as this must be seen in context. The Minister, as dealt with, had to ask the board twice, including the Applicant, before the board and the Applicant responded to his *audi* principle call as set out in the letter of the 22 July 2023. Notwithstanding, the Applicant's flagrant disregard to respond by the 31 July 2023, as the directed.

[113] In written argument the Applicant's Counsel also asked the Court to consider that the Respondents' answering affidavit was delivered with the support of the New Minister and on that basis a punitive cost order should be awarded against the Respondents. This Court does not quiet follow the argument and nor was it expanded in argument to support sufficient reasons and facts upon which an extraordinary cost order can be entertained. This Court is not inclined to grant the punitive cost relief raised and substantiated on that basis.

[114] There is no reason why the costs should not follow the result as prayed for in the notice of motion.

[115] The following order:

1. The First and Second Respondents are granted condonation for the late filing of their Answering affidavit.
2. It is declared that the First Respondent acted unlawfully in that he removed the Applicant from the board of directors of the SA South African Postbank SOC Limited by voting for her removal without following the procedures as set out in section 71 of the Companies Act of 2008.
3. The First Respondent's decision to remove the Applicant from the board of directors of the South African Postbank SOC Limited on the 14 September 2023 is not set aside.

4. The First and the Second Respondents are ordered to pay the Applicant's costs, taxed on Scale C, such costs to exclude the costs associated with the Applicant's supplementary affidavit.



L.A. RETIEF
 Judge of the High Court
 Gauteng Division

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Date of argument: 19 May 2025
Date of judgment: 18 August 2025