IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 1578/2016P

and 3861/2016P

In the matter between**:**

ATWELL SIBUSISO MAKHANYA	**APPLICANT**
and	
THE MINISTER OF WATER AFFAIRS AND SANITATION	**FIRST RESPONDENT**
DUDUZILE MYENI N.O.	**SECOND RESPONDENT**
MUSA XULU N.O.	**THIRD RESPONDENT**
POPPY DLAMINI N.O.	**FOURTH RESPONDENT**
FREDERICK BOSMAN N.O.	**FIFTH RESPONDENT**
NONHLANHLA KHUMALO N.O.	**SIXTH RESPONDENT**
AMIT BADUL N.O.	**SEVENTH RESPONDENT**
BRIAN RAWLINS N.O.	**EIGHTH RESPONDENT**
NICA GEVERS N.O.	**NINTH RESPONDENT**
THEMBINKOSI MADIKANE N.O.	**TENTH RESPONDENT**
BONGI MSHENGU N.O.	**ELEVENTH RESPONDENT**
SIMO CHAMANE N.O.	**TWELFTH RESPONDENT**
MHLATUZE WATER	**THIRTEENTH RESPONDENT**

JUDGMENT

Date Delivered: 28 November 2016

MBATHA J:

Introduction

[1] On 15 April 2016 the applicant brought an urgent application for relief against the respondents under case number 3861/2016P, pending relief sought in in the main application under case number 1578/2016P.

[2] The two applications are to be determined jointly so that the court can grant final relief on the urgent application and determine the orders sought in the main application. The relief sought in the main action is as follows:

> '1. That, pending the relief sought in paragraphs 2 to 6 below, respondents be and are hereby directed to permit applicant to continue performing his functions and responsibilities as thirteenth respondent's Chief Executive Officer.
>
> 2. That the first respondent's purported extension of second to twelfth respondents terms of office as board members of Umhlatuze Water (the thirteenth respondent):
>
> 2.1 from 28 February 2015 to 30 June 2015; and
>
> 2.2 from 30 June 2015 until the appointment of a new board, are unlawful, invalid and are set aside.
>
> 3. That the first respondent's purported action to extend second respondent's term of office as Chairperson of Umhlatuze Board beyond 28 February 2015 is unlawful, invalid and is set aside.

4. Declaring that the second to thirteenth respondent's decision contained in their resolution dated 7 November 2015 purporting to suspend applicant as the Chief Executive Officer of the thirteenth respondent is invalid, unlawful and of no force and effect.

5. That second respondent to thirteenth respondents' decision referred to in paragraph 4 above be and is hereby reviewed and set aside.

6. That second respondent's decision of 20 November 2015 purporting to suspend applicant as thirteenth respondent's Chief Executive Officer is declared to be unlawful, invalid and of no force and effect ***alternatively,*** is hereby reviewed and set aside.'

[3] The applicant in the main action has raised the following issues for consideration:

(a) Whether the water board is lawfully constituted. The board's term of office expired on 28 February 2015 and the Minister has extended its term of office for an indefinite period. The question for consideration is whether the Minister of Water Affairs and Sanitation has powers to extend the water board's term of office.

(b) The second port of call as stated by the applicant is the legality of the board's decision to suspend the applicant. This involves the questions of fact and law.

[4] In this application the applicant submits as follows:

1. That the Minister has no powers to extend the board members terms of office. Their terms lapsed on 28 February 2015. She can only reappoint board members, which she has not done, but is precluded from extending their term of office.

2. That the term of office of the second respondent, the Chairperson of the board, has expired and the Minister can neither extend nor reappoint her. She has served the maximum period of three terms as a board member (four years each).

3. That the Minister's purported extension of the board's term of office is unconstitutional, as it amounts to an unlawful usurpation of the legislative powers of the executive.

4. That the applicant seeks an order setting aside the board's decision purporting to suspend him as the thirteenth respondent's Chief Executive Officer. The purported suspension is a nullity as it was taken by a board which, in law, does not exist as the decision was taken after the lapse and / or expiry of the board's term of office.

5. That the suspension is unlawful as it offends the principle of legality as it was taken to tarnish the applicant's reputation and standing within the community and the decision was irrational in that it had no connection with the purpose for which it was taken.

Dispute of Facts

[5] Although there are factual disputes, I must consider whether they are fundamental in nature, *bona fide* and genuine. In *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and another*[1] the court endorsed the principle held in *Truth Verification Testing Centre v PSE Truth Defection CC and Others*[2] that 'a common sense and robust approach' in relation to the resolution of disputed issues on paper where a respondent contends himself with bold and hollow denials of factual matter confronting him must be adopted. It went on further to state that the court should be prepared to undertake an objective analysis of such dispute of facts when required to do so. In the event that there are disputes of fact, the court is not permitted to determine the balance of probabilities on the affidavits but must apply the *Plascon-Evans* rule. It is also trite that during application proceedings, if a dispute of facts arises, the court must exercise a discretion in terms of Rule 6 of the Uniform Rules of Court, whether to refer the disputes to oral evidence or dismiss the application. However in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[3] Corbett JA stated:

> 'where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

In the light thereof I have adopted the approach as envisaged in *Plascon-Evans*.

[1] 2011 (1) SA 8 (SCA)
[2] 1998 (2) SA 689 (W)
[3] 1984 (3) SA 623 (A) at 634H-I

The Application to Strike Out

[6] An application to strike out vexatious, scandalous, irrelevant and hearsay issues have been brought by Counsel for the second respondent and other respondents cited as third to thirteenth respondents. Mr *Gajoo SC*, counsel for the respondents, submitted that such averments are personal in nature and had been made to side-track the attention of the court from the legal issues before the court. He further stated that they are irrelevant, vexatious and scandalous issues which have impugned the dignity and integrity of the second respondent as they have got nothing to do with the applications before me.

[7] The application to strike out in terms of Rule 6 (15) of the Uniform Rules of Court is directed at various specified paragraphs of the Applicant's founding affidavit and replying affidavit to the main action. Rule 6 (15) enjoins the court to strike out from an affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate order for costs. The meaning attributed to such terms has been described as follows by Van Loggerenberg et al *Erasmus Superior Court Practice* vol 2 at D1-91:

> '(a) Scandalous matter – allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.
>
> (a) Vexatious matter – allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.

(b) Irrelevant matter – allegations which do not apply to the matter in hand and do not contribute in one way or the other to a decision of such matter.'

[8] The court in its interpretation of these aforementioned terms in *Vaatz v Law Society of Namibia,*[4] while reaffirming the meaning ascribed to these terms, also added the requirement of prejudice to the other party if the material is allowed to remain in the affidavits. I accept that these averments have the effect of tarnishing the image of the second respondent in the eyes of the court and the community. The courts are not places where people should raise unsolicited and scandalous matters to get its attention.

[9] The averments pointed out by Mr *Gajoo SC* are in my view irrelevant, scandalous and vexatious in nature. If these averments are struck off, there will be no prejudice to the applicant as the matter at hand relates to the powers of the board, the suspension of the applicant and the powers of the Minister with regard to the extension of the terms of the board.

[10] In motion court proceedings affidavits serve to place the relevant issues before the court, affidavits should not be used for tarnishing the image of any applicant or respondent or to sensationalise the matter before the court. The allegations alluded to are not placing any historical facts before the court, but can assist only to sell newspapers.

[4] 1991(3) SA 563 (Nm)

[11] In this regard, I therefore strike off the following averments and paragraphs as follows:

1. the second sentence in paragraph 24.2 to 24.4 together with annexures “ASM1” on the basis that it is hearsay evidence;

2. paragraphs 82 to 104 together with annexures “ASM16” on the basis that they introduce irrelevant and scandalous material which is defamatory to the second respondent; and

3. paragraph 16, 26, 2.3, 26.3, 26.4 and 26.5 of the applicant’s replying affidavit as it introduces new issues in reply. This is prejudicial to the respondents as they cannot respond thereto.

The Facts

[12] It is now proper that I should set out the facts of the dispute between the Applicant, who is the Chief Executive Officer of the Mhlathuze Water Board and the Minister of Water Affairs and Sanitation, the Chairperson and members of the Mhlathuze Board and Mhlathuze Water Board.

[13] The applicant brought an urgent application seeking an order directing the respondents to permit him to resume and perform his duties as Chief Executive Officer of the thirteenth respondent, Mhlathuze Water Board. In the main application he seeks an order setting aside the Minister’s decision purporting to extend the term of office of the members of the Mhlathuze Water Board on the basis that the Minister

has no such statutory powers, the board's term has lapsed and the Minister has no power to extend such terms of office. He also seeks an order setting aside the board's decision purporting to suspend him as the Chief Executive Officer of the thirteenth respondent as the purported suspension is a nullity, as it was given by a board which in law does not exist. The applicant contends that the board's actions were unlawful, offend the principle of legality, and that the actions of the board members were irrational.

[14] It is common cause that the applicant on 3 September 2014 was appointed as Chief Executive Officer of the thirteenth respondent by the board. He alleges that on 26 July 2015 he learnt that there were serious allegations of impropriety made against him by certain unknown individuals. Subsequently the second respondent informed him about allegations made against him, which necessitated a formal investigation. Messrs Edward Nathan, Sonnenbergs Africa (ENS) were appointed by the board to investigate the said allegations of misconduct. Thereafter he was called upon to provide answers to the allegations made against him, to which he responded to by 31 August 2015.

[15] According to the applicant on 7 November 2015, without his knowledge, the board resolved to suspend him with immediate effect. He was not available during the period of 10 November to 17 November 2015 due to illness, but resumed duties on 18 November 2015. On that very same day of his return to work the second respondent gave him a letter notifying him of the board's intention to suspend him. At the time of delivering the letter to him the second respondent informed him that the

board took a decision on 7 November 2015 to suspend him. He refers to this as a facade, as he states that a decision had already been taken by the board to suspend him, more so as an acting Chief Executive Officer had been appointed in his absence until 26 November 2015. The notification stated that the acting Chief Executive Officer was appointed due to his illness, and he does not believe this.

[16] He responded to the ENS allegations within a period of three days. His response was emailed to the second respondent on 20 November 2015 at about 14h00. They met the very same day at about 18h00 in Richards Bay whereupon the second respondent informed him about a letter of suspension that would be delivered to him over the weekend. On 21 November 2015 the letter of suspension was emailed to him. His view is that the board did not consider his responses, but he was unilaterally suspended by the second respondent acting alone without the input of the board.

[17] He then approached the Labour Court for urgent relief on or about 27 November 2015 against the first, second to thirteenth respondents, an application which failed due to lack of urgency, and that the applicant had an alternative remedy as he had bypassed the CCMA process, which he had failed to approach and that the issues he had raised were not for the Labour Court to adjudicate upon.

[18] On 16 February 2016 he brought an application under case no 1578/2016P, referred to as the main application, as well as an urgent application on 15 April 2016

under case no 3861/2016P, seeking relief pending the determination of the main application, in that an order be granted interdicting the second to thirteenth respondents from making any decisions purporting to suspend the applicant; declaring that the decision of the thirteenth respondent communicated to the applicant on 14 April 2016 purporting to commence disciplinary proceedings is invalid, unlawful and of no force or effect and an order for costs against the respondents on an attorney and clients scale.

[19] The urgent application was precipitated by receipt of an email on 14 April 2016 from the second respondent, requesting the applicant to show cause why he should not be suspended pending the disciplinary proceedings against him. This urgent application was brought a day after he had brought the main application challenging the authority and power of the board to make a decision suspending him. He contends that the board is not properly constituted, its purported decision to suspend him is a nullity, invalid and of no force and effect, the board's members term of office has expired, they have not been reappointed in terms of Schedule 1 (1) of the Act, and that the decision of the Minister to extend their term of office was legally invalid. Furthermore, the decision of the board to suspend him was actuated by ulterior motives, is irrational and invalid.

[20] He states that the letter to show cause dated 14 April 2015 was to render the pending main application nugatory, academic and irrelevant. Therefore he finds this to be an interference with the court processes and the courts authority to

independently and impartially determine the pending main action (Case no 1578/2016P) set down for hearing on 18 April 2016.

[21] The urgent application came before Koen J, where the court ruled that it would be prudent that the urgent application be determined together with the main application under case no 1578/2016P set down for hearing on 18 April 2016. On 18 April 2016 it came before Balton J, but did not proceed, whereupon the rule *nisi* was extended to the same date of the hearing of the main application and the parties were put to terms with regard to the delivery of answering and replying affidavits.

[22] The second respondent's response is that in April 2016 Edward Nathan, Sonnenbergs Africa (ENS) presented a memorandum with serious allegations against the applicant. This was a complete report to their initial investigative report to the Chairperson of the Audit and Risk Committee of the thirteenth respondent. In the light thereof the board resolved to take disciplinarily proceedings against the applicant and mandated Edward Nathan, Sonnenbergs Africa (ENS) to conduct the disciplinarily proceedings on behalf of the thirteenth respondent. The applicant was called upon to show cause why he should not be suspended pending the finalisation of such disciplinary proceedings. The applicant was furnished with a copy of a notice of intention to suspend him as well as draft charges arising from the Edward Nathan, Sonnenbergs Africa (ENS) report. These were served upon him on 14 April 2016.

[23] The second respondent submits that although the applicant was already on suspension, he was being offered a further opportunity to make representations whether his suspension should be extended pending the finalisation of such disciplinary proceedings.

[24] The board's view is that it exists as a lawfully constituted board until such time as the court makes a pronouncement and a determination on the validity of the extension of the terms of office of the board members. It is still obligated to carry its mandate in relation to the proper functioning of the thirteenth respondent, including the authority to proceed with disciplinary issues relating to the applicant fairly and as expeditiously as provided in the Disciplinary Procedures. The second respondent states that the mere institution of the main application does not preclude it from continuing with its functions as these are day to day functions of the board. The applicant's belief that the letter of 14 April 2016 intended to undermine the relief sought in the main application is unfounded and devoid of substance, according to the respondents.

[25] The second respondent's contention is that in the absence of a finding of any invalidity, the applicant has not shown a clear right to the relief that he sought and the interim relief should be discharged with costs.

The Law

[26] It is important that I outline the relevant provisions of the Act governing the water boards, as the facts of this case relate thereto. The water boards are governed by the Water Services Act[5] and the regulations thereto as follows:

(a) Water boards are created and established under Chapter 6 of the Act. Section 35 of the Act deals with the governance of water boards and it states as follows:

'**35 Governance of water boards**

(1) A water board consists of a chairperson and such other members as the Minister may appoint from time to time.

(2) Schedule 1 regulates the terms of office of board members, the procedure for the recommendation of persons for appointment as chairperson or board members and the termination of office of board members . . .'

(b) Section 36 provides for the appointment of a suitable person as Chief Executive of the water board, for a renewable period.

(c) The general powers of the Minister are set out in section 73 of the Act. Amongst others, section 73 (1) (*l*) provides as follows:

'**73 General powers of Minister**

(1) The Minister may –

. . .

(l) on good cause, extend any time period provided for in this Act.'

[5]108 of 1997

(d) The general powers of the Minister are set out as follows in section 73(1):

'(1) The Minister may-

(a) acquire a water services work and may transfer or dispose of any water services work belonging to the National Government;

(b) construct, operate, alter or repair any water services work with the permission of the relevant water services institution;

(c) contract with any person to perform any work which the Minister is authorised to perform under this Act;

(d) act as a water services provider under contract or approval only if the relevant water services authority is unable to provide the water services;

(e) provide water services in emergency situations;

(f) perform the functions of a water services authority or water board;

(g) levy tariffs for water services provided by him or her;

(h) issue guidelines to water services institutions on performing their functions in terms of this Act;

(i) issue model conditions for the provision of services for use by water boards and water services committees;

(j) prescribe measures to be taken by water services institutions to conserve water;

(k) prescribe how any matter arising out of the repeal of any law by this Act must be dealt with, to the extent that this Act or any other law does not sufficiently provide for it; and

(l) on good cause, extend any time period provided for in this Act.'

[27] The Schedule to the Act provides as follows:

(a) Schedule 1 of the Act provides for the terms of office of board members as follows:

'1 **Terms of office of board members.**

(1) A member of a water board is appointed for a period of office determined by the Minister, which may not exceed four years.

(2) A member of a water board may be reappointed. Reappointment is limited to three consecutive terms of office.'

(b) Item 4 of the Schedule deals with the termination of office of board members:

'4. **Termination of office of board members**

(1) A member of a water board ceases to hold office –

(a) from the effective date of his or her resignation;

(b) if he or she has been absent from more than two consecutive meetings without leave of the chairperson. Leave may be granted retrospectively, if the absence of a member was due to unforeseen circumstances;

(c) if he or she has become disqualified in terms of Item 2 of this Schedule;

(d) if he or she has been declared to be of unsound mind by a competent authority; or

(e) if his or her appointment has been terminated in terms of section 35 (5) of the Act.'

Application of the Law

[28] The term of office of the board members is regulated by Item 1 of Schedule 1 which states as quoted above. The applicant submits that Item 1 (2) of Schedule 1 provides no room for the extension of the terms of office for board members at all.

[29] It is common cause that the four year term of the board expired on 28 February 2015. The second respondent was appointed as a member of the board in 2002. She was appointed as Chairperson of the board in February 2006. Her reappointment in February 2006 as Chairperson and as board member was her second term of office. On or about January 2010, a new board was appointed for the thirteenth respondent and on 1 March 2011 the second respondent was reappointed as a board member and Chairperson of the thirteenth respondent. This was her third and last term as a board member. The third to twelfth respondents terms of office also expired on 28 February 2015.

[30] On 11 February 2015, the Minister of Water Affairs and Sanitation, the first respondent, being aware that their terms of office were to expire on 28 February 2015, decided to extend their terms of office to 30 June 2015, in order to allow her office to finalise the process for the appointment of a new Board. On 1 June 2015 their terms of office were purportedly further extended until the new board was put in place and for the first respondent's department to be able to finalise the process of appointing a new board and a merger with Umgeni Water Board.

[31] In this regard the applicant submits that the first respondent, in purporting to extend the term of office of the board members, exercised powers that she did not have in terms of the Act. Therefore such an extension is unlawful and invalid. The applicant submits that the second respondent has served three consecutive terms as board member as she was appointed in 2002. In the light of the extension of the four

year term for other board members, the board lacked the requisite authority to perform any of their functions assigned to its members in terms of the Act, as the Act does not make such a provision. Therefore it lacked statutory power and authority to perform the functions of a properly constituted board, when it suspended the applicant on 7 and 8 November 2015.

[32] The applicant submits that it is clear from the language of the Act that the terms of the board members should not exceed four years, that the wording of sections 35 (1) and (2) of the Act and Item 1 of Schedule 1 does not give any discretionary power to the first respondent to extend the said terms beyond the four years stipulated therein, nor do the provisions of the Act, empower the first respondent, as an executive arm of government, to extend the terms of office of board members beyond the four years or at all, as this would undermine the legislatively ordained term of office. In fact this would be tantamount to the executive usurpation of the legislative power.

In the light of the irregular extension of their terms of office they lacked the requisite authority to suspend the applicant or perform any functions of the board.

[33] The first respondent relies on section 73 (1) (*l*) of the Act which states that the Minister may on good cause extend any time period provided for in the Act. She acknowledges that the term of office for the board ended on 28 February 2015. However on 11 February 2015, the Minister realised that by the end of 28 February 2015 the process of appointing the new Board would not have been finalised, she

then decided to act in terms of section 73 (1) (*l*) of the Act to extend the term of office of the board to 30 June 2015.

[34] The process was started in February 2015 for nominations. Notices were advertised in terms of the Act, with the closing date of 23 March 2015. It is submitted that this was not the only the process at hand, but there was a consideration of the merger and amalgamation of the two Water Boards, Umgeni and Mhlathuze, which was at quite an advanced stage in mid-2015. With the process of appointing a new board not being finalised, and the consideration of the merger of the two boards being in the pipeline, considerations of public interest and good governance dictated that it would not be in the interest of the thirteenth respondent to appoint a new board whilst the merger of two boards was in consideration. The Minister then extended the term of the board for an indefinite period.

[35] This court can accept that this process was known to the applicant as well. The merger and amalgamation process has also been alluded to by the applicant in his founding affidavit where he states that the first respondent on or about 29 October 2015 presented to a recognised trade union of the thirteenth respondent the road map to such a merger at its premises. The process was envisaged to have come into fruition in January 2016. This proposed merger would see the end of the two Water Boards, and a new KwaZulu-Natal Water Board would come into fruition. However, the applicant now sees the process in a different light in that the proposed merger is done to displace him as the Chief Executive Officer of the Mhlathuze Board.

[36] It is common cause that the governance of the board as regulated by section 35 rests on the Chairperson and other such members as appointed by the Minister from time to time. Schedule 1 of the Act regulates the terms of office of the board members. Item 3 of the Schedule states the procedure that must be followed for nomination and appointment of board members. It is quite an involved process whereupon the Minister may require a water board to constitute a selection panel to recommend persons for appointment as members of a water board, a publication of notices by the Chief Executive Officer of the board calling for nominations, copies of such notice to be published in two newspapers and sent to various organisations having a substantial interest in the matter, including representatives of municipalities, then a selection panel is appointed from various organisations and persons, the nominations are considered, a shortlist is prepared, shortlisted candidates are interviewed and recommendations made to the Minister of suitable candidates. The selection panel will then consider candidates for the position of Chairperson. The Minister does not merely rubber stamp but must also consider the recommendations made by the selection panel.

[37] The applicant having submitted that the second respondent has served three consecutive terms of office and that the extension of her term is unlawful and irregular, further argues that the Act does not make any provision for the extension of the terms of the board but only for the appointment of the board. The applicant contends that this extension amounts to a reappointment of a Chairperson who has served the three consecutive terms of office. This is unlawful and subverts the object

of the Act. However, the first respondent submits that this is not a reappointment, which would have violated the provisions of the Act. The first respondent submits that it relies on the provisions of section 73 (1) (*l*) of the Act which empowers the Minister to extend time limits provided for in the Act, including the time limits prescribed in the Schedule.

[38] This boils down to the question of whether section 73 (1) (*l*) is an empowering provision for the Minister to extend the terms of office of the board members or not and whether the provisions of section 73 (1) (*l*) are applicable to Schedule 1 of the Act, which provides for the terms of office of the board members.

[39] The interpretation of the provisions of section 73 (1) (*l*) and their relationship to the Schedule needs to be ascertained and determined. Counsel for the first respondent, *Ms Moroka* SC, has requested the court to take into account what the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6] stated regarding the rules of interpretation:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the

[6] 2012 (4) SA 593 (SCA) para 18

material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; . . .'

[40] The first respondent submits that the court should look at the preamble to the Act, which should be read in line with the powers in section 35 of the Act. She argues that the Schedule should be read with the Act, and that section 73 (1) (*l*) should therefore be applicable to the Schedule.

[41] As submitted by *Mr Madonsela* SC, counsel for the applicant, I accept that the overall purpose of stipulating the period for each term of office and the number of terms that may be served by a board member was to limit the time frame to strictly four and twelve years respectively and not beyond those periods. A restrictive interpretation must be used to the Schedule to the Act. The reliance upon section 73 (1) (*l*) of the Act by the Minister which states that 'the Minister may on good cause, extend any time period provided for in this Act', should not apply to Schedule 1 (1) and (2) as it relates to a time period provided in the Act and not the Schedule. Furthermore, the words 'which may not exceed four years' in the Schedule do not

give the Minister any discretion to extend the period from four years for whatever reason.

[42] Item 1 (2) of the Schedule further states that ‘reappointment is limited to three consecutive terms of office.’ Any extension of any term of appointment would defeat the specific periods stated in the Schedule and the purpose for such an appointment.

[43] The termination of office is regulated by the provisions of section 35 (5) of the Act, where it states that the Minister may terminate the appointment of any or all the members of a water board under specified circumstances. Nowhere does the Act or the Schedule state that the term of office may be extended by the Minister. This can only mean that the legislature did not envisage that there may be a need for an extension of the term of office of board members, but envisaged that there may be circumstances where the Minister may terminate the term of office before the expiry of the four year period.

[44] If one looks at section 73 of the Act, it deals with general powers of the Minister in the performance of the services relating to the general functions of the board. The provisions of section 73 (1)(a) to (k) relate to the performance of duties in relation to the provision of water services. Section 73 (1) (*l*) states that ‘on good cause, extend any time period provided for in this Act’. Section 73 (1) (*l*) has no bearing on the appointment of board members. It is my view that this extension of

time applies only to the section 73 (1)(a) to (k) of the Act and not to the entire Act and the Schedule thereto.

[45] The first respondent relies on this provision of the Act and a definition section which does not include the Schedule to the Act. It is clear that the legislature did not want to be second guessed when it came to the terms of office of the board members, as they are specifically and separately dealt with in the Schedule, which is separate to the Act.

[46] If the legislature had envisaged the extension of the terms of the members of the board, this would have been expressly stated in the Schedule or in the Act, or the provisions of section 73 (1) (*l*) would have stood alone, separate from the entire section, possibly with a caveat that it includes its application to the Schedule as well.

[47] I accept that the interpretation advanced by the respondents, in particular the first respondent, will result in absurdity, will subvert the overall purpose of the Act, and will result in an impermissible delegation of plenary legislative powers to an executive arm of government, as submitted on behalf of the applicant. This scenario is similar to the case of *Justice Alliance of South Africa v President of Republic of South Africa and Others*[7] where the court dealt with the separation of powers between executive and judiciary. The Constitutional Court in that case dealt with a

[7] *Justice Alliance of South Africa v President of Republic of South Africa and others, Freedom Under Law v President of Republic of South Africa and others, Centre for Legal Studies and another v President of Republic of South Africa and others* [2011] ZACC 23; 2011 (5) SA 388 (CC).

term of office of a Constitutional Court justice who holds office for a non-renewable term of twelve years or until he or she reaches the age of 70 years, whichever happens first, except where an Act of Parliament extends the term of office of a Constitutional Court Judge.

[48] The Constitutional court held that section 176 (1) of the Constitution must be interpreted against the background of the Constitutional imperatives of the rule of law, separation of powers, and the independence of the judiciary. A non-renewable period is an important feature of these Constitutional imperatives.

[49] It held further that it vests such authority with independence of the judiciary. However, section 8 (a) of the Judges' Remuneration Act[8], which permits the President to extend the term of office of the Constitutional Court Judge, shifts all the power granted by section 176 (1) from Parliament to the Executive, thereby surrendering and usurping the exclusive power of Parliament to extend a Constitutional Court Judge's term of office. Not only does this amount to an unlawful delegation of a legislative power, but the conferral of an open-ended discretion to the Executive also violates the principle of judicial independence, with the result that section 8 (a) was both unconstitutional and invalid.

[50] In the result I accept the submission made by the applicant's counsel that the construction urged by the Minister will result in absurdity, will subvert the overall

[8] Judges' Remuneration and Conditions of Employment Act 97 of 2001

purpose of the Act as well as the legislative scheme and will result in an impermissible delegation of plenary legislative powers to an executive of government.

[51] It is also accepted that in applying the provisions of any Act of Parliament, it must be interpreted to give effect to its primary objects, purpose and such interpretation should be in line with the Constitution. The Act has various headings to sections thereof, which in the past assisted to establish the purpose of the legislation only when the rest of the provision was not clear.[9] Subsequently, in *Turffontein Estates Ltd v Mining Commissioner Johannesburg,*[10] the court pointed out that the value attached to headings will depend on the circumstances of each case.

[52] Schedules to an Act help to simplify the contents of the legislation. Each schedule is considered *vis-à-vis* the relationship it has with the Act, whether the Act refers to it and the language in which the Act refers to it. Section 35 relates to the Governance of Water Boards. Section 35 (2) states as follows:

> 'Schedule 1 regulates the terms of office of board members, the procedure for the recommendation of persons for appointment as chairperson or board members and termination of office of board members.'

[9] *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 24
[10] 1917 AD 419

I have considered the language used in section 35 (2) of the Act. It uses the word 'regulate'. 'Regulate' as a verb is defined in the Oxford Dictionary as 'control or maintain the rate or speed of (a machine or process) so that it operates properly:' It is described as originating in late Middle English (in the sense 'control by rules').

[53] The language of the statute is clear and resolute in the use of this robust language in stating that the terms of the board members shall be regulated by Schedule 1. It clearly ousts any provision in the Act.

[54] The court has taken cognisance that in the case of conflict between a section of the Act and a schedule the section prevails.[11] Be that as it may, it is noteworthy that the entire Schedule 1 to the Act specifically only deals with issues relating to the board members, their terms of office, disqualification, procedure for nomination and appointment of board members and termination of office of board members. There is absolutely no provision that enables the Minister in the schedule to extend the term of office to the board members.

[55] I therefore find that the Minister's purported extension of the term of office of the board members to be unlawful and invalid in law. I find that on 'good cause shown' would only be applicable to the provisions of section 73. The legislature could not have given the Minister the best of both worlds, executive and legislative powers. If the terms of office are extended, in this case indefinitely, this will result in the

[11] *African and European Investment Co. Ltd v Warren and others* 1924 AD 308

second respondent serving more than the stipulated period envisaged by the legislature. The maximum period of twelve years caters for experience in holding office as a board member at the same time ensuring that new board members are appointed. Similarly, the board members should not exceed the four year term as this would result in them serving for a longer period than twelve years or four years depending on each case, if their terms of office are extended.

[56] In *Pharmaceutical Manufacturers Association of South Africa and another: In re Ex parte President of the Republic of South Africa and Others*,[12] the court dealt with exercise of public powers. It held that the exercise of all public powers had to comply with the Constitution, which was the supreme law, and with doctrine of legality, which was part of that law. The question whether the President had acted *ultra vires* or *intra vires* in bringing the an Act into force when he had done so was, accordingly, a Constitutional matter and the finding that he had acted *ultra vires* was a finding that he had acted in a manner consistent with the Constitution.

[57] In the light of this decision I therefore find that the Minister's purported extension of the terms of office of the board members to be invalid and against the Constitution. Her decision should be reviewed and set aside as it is inconsistent with the Act and the Constitution.

[12] [2000] ZACC 1; 2000 (2) SA 674 (CC)

[58] In the first respondent's supplementary heads of argument, the Minister has in the alternative sought a suspension of the order of invalidity. It is common cause that the order suspending a declaration of invalidity is discretionary and where interests of third parties are affected.

[59] I have been referred to *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others*,[13] where the court stated:

> 'The discretionary choice may not precede the finding of invalidity. The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it. Normally this would arise in the context of third parties having altered their position on the basis that the administrative action was valid and would suffer prejudice if the administrative action is set aside, but even then the "desirability of certainty" needs to be justified against the fundamental importance of the principle of legality.'

[60] It is clear to this court that it is quite an involved process for the appointment of such boards, however, in this case, the second respondent had been the longest serving member of the board, was Chairperson and should have timeously brought it to the attention of the Minister to appoint the board so as to prepare for a timeous exit, irrespective of whether such a merger or amalgamation were to take place or not. Similarly, the Chief Executive Officer of the thirteenth respondent, who is the

[13] [2010] ZACC 26; 2011 (4) SA 113 (CC) para 84

applicant in these proceedings, instead of vigilantly and vigorously supporting the extension of the terms of office for the board members, should have assisted in the process of the appointment of a new board rather than entrenching the old board in the institution. However, as soon as he falls out with the board, which he had so actively tried to entrench, he sees their actions as unlawful and illegal. The applicant had a hand in this unlawful conduct to a certain extent.

[61] The first respondent has requested that should this court declare the actions of the Minister to have been unlawful and invalid, the court is in terms section 8 of the Promotion of Administrative Justice Act[14] ('PAJA') and section 172 of the Constitution mandated to consider what is just and equitable in the circumstances of the case.

[62] In consideration of this, the court has been requested to take judicial notice of the fact that the board is specifically and legislatively created to run the affairs of the thirteenth respondent. It has to take decisions with a view to advance the business interests of the thirteenth respondent and act in the public interest. The court in the exercise of its judicial discretion must ensure the continuity of the entity in the interests of the public.

[63] This is a very persuasive argument in the light of the water challenges that our country is facing at the moment. Extra-ordinary and urgent measures need to be

[14] Act 3 of 2000

undertaken by the water boards, unlike at other times. Having a headless institution at the time of a water crisis like the present moment would defeat the intention of the legislature as envisaged in the preamble of the Act, and it would be against the interests of the public.

[64] This would be in line with what the Constitutional Court stated in *Steenkamp NO v Provincial Tender Board, Eastern Cape,*[15] cited by the first respondent's counsel, where the court held that the ultimate purpose of a public law remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administrative justice, to advance efficient and effective public administration compelled by constitutional prescripts and at a broader level to entrench the rule of law and that ultimately the remedy must be fair and just in the circumstances of a particular case.

[65] I have taken into account that the board has taken decisions which for practical reasons may be prejudicial to ordinary members of the public if set aside, and which are *bona fide* decisions taken in the interest of the public fairness and in furtherance of the functions of the board. This would lead to prejudice to members of the public as the preamble of the Act provides for the entrenchment of constitutional right to water as envisaged in the Bill of Rights. Section 27 (1) (b) of the Constitution also states that everyone has the right to have access to sufficient food and water. The preamble to the Act recognises the rights of access to basic water supply and basic sanitation necessary to ensure sufficient water and an environment not harmful

[15] 2007 (3) SA 121 (CC) para 29

to health or wellbeing. It also affirms the National Government's role as custodian of the Nations water resources.

[66] I find myself bound to uphold the aforementioned principles. Accordingly, I find that it will be just and equitable that the board continue with the performance of its duties, as the actions of the board did not relate only to the decision regarding the disciplinary hearing of the applicant but to other spheres of operation of the Water Board. On the other hand, it is imperative that the first respondent be directed to expedite and finalise the process of appointing a new board, a board that will take over from the current board.

[67] I must now deal with the applicant's suspension. He seeks an order setting aside his suspension and that all disciplinarily proceedings preferred against him be declared a nullity. He asserts that his suspension was procedurally flawed, he was not given an opportunity to make representations and that it was done for ulterior motives.

[68] According to the respondents, serious allegations have been raised against the applicant. These findings were as a result of an independent investigative process carried out by Edward Nathan, Sonnenbergs Africa (ENS). The applicant states that a decision to suspend him was taken without him being afforded an opportunity to make representations. This could not have been the case as he returned to work after taking sick leave. He was called upon to show cause why he

should not be suspended, responded thereto and a decision was taken to suspend him pending the finalisation of the investigation. He refers to that as a facade as the decision had been taken. This was after preliminary findings were made by Edward Nathan, Sonnenbergs Africa (ENS).

[69] Had he been suspended, as he alleges, on 7 November 2015 he would not have executed his duties between 7 November 2015 to 22 November 2015. It is clear to me that the 'Board's resolution' was not a resolution to suspend him with immediate effect but was a noting of the process that should be taken regarding the allegations made against him. These were serious allegations as they related to nepotism and abuse of power by the applicant.

[70] The second notice of intention to suspend him dated 14 April 2016 came only after the completion of the investigation by Edward Nathan, Sonnenbergs Africa (ENS). It was intended to enable the applicant to prepare for a disciplinary hearing and give him access to witnesses and documents at the institution. The applicant has tried to subscribe the disciplinary process to the ulterior motives, on the part of the second respondent and that this was also intended to remove him in line with the proposed merger of the Mhlathuze and Umgeni Water Boards.

[71] Having found that the decision by the Minister to extend the term of office of the board to be invalid, this also impacts on the decision of the board to proceed with the disciplinary process against him. Therefore that process cannot be valid in law.

[72] Having come to the conclusion that the term of office of the board members were unlawfully extended, the respondents submits that the operation of such an order should be suspended for these reasons:

(a) The second to the twelve respondent (the members of the thirteenth respondent, the board) had nothing whatsoever to do with the extension of their terms office. The decision in this regard were taken or made by the first respondent.

(b) The applicant in fact motivated the extension of the terms of office of the members of the board. He gave a glowing report about their competency as a board.

(c) It was not the second respondent alone but the members of the board who resolved on 25 July 2015 to investigate the whistle-blower allegations against the applicant.

(d) The applicant provided a preliminary response to the allegations against him on 31 August 2015.

(e) On 30 October 2015 ENS Africa released their interim report which provided preliminary and *prima facie* evidence of misconduct on the part of the applicant.

(f) The report was provided by an independent outsider, Edward Nathan, Sonnenbergs Africa (ENS) whose integrity has not been questioned.

(g) On 7 November 2015 the resolution was taken to pursue disciplinary action against the applicant and to suspend him.

(h) It emerged that the report had been leaked to the applicant who contacted employees of the board and sought to garner their support and to interfere with the investigative process.

(i) The applicant booked himself off sick from 10 November 2015 until 17 November 2015.

(j) He resumed his duties on 18 November 2015 and was handed the notice of the intention to suspend him pending the disciplinary inquiry.

(k) On 27 November 2015 the applicant launched an application out of the Labour Court which failed.

(l) The ENS Africa report was finalised on 26 February 2016.

(m) On 29 February 2016 the board resolved to pursue disciplinary charges and to invite representations from the applicant as to why he should not be suspended pending the outcome thereof.

[73] I have been persuaded to suspend the order of invalidity for a period of 180 days by Counsel for the respondents, on the basis that the actions of the Minister were *bona fide* and that the Minister's actions had nothing to do with the protection of any of the respondents, in particular the second respondent, having found that the decision of the Minister to extend the terms of board members to be invalid, should be reviewed and set aside, as her decision is inconsistent with the provisions of the Act and its Schedule and Constitution.

[74] In *Bengwenyama* the court held that a court has a discretion under section 172 (1)(b) of the Constitution to suspend a declaration of invalidity where it is just and equitable to do so. Section 8 (1) of PAJA states as follows:

> 'The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable . . .'

The court in *Bengwenyama* went on further to state as follows:

> 'This "generous jurisdiction" in terms of section 8 of PAJA provides for a wide range of just and equitable remedies, including declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner and orders prohibiting him or her from acting in a particular manner.'

[75] The respondents advocated the approach followed in *McBride v Minister of Police and Another*[16] as the one I should follow in this matter in support of a just and equitable remedy is sought by the respondents. The respondents have requested that I grant such an order, should I find in favour of the applicant with regard to the Minister's powers. The main submission is that the Minister acted in good faith and that she had put the best interests of the thirteenth respondent first. It is also submitted that the disciplinary proceedings have already commenced and that the process is handled by a reputable and independent consultant, whose actions have not been tarnished in any way. They have filed an investigation report which is before the board, which indicates that *prima facie*, the applicant has a case to answer. Likewise the applicant has strenuously argued for the setting aside of the disciplinary proceedings instituted against him, as these were as a result of an

[16] [2016] ZACC 30; 2016 (2) SACR 585 (CC)

invalid decision taken by an invalid board and that they were perused for ulterior motives.

[76] I am persuaded that the setting aside of all the invalid decisions by the board would bring disruption to the functions of the thirteenth respondent if all their decisions were to be set aside, including the decision to suspend and proceed with a disciplinary hearing against the applicant. This will also give the applicant an opportunity to deal with the allegations against him. This is a different case to the *McBride* case where Mr McBride was keen to proceed with the disciplinary hearing and clear his name. The grant of the just and equitable remedy in terms of section 172 (2) (b) of the Constitution does not go down well with the applicant, which is understandable in the circumstances. However, the integrity of the institution is also at stake.

In the light that the final investigations and recommendations to proceed with disciplinary proceedings against the applicant were made by an independent body Edward Nathan, Sonnenbergs Africa (ENS) and not by the board, that process should proceed and be carried out by Edward Nathan, Sonnenbergs Africa (ENS)

Conclusion

[77] Accordingly, I make the following order:

1. The decision by the Minister to extend the terms of the office of the board is declared invalid and set aside;

2. The decision by the board to pursue disciplinary proceedings against the applicant and suspend him is declared invalid and set aside;
3. The orders in paragraph 1 and 2 above are suspended from the date of this order for a period of 180 days for the Minister to appoint a new board;
4. The disciplinary proceedings against the applicant are to be conducted by Edward Nathan, Sonnenbergs Africa (ENS) and should be finalised by not later than 31 January 2017. Edward Nathan, Sonnenbergs Africa (ENS) will then make its recommendations to the newly appointed board as stated in paragraph 3 above, as soon as it is constituted;
5. The rule *nisi* in case number 3861/2016P is discharged; and
6. The applicant is awarded costs in respect of both matters (1578/2016P and 3861/2016P) including the costs consequent on the employment of senior and junior counsel where applicable.

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MBATHA J

Date of hearing	:	20 September 2016
Date delivered	:	28 November 2016

Appearances:

For the Applicant	:	Adv TG Madonsela SC/ Adv N Mfeka
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Instructed by	:	DLAMINI ATTORNEYS The Forum Building, 12th Floor 2 Maude Street Sandton C/O MH ATTORNEYS & ASSOCIATES 51 Pietermaritz Street Pietermaritzburg
For the Second to Thirteenth Respondents:		Adv VI Gajoo SC / Adv LR Naidoo EDWARD NATHAN SONNENBERGS 1 Richefond Circle Ridgeside Office Park Umhlanga C/O VENN NEMETH & HART ATTORNEYS 281 Pietermaritz Street Pietermaritzburg