


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 88891/2018

(1)	REPORTABLE: NO / YES
(2)	OF INTEREST TO OTHER JUDGES: NO / YES
(3)	REVISED: NO
	
SIGNATURE	DATE
	16 Aug. 2019

In the matter between:

DR KELVIN RICHARD KEMM

FIRST APPLICANT

GOODLUCK PHUMZILE TSHELANE

SECOND APPLICANT

PAMELA BOSMAN

THIRD APPLICANT

and

THE MINISTER OF ENERGY

FIRST RESPONDENT

THE SOUTH AFRICAN NUCLEAR ENERGY
CORPORATION SOC LTD

SECOND RESPONDENT

DR NGAME TINY MAGAU

THIRD RESPONDENT

DR GREGORY JEROME DAVIDS

FOURTH RESPONDENT

MIDIAVHATHU PRINCE KENNEDY TSHIVHASE

FIFTH RESPONDENT

EUGENE NHLANHLA NGCOBO

SIXTH RESPONDENT

ZIBUSISO COMFORT NGIDI

SEVENTH RESPONDENT

ROSEMARY MOSIA

EIGHTH RESPONDENT

MATLOBELA SAMUEL SEKGOTA

NINTH RESPONDENT

KATSHE MAPHOTO

TENTH RESPONDENT

DR ROBERT MARTIN ADAM

ELEVENTH RESPONDENT

DR RAMATSEMELA MASANGO

TWELFTH RESPONDENT

AADIL PATEL

THIRTEENTH RESPONDENT

BISHEN SINGH

FOURTEENTH RESPONDENT

PULANE KINGSTON

FIFTEENTH RESPONDENT

MATHLODI NGWENYA

SIXTEENTH RESPONDENT

JABULANI NDLOVU

SEVENTEENTH RESPONDENT

PULANE MOLOKWANE

EIGHTEENTH RESPONDENT

JUDGMENT

MTATI AJ

Introduction

[1] This application was brought before Court as a matter of urgency and it was initially enrolled to be heard on 17 January 2019. At the hearing of the matter on 17 January 2019, the application was struck from the urgent roll because the urgency was not established during the hearing. The application was then re-enrolled for hearing on 10 and 11 June 2019 as a special motion. Apart from bringing the application on an urgent basis, the applicants sought the following substantive relief:

- 1.1. an order reinstating them as directors of NESCA;
- 1.2. an order declaring unlawful and setting aside the notices and subsequent decision of their removal and the suspension of Tshelane by the Minister.

Background

[2] The first and third applicants (hereinafter referred to as Kemm and Bosman, respectively) were members of the Board of the second respondent (hereinafter referred to as NECSA). Kemm was the chairperson of the Board appointed on 24 March 2016 for a period of three years. Bosman was also appointed on the same date, and for a period of three years. Their term of office would then have lapsed on 23 March 2019. It is for that reason that the issue of urgency has become moot since their membership to the Board has come to an end. The second applicant (hereinafter referred to as Tshelane) was the Group Chief Executive Officer (CEO) of NECSA and also a member of the Board by virtue of his designation as the CEO.

[3] Both Kemm and Bosman's membership to the Board was terminated by the first respondent (hereinafter referred to as the Minister) on 4 December 2018. Tshelane was suspended from his position as CEO and evidently as Board member by the Minister on 22 November 2018. On 4 December 2018, the period of suspension was extended indefinitely, pending a disciplinary enquiry.

The Minister had sought to file a supplementary affidavit in an attempt to bring certain information to the attention of the Court and that application was opposed by the applicants on various grounds. The application was not pursued during argument

by Mr Erasmus on behalf of the Minister. In the circumstances, I also do not intend to deal with same in this judgment in the light of my conclusions.

[4] On 5 December 2019, the Minister appointed the eleventh to the eighteenth respondents as the new directors of NECSA, in replacement of the applicants and all other previous directors who were members of the Board. The membership of the newly appointed Board members was approved by the Cabinet, immediately.

[5] Consequently, the applicants are challenging the decision of the Minister in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as the constitutional principle of legality. Whilst the initial application sought to re-instate the applicants to their positions as directors of NECSA, this remedy has been overtaken by events since the applicants' term of office has already lapsed. In the circumstances, I will deal with Tshelane's position separately as it is somewhat different to that of Kemm and Bosman.

Applicants aver that, if the decision of the Minister ensues to be unchallenged, their reputation is likely to be affected.

[6] It is the common cause that, on 22 November 2018, the Minister sent letters to the applicants in accordance with section 71(3)(b) of the Companies Act, 71 of 2008 (hereinafter referred to as the Companies Act), requiring them to furnish reasons as to why they should not be removed from their positions for failing to address a number of issues. These letters were similar in nature except for the one of Tshelane, which specifically omitted two items, namely, the dissemination of

information to the media and disqualification of Bosman as a director of NECSA. The matters raised by the Minister which were of concern to him were the following:

1. "Unauthorised international travel";
2. "Dissemination of false information in the media";
3. "NTP Shutdown";
4. "Unlawful MoU with Rosatom";
5. "Unauthorised increase of Board remuneration";
6. "Remuneration of the NECSA CEO";
7. "Financial disclosure";
8. "Chairperson's conflict of interest";
9. "Disqualification of Ms. Pamela Bosman"; and
10. "Complaint received from Dr Lassina Zerbo, the Executive Secretary-Comprehensive Nuclear Test Ban Treaty Organisation".

[7] In these letters, the Minister furnished reasons for the alleged non-compliance in respect of each of the aforementioned ten items and in his conclusion stated that:

"Accordingly, the aforementioned inconsistencies constitute a serious violation of a number of laws, principles and/or directives.

It is therefore my considered view that the aforementioned actions by the NECSA Board conclusively constitute a clear-cut case of gross misconduct.

Therefore, it is my considered view that the relationship between yourself (as NECSA Board member) and myself (being the shareholder representative of NECSA and effectively the Executive Authority who appoints NECSA Board members) may have now broken down, possibly irretrievably.

This is based on your apparent inability to provide the required oversight and to ensure that the aforementioned transgressions of legislation, conditions of appointment, and internal NECSA policies, systems, procedures [,] principles and/or directives should not have taken place.

Accordingly, and in light of all aforementioned factors, and in accordance with s71(3)(b) of the Companies Act, 71 of 2008, I hereby request that you furnish me with comprehensive reasons as to why you should not be removed from your position as a NECSA Board member. Your response must be submitted within 5 calendar days, from the date upon which you receive this correspondence.

Please note that should you not meet the 5 day deadline, it will be assumed that you have no intention to continue in your position as a NECSA Board member and as such, your position as a NECSA Board will be considered to have been terminated immediately upon expiry of that period."

[8] The Minister afforded Kemm and Bosman an opportunity to respond within 5 calendar days. I pause to mention that the 22nd of November 2018 was on a Thursday and effectively the applicants were expected to work over the weekend to provide this "comprehensive" report.

The letter to Tshelane required his response within 7 calendar days, effectively providing him 5 working days within which to respond. It is also important to mention

that Tshelane was further required to provide *"the necessary supporting documentation, including but not limited to Board Resolutions, Committee Resolutions, contracts, letters of appointment, internal proof of payment approvals, or any other documentation/evidence deemed necessary by [Tshelane] to substantiate [his] responses to the aforementioned concerns."* I will revert to the relevancy hereof when I determine the process leading to the ultimate decision taken by the Minister. Tshelane was in the same letter placed under precautionary suspension from his position.

[9] On 24 November 2018, the legal representatives of applicants wrote a letter to the Minister basically placing themselves on record as the representatives of the applicants. On 26 November 2018, the legal representatives of the applicants wrote another letter to the Minister requesting a 7 day extension period, in order to afford them sufficient time to prepare and deliver their responses as directed by the Minister. The extension was requested until Monday, 3 December 2018. The Minister did not respond to the request.

Indeed on 3 December 2018, the applicants, through their legal representatives filed their responses to the office of the Minister, albeit late. They further undertook therein to submit all annexures on the following day, being 4 December 2018, and which they duly did around lunch time. In response to the question of the Court regarding the quantity of the annexures that were submitted, the Counsel for the applicants indicated that the annexures in concern are about over 2000 pages.

[10] On 4 December 2018 and about an hour of delivery of the original responses and the supporting documents, the Minister wrote to the applicants, seemingly acknowledging receipt of the applicants' letters of correspondence and the

supporting documents and further notifying the applicants of the Minister's decision. The Minister's response to Kemm and Bosman was identical and it read as follows:

"RE ANALYSIS OF NECSA GOVERNANCE STRUCTURES, SYSTEMS AND PROCESSES

The aforementioned matter, and various pieces of previous correspondence between ourselves, relating thereto, has reference.

Having applied my mind to the contents of your response(s) to the allegations put to you in my initial correspondence, I am of the following view:-

- a) That the response received from yourself individually inherently fails to meet the required standard of proof, insofar as your attempt to comprehensively respond to each allegation is concerned;*
- b) That as a direct result thereof, it is my considered view that the relationship between yourself (as NECSA Board member) and myself (being the shareholder representative of NECSA and effectively the Executive Authority who appoints NECSA Board members) has indeed now broken down irretrievably.*
- c) That the NECSA Board has rendered itself extremely dysfunctional. Accordingly, the continued existence of the current NECSA Board is no longer tenable, nor is it in the best interest of the Nuclear Industry, the Department of Energy, the Minister of Energy, or the NECSA Group of Companies itself.*

I therefore hereby opt to exercise the legislative discretion afforded to me by section 17(1)(a) read with section 17(1)(c) of the Nuclear Energy Act, 46 of 1999, to disband the NECSA Board.

You are therefore requested to cease and desist from continuing, or participating in, any activities whatsoever related to NECSA, or considered to be matters reserved for the NECSA Board. Furthermore, and in relation to the above, you may no-longer enter the NECSA Pelindaba site and you are not permitted to engage with any employees of NECSA in relation to this matter."

[11] The letter to Tshelane, in addition to some of the averments made to Kemm and Bosman, provided as follows:

"Accordingly, it is in the interests of all concerned that the responses received are meticulously tested against the various allegations raised, in a formal forum specifically established to examine the veracity of each and every allegation which has been put to you (ie: a disciplinary hearing), and to ascertain whether the prescripts of section 22(4)(a) of the Nuclear Energy Act, 46 of 1999, have in fact been satisfied.

Further details regarding this disciplinary hearing shall be communicated to you in due course, however, in the interim, your precautionary suspension is hereby formally extended for the duration of this disciplinary process. During this period, and effective immediately, you are not permitted to perform any functions related to the position of NECSA Group Chief Executive Officer. A formal charge sheet shall be presented to you in due course..."

The remainder of the provisions of the Minister's letter pertains to conditions placed on Tshelane's suspension, which I do not find them relevant for purposes of this judgment.

[12] In the circumstances of this matter, I do not intend to deal with all the responses provided by the applicants in any detail but only as far as they relate to the determination of the order sought in this application.

I now turn to deal with their responses and arguments levelled by both Counsel on behalf of the parties.

Interactions with the Minister

[13] The letters sent by the Minister to the applicants detailing the matters of concern and those detailing that their responses are below the required standard of performance were duly responded to by the applicants. I detail some of the responses furnished to the Minister below;

- 13.1. *Unauthorised International Travel:* the applicants furnished a letter from the Minister's predecessor authorising them to undertake this travel. Upon being furnished with this proof of authority, the Minister changed tact and relied on the applicants' failure to furnish a required schedule as proof of the travel as being the condition placed by his predecessor;
- 13.2. *Dissemination of false information:* Kemm refutes that he disseminated false information. In fact, he submits that in his view he was placing the National Nuclear Regulator in good footing and further emphasises that it was very thorough in ensuring safety in the nuclear energy sector. The Minister clearly did not share the same view;
- 13.3. *The NTP shutdown:* It appears that it was the active intervention of the Applicants that facilitated and supervised the functionality of the site. It is

also not in dispute that the then Minister Mahlobo was kept abreast with developments;

- 13.4. *Unlawful MoU with Rosatom*: Given the Minister was apparently informed of this intended co-operation which was more of a collaboration between the two entities and however has failed to indicate his disapproval; it thus appears to me that the Minister expected all the arrangements to be cancelled immediately when he indicated that he was not comfortable to proceed with this collaboration. The Minister clearly did not indicate his discomfort/disapproval when he was informed of this intended co-operation agreement.
- 13.5. *Unauthorised increase of Board remuneration*: It was explained to the Minister that there was an option to pay Board members a retainer and that their fees are not strictly speaking, as per sittings in meetings only. This explanation was not acceptable to the Minister as well since the applicants' membership had been terminated.
- 13.6. *Remuneration of the NECSA CEO*: A letter was sent to the Minister demonstrating that the salary revision of the CEO was discussed with the then Minister Mahlobo. The Applicants also mentioned to the Minister that they obtained approval for this revision. Notwithstanding the explanation, the Minister proceeded to terminate their membership from the NECSA Board.
- 13.7. *Financial disclosure*: It is alleged that Kemm did not disclose his financial interests. Despite the evidence at his disposal, showing that the disclosure was made on 2 May 2018 and again on 24 May 2018 before the stipulated

deadline of 31 May 2018, the Minister has come to a conclusion that Kemm did not comply with the required processes.

- 13.8. *Chairperson's conflict of interest:* This allegation was refuted by demonstrating that there was no conflict of interest for the period under of Kemm's Chairpersonship. Kemm conceded that he had done some consultancy work for certain directors of NECSA during 2016 and that was never kept as a secret.
- 13.9. *Disqualification of Ms Pamela Bosman:* Bosman was a Board member of another entity in the Eastern Cape and her membership was challenged as a result of certain allegations made against her. The applicants highlighted in respect of this issue that the matter is pending on appeal before another court. In her support, Kemm also stated that Bosman has performed outstanding work for the Board of NECSA.
- 13.10. *Complaint received from Dr Lassina Zerbo:* This complaint relates to access to the premises of NECSA. It is not clear to me as to why Board members should be held responsible for operational issues. At any rate, it appears as though that Dr Zerbo did not have the required documents entitling him to gain access to NECSA. However, the Minister was again not happy with this information.

[14] As it appears from the letters of the Minister to the applicants, dated 4 December 2018, the Board was dissolved and new members were appointed the following day. The question that has to be determined is whether the Minister has considered the responses furnished to him by the applicants or he has already made

up his mind when he sought some answers. The nature and form of the Minister's letter assists in determining whether any of the responses were in actual fact considered by the Minister. Furthermore, the question arises as to whether the decision of the Minister is reviewable and ought to be set aside.

Before doing so, the Court has to determine if the application for review before me constitutes an administrative action in terms of PAJA or the decision is reviewable under the constitutional principle of legality. The applicants based their applications for review under PAJA and in the alternative, on the basis of legality. On behalf of the Minister, it was argued that PAJA does not find application in this review. I proceed to consider the principles applicable in PAJA in contrast with those considered under the principle of legality.

PAJA and the Constitutional principle of legality

[15] It is by now well known that PAJA gives effect to the right to just administrative action as espoused by section 33 of the Constitution. Nugent J in *Grey Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at paragraph 21, summarised what constitutes administrative action as follows:

"Administrative action means any decision of an administrative nature made ... under an empowering provision [and] taken ... by an organ of State, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of State, when exercising a public power or performing a public function in terms

of an empowering provision, which adversely affects the rights of any person and which has a direct external legal effect..."

The Constitutional Court has cited the *Grey Marine* case with approval and further divided this definition into seven components in the case of **Minister of Defence and Military Veterans v Motau and Others 2014 (5) SA 69 CC**. At paragraph 33 the court mentioned the seven components and summarised that-

"there must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions".

[16] The principle of subsidiarity requires that, if the decision taken by the Minister falls within the parameters of PAJA, then this review should follow the provisions of section 6(2)(f)(ii) of the PAJA. In **Minister of Defence v Xulu 2018 (6) SA 460 SCA** at paragraph 47, Wallis JA highlighted that:

"The right to just administrative action is the primary source of the power of the courts to review the actions of the executive and the administration. The Constitution required legislation to be enacted to provide for this and PAJA is the result. It is specific, although not necessarily simple, in its provisions and prescribes procedures that must be followed in pursuing judicial review, while vesting rights in people dealing with the administration, such as the right to reasons. It imposes significant limitations in regard to the requirement to exhaust internal remedies and in regard to the time within which review

proceedings must be brought. Litigants and courts should not circumvent these by proceeding directly to questions of legality. If action by the executive and administration is administrative action, then the jurisprudence of the Constitutional Court is clear in saying that this is the path that the litigation must follow." (Footnotes omitted)

[17] It is evident that the Minister removed the applicants as members of the Board in terms of section 71(3) (b) of the Companies Act. It is prudent to quote the relevant provisions of the Companies Act, inclusive of sub-section (2) as it also finds application, in my view, to the action taken by the Minister. Section 71 provides as follows:

"Removal of Directors – (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 meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).*

(2) *Before the shareholders of a company may consider a resolution contemplated in 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.

(3) if a company has more than two directors, and a shareholder or director has alleged that a director of the company –

(a) ...

(b) has neglected, or been derelict in the performance of, the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

[18] It was argued on behalf of the Minister that a meeting was called by the Minister on 20 November 2018 where the issues of concern were raised to the directors. This meeting, according to the applicants, was held for not more than 20 minutes. This meeting, cannot be viewed as an intention to comply with provisions of section 71 of the Companies Act. There was no proper notice given to the directors, no agenda was provided and more importantly, the Minister's letters of 22 November 2018 sought to initiate a process as envisaged by section 71 of the Companies Act. In fact, according to an affidavit deposed to by the then Deputy Minister Thembisile Majola (Deputy Minister of Energy), this meeting was called as a result of the calls she received from employees who were concerned about their continued employment as a result of the NTP shutdown by the NNR. Accordingly, any meetings before 22 November 2018 cannot be interpreted to have been providing an

opportunity to applicants to make presentations. Furthermore, section 71(2)(b) requires the Minister to provide *the director* with ... *a reasonable opportunity to make a presentation, in person or through a representative...* before taking a decision. (own emphasis).

[19] Otherwise other than section 71 referred to above, the only other provision available to the Minister to remove a director is provided for in section 17 of the Nuclear Energy Act 46 of 1999 which provides that:

"Vacation of office – (1) *The Minister may at any time discharge a director from office-*

- (a) if the director repeatedly has failed to perform the duties of that office efficiently;*
- (b) ...*
- (c) for misconduct.*

(2) *A director vacates office-*

- (a) upon becoming disqualified in terms of section 16(3);*
- (b) when discharged in terms of subsection (1);*
- (c) ...*

[20] The authority by the Minister to remove the applicants is specifically provided for in the enabling legislation being both the Companies Act and the Nuclear Energy Act. In determining whether it can be said that the Minister exercised an executive action in his decision to terminate to directorship of applicants, I proceed to evaluate various authority that distinguishes between the administrative and executive action.

De Ville¹ summarises the distinction between administrative and executive action by referring to the leading case on this topic being that of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.² He states that:

"In President of the Republic of South Africa and Others v South African Rugby Football Union and Others the Constitutional Court for the first time drew the distinction between executive and administrative action. The classification of the action in question depends primarily on the nature of the power that is exercised (or the function that is being performed), and specifically, in this context, how closely the action is related to policy considerations. Although no decision is free from such considerations, administrative action is said to be concerned primarily with the implementation of legislation whereas executive action relates to the development or formulation of policy and the initiation of legislation. Other considerations of importance are the source of the power, the subject-matter thereof and whether it involves the exercise of public duty.³ In deciding whether action qualifies as administrative action, regard must furthermore be had to 'the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration'."

De Ville further refers to a number of cases where the aforementioned guidelines were applied. He states:

¹ J.R. De Ville: *Judicial Review of Administrative Action in South Africa*, 2003, LEXIS NEXIS BUTTERWORTHS at page 59, paragraph 2.1.7.

² 1999 (10) BCLR 1059 (CC) paras 140-143

³ *Cape Metropolitan Council v Metro Inspection Services Western Cape CC and Others* 2001 (3) SA 1013 SCA para 17.

"Applying the above guidelines, it has been held that the determination by the MEC for Education of the precise criteria or formulae for the grant of subsidies to independent schools constitute administrative action⁴. Similarly, the appointment by the Premier of a province of a 'chief' in terms of section 2(7) of the Black Administration Act constitutes administrative action as the Premier in such an instance (purportedly) acts 'in pursuance of powers conferred upon him to implement specified legislation'⁵.

On the other hand, the decision by the President to appoint a commission of enquiry⁶, to bring legislation into effect⁷, and that a person can be extradited⁸ (in terms section 3(2) of the Extradition Act) are not regarded as administrative action. Steps taken by the national and provincial governments in preparing and initiating legislation also do not qualify as administrative action, but executive action..."

In **Popo Molefe and Others v The Minister of Transport and Others** (17748/17) [2017] ZAGPPHC 120 (10 April 2017) at paragraph 31, Mabuse J had the following to say in determining whether the decision of the Minister was an administrative or an executive action:

"As a consequence of the dichotomous views with regard to the characterisation of the Minister's action, it is only apposite at this stage to

⁴ Permanent Secretary, Department of Education, Eastern Cape and Another v Ed-U-College (PE) 2001 (2) SA 1 (CC) at para 18

⁵ Mkhathshwa v Mkhathshwa and Another 2002 (3) SA 441 (T) at 450B

⁶ President of the Republic of South Africa and Others v South African Rugby Football Union and Others (10) BCLR 1059 (CC) para 143

⁷ Pharmaceutical Manufacturers Association of South Africa and Others v President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) para 79

⁸ Geuking v President of the Republic of South Africa and Others 2003 (3) SA 34 (CC) paras 24-30

pause and determine whether the Minister's decision to remove the directors from the board constituted an executive or administrative action. Considering that the application is brought under PAJA, the classification is crucial as it will enable this Court to establish whether the principles of PAJA apply to the Minister's decision, if it is an administrative action or the principles of legality apply to it, if it is an executive action.

[32] The Minister derives the power to appoint and dismiss the Board from s 24 of the Legal Succession Act... Accordingly the Minister's appointment and dismissal of the members of the Board constitutes administrative action as it involves the implementation of national legislation..."

See also **Steenkamp and Another v Central Energy Fund SOC Ltd and Others 2018 (1) SA 311 (WCC)** at paragraphs 37-59.

[21] In determining the exercise of public power, the Constitutional Court held in **Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 239 (CC)** at paragraph 49, that:

"It is by now axiomatic that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law. More recently, and in the context of s 84(2)(j), we held that, although there is no right to be pardoned, an applicant seeking pardon has a right to have his application 'considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality'. It follows therefore that the exercise of the power to grant pardon must be rationally related to the purpose sought to be achieved by the exercise of it".

[22] In light of the above discussion, I am of the conclusion that the letters sent by the Minister to the applicants bears reference to the authority of the Minister, as the sole shareholder, to the enabling legislation. The Minister relied on the Companies Act to remove the Applicants from their positions as directors of the Board. The Minister purported to also comply with the provisions of section 71(2) (b) in calling for reasons why the applicants should not be removed as directors of NECSA. The conduct of the Minister falls squarely within the prescripts of an administrative action as defined in PAJA. Even if I am wrong in this conclusion, the Minister still fell short of the principles of legality in the manner in which he took the decision as I demonstrate below.

[23] The letters sent to the applicants are similar in nature. It is not conceivable, for example, that Bosman can be held liable for the signing of the Rosatom agreement. Furthermore, I do not see how Bosman could have to account for the conflict of interests of Kemm as well as the allegation that Kemm did not disclose his interests. Both Kemm and Bosman are expected to account for the failure of Dr Lassina Zerbo to gain entrance at Pelindaba which is a logistical matter that at the best should rest with Tshelane.

[24] The response by the Minister to the submissions made by the applicants similarly raises concerns. Firstly, over two thousand pages worth of documents were submitted to the Minister on 4 December 2018 at around lunch time. Within one hour thereafter the Minister sent letters termination the membership of Kemm and Bosman to the Board. Once again, in these letters, the Minister does not deal with each response raised by the applicants but comes to a generic all-encompassing

response emphasising his dissatisfaction about the performance of Kemm and Bosman. The Minister also at this stage had extended the suspension of Tshelane. Strangely, the Minister also disbanded the membership of all other directors to the Board including those who had complained about Kemm to the extent of sending letters of complaint to the Minister.

[25] It is clear to me, although irrelevant for purposes of this application, that the Minister was frustrated by the operations at NECSA and particularly the NTP shutdown and failure of operations to resume timeously. Added to this were telephone calls made to the Deputy Minister of personnel complaining about their continued employment because of the NTP shutdown. There appears also to have been disagreements between and among directors at NECSA, NTP and NNR. The Minister had every right to be concerned about these areas of apparent non-compliance but for the process followed.

A careful reading of the letters from the Minister indicates that a decision had already been made when the letters of 22 November 2018 were sent to the applicants but the Minister sought to fully comply with the provisions of section 71 of the Companies Act. This can be discerned from the language used from these letters, for example, the letters read:

"It is therefore my considered view that the aforementioned actions by the NECSA Board conclusively constitute a clear-cut case of gross misconduct.

Therefore, it is my considered view that the relationship between yourself (as NECSA Board member) and myself (being the shareholder representative of NECSA and effectively the Executive Authority who appoints NECSA Board

members) may have now broken down, possibly irretrievably.(Own emphasis).

[26] In the circumstances, I find that the decision of the Minister to issue notices of removal and the ultimate removal of the Applicants from being directors of NECSA fall within the definition of an administrative action and accordingly, reviewable in terms of PAJA.

[27] I now turn to the specific application of Tshelane. His application is couched similarly to that of Kemm and Bosman except that as a precursor to my conclusions, the Court needs to determine whether the decision of the Minister to place Tshelane under precautionary suspension is unlawful and reviewable in law. I pause to mention that, if the Court was to find that there was nothing wrong in the actions of the Minister to suspend Tshelane, it will then also follow that his directorship to the Board of NECSA was not unlawful.

[28] The letter by the Minister to Tshelane dated 22 November 2018 makes mention of all areas of alleged non-compliance by Tshelane as mentioned above and concludes by placing Tshelane under precautionary suspension. The exact wording of the relevant paragraph reads:

"Accordingly, and in light of all the aforementioned factors, and in accordance with s 71(3)(b) of the Companies Act, 71 of 2008, I hereby place you on precautionary suspension from your position as NECSA CEO, and I simultaneously request that you furnish me with comprehensive reasons as to

why you should not be removed from your position as NECSA CEO. Your response must be submitted within 7 calendar days, from the date on which you receive this correspondence."

[29] There is no doubt that the Minister used an incorrect section in initially suspending Tshelane since the position of the CEO is specifically regulated by section 22 of the Nuclear Energy Act, 46 of 1999. This error, the Minister may have observed since in his letter of extending the suspension of Tshelane dated 4 December 2018, he wrote:

"Having applied my mind to the contents of your response(s) to the allegations put to you in my initial correspondence, I am of the view that the response received from yourself inherently fails to meet the required standard of proof, insofar as your attempt to comprehensively respond to each allegation is concerned.

Accordingly, it is in the interests of all concerned that the responses received are meticulously tested ...to ascertain whether the prescripts of section 22 (4)(a) of Nuclear Energy Act, 46 of 1999 have in fact been satisfied...

Your employment status as a permanent fixed-term contract NECSA employee, during this period of suspension, shall remain operative for the duration of this disciplinary process and as such, your terms and conditions of employment, and your monthly remuneration, shall continue to apply..."

[30] It was argued on behalf of Tshelane that the Minister's action to suspend him was *ultra vires*. The argument proffered was that the provisions of section 17(1)

(which relate to removal of directors) and those of section 22(4) (removal of CEO) are essentially the same. Whilst I agree, on one hand that, in substance, these provisions are the same, I do not agree, on the other hand, that the relationship of non- executive directors is the same as that of the CEO. Whereas there are certain pre-requisites to be taken by the Minister before a removal of a non-executive director, there may not be equivalent expectations as far as the CEO is concerned.

The Minister cannot, for example, suspend a non-executive director pending a disciplinary enquiry but I see no reason why he cannot do so to the CEO of an institution. The CEO of NECSA is firstly an employee and by virtue of his designation, then becomes a director of NECSA. Surely he cannot be seen in the same way as other directors of NECSA.

[31] It is common cause that Tshelane was not provided an opportunity to make representations before he was placed under precautionary suspension. It was argued on behalf of the Minister, rightly so in my view, that this requirement has already been settled by the Constitutional Court in the matter of **Long v South African Breweries (Pty) Ltd 2019 JDR 0218 (CC)** wherein Theron J confirmed the findings of the Labour Appeal Court and held as follows:

"In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one... Where a suspension is precautionary and

not punitive, there is no requirement to afford the employee an opportunity to make representations."

[32] In conclusion, I am not convinced that the position in which Tshelane finds himself can be equated to that of Kemm and Bosman. The Minister was authorised to suspend Tshelane pending a disciplinary enquiry and, any other issue that deserves consideration regarding the level of alleged non-compliance or irregularities, should be traversed at the disciplinary enquiry. However, the same does not go for Kemm and Bosman. Firstly, the Minister did not comply with section 71 of the Companies Act by failing to provide Kemm and Bosman an opportunity to make presentations at a meeting providing reasons why they should not be removed as directors. Secondly, I find that the Minister did not consider their written representations before making a decision to remove them as directors of NECSA.

Costs

[33] I have considered the issue of costs and as is common practice, the successful party is awarded costs whilst the Court still has a discretion to direct otherwise. In the circumstances of this matter, the applicants were not totally successful nor is the Minister. In my view, the applicants had every right to assert their rights to restore their dignity and Kemm and Bosman have been successful in doing so but for Tshelane. I do not find, on the other hand that the Minister had any ulterior motives by the actions that he took. Hasty, he definitely was, but in pursuance of restoring the stature of NECSA as an institution.

[34] Wherefore, I make the following order:

1. The decision to remove the First and Third Applicants issued on by the First Respondent on 4 December 2018 are reviewed, declared unlawful and set aside;
2. The application by the second applicant to uplift the suspension by the first respondent is dismissed; and
3. Each party shall bear his/her own costs.



MTATI AJ

Acting Judge, Gauteng Division of
the High Court of South Africa,
Pretoria

Heard on:

10-11 June 2019

Date of Judgment:

16 August 2019

APPEARANCES

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