REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **44337/2012**

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

30/3/17

Date **WHG VAN DER LINDE**

In the matter between:

The Companies and Intellectual Property Commission	**Applicant**
and	
Moola, Mahomed Yacoob	**First Respondent**
Moola, Imran Yacoob	**Second Respondent**
Moola, Zainul Abedeen Mahomed	**Third Respondent**

Judgment

Van der Linde, J:

Introduction

[1] The applicant applies for an order declaring the first and second respondents as delinquents as envisaged in s.162(3)(a) of the Companies Act 71 of 2008 ("the Act"), read with s.162(5)(c)(iv)(aa) of that Act; and that the third respondent be so declared as envisaged in s.162(3)(a), read with s.162(5)(c)(iv)(bb) of the Act.

[2] There is a contending application by the three respondents against the applicant, under the same case number, and which the parties were agreed should be heard together with this application. It is for a review of the decision of the commissioner of the Companies and Intellectual Property Commission (CIPC) to accept a report from two inspectors, the latter two cited as third and fourth respondents in that application. The report, amongst others, recommends that the present application brought by CIPC against the three respondents.

[3] What had happened is that three brothers, Mohamed, Imran and Nazeer, were ostensibly the sole shareholders in a company, CCE Motor Holdings (Pty) Ltd ("CCE"), at least according to them.[1] That they were the sole shareholders of CCE is disputed by the father who says that in truth they were mere nominees for him, he being the sole shareholder. The father was the sole director; at least to start off with, that much is undisputed.

[4] On 20 September 2010 an event occurred at which there was a serious disagreement between the father and the first two respondents about the way in which the business of CCE was to be run. The third respondent was not present, nor the third brother, Nazeer. The latter in fact did not know of and was not notified in advance that there would be such a gathering or discussion.[2]

[5] The three respondents contend that that gathering was a lawful meeting of shareholders at which the father was duly removed as director, and at which the three brothers were

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[1] Nazeer is not to be confused with the third respondent, Zainul, who is a cousin.

[2] The papers include a purported notice that such a meeting would be held; see annexure AC6, p254. But it is common cause that this is a fraud, although it is disputed by whom precisely. The respondents say it was a fraud by a Mr Kalla that had been employed by the third respondent at the time to undertake secretarial functions, but that he has since passed on. See also p206 of the review application, para 38, read with the replying affidavit, p292, para 58.

appointed as directors instead. They say a resolution to this effect was passed there and then.[3] The father disputes that a proper meeting took place, and that a resolution removing him as director, and appointing his sons as directors in his stead, was ever passed. More than a year later he reported the events to the CIPC and was reinstated as director.

[6] In turn, CIPC appointed the two inspectors to investigate the matter, and after enquiries they prepared a report in which they recommended that the matter be referred to the National Prosecuting Authority in terms of s.170()(f) of the Act. They recommended too that the applicant consider launching this application.

[7] That led to the application by the respondents to review the report and its acceptance by the applicant, and for some ancillary relief. The father brought his own application under a different case number to secure his own position. This latter application is not before me, and has not yet been disposed of.

Discussion: the applicant's case

[8] It is appropriate to begin considering the applicant's case. If the father is in fact the sole shareholder, as he says he is, then the purported resolution removing him as director could not have been passed, because he never agreed to resign as director.

[9] But even on the respondents' version of the shareholding and the events of 20 September 2010, the resolution could in any event not have been passed, for two reasons, one factual and one legal. At a factual level, on the respondents' own version, there was no notice given of a meeting, so that the third brother, Nazeer, did not know of the so-called meeting. At a factual level, the decision purportedly to remove the director, Mr Moola senior, was taken without Nazeer being present or even knowing that it would be or was being taken. At a

[3] Founding affidavit in review application, p17, para 29 to p18, para32. Although the forms later submitted to CIPC suggested that the appointment of the three respondents as directors occurred on 20 July 2011, as to which see pp145 to 147 of the founding affidavit in the review application, no-one suggested that there was any meeting other than that supposedly held on 20 September 2010 at which the three brothers were appointed as directors.

factual level, the presence of the father at the meeting was entirely fortuitous. He happened to overhear the discussion between two of the sons and joined them on that account.

[10]And the same goes for the appointment of the three brothers as directors: at a factual level, Nazeer did not know that that issue would be tabled there, or that in fact it was even tabled. According to the respondents, the so-called meeting was over and done, and the resolution removing Mr Moola senior passed and the three brothers appointed instead, without Nazeer knowing anything about it. On the respondents' own facts, in my view, calling that event a legal meeting of shareholders is being over-ambitious.

[11] At a legal level, at that time the removal of a director was governed by s.220 of the Companies Act 61 of 1973 ("the old Act"). S.220 (2) required that *"special notice"*[4] be given to the company of any proposed resolution *"to remove a director under this section or to appoint any person in the stead of the director so removed at the meeting at which he is removed..."*. Notice as statutorily required was not given.[5]

[12]Consequently, on the respondents' own version of the events of 20 September 2010, there was no meeting, in fact or in law, at which Mr Moola senior was removed as a director, and at which the Moola brothers were appointed as directors of the company in his stead.

[13]The applicant's founding affidavit raises, from the outset, serious suspicion concerning the respondents' *ex post facto* gloss of the alleged meeting of 20 September 2010. It explains how Mr Moola senior's signature was likely forged on what purported to be minutes of that meeting;[6] and that when the inspectors drilled down on this issue, the respondents could not provide a satisfactory explanation.

[14]Instead, the respondents produced what purported to be minutes of a meeting of 2 March 2012 in terms of which the father and the three sons would *"remain"* as directors of CCE, and recording that Taahir Moola, appointed by the father as his alternative, had now

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[4] See s.186(3) of the old Act.
[5] Answering affidavit, p269 para 28.17.
[6] Founding affidavit p21 para 17 ff.

resigned. The inspectors, not satisfied with this response, then pursued the issue of the legitimacy of the meeting of 20 September 2010.[7] They never received a satisfactory response, and this fact led them to complete their report and to make the recommendations in it.

[15]The point of all this is that the sting of the applicant's attack on the respondents is the alleged dishonesty surrounding the events of 20 September 2010. That alleged meeting is the very foundation of the applicant's case that the respondents represented dishonestly that they were properly appointed as directors – and should therefore be declared delinquent. The respondents' allegation of a proper meeting having taken place then, and the documents they subsequently produced to shore up that contention, is at the same time the very foundation of the respondents' case of their due appointment as directors.

[16]The applicant's very case is therefore that the purported removal of Mr Moola senior as director was unlawful; that is why the applicant in fact reinstated him and his alternate as directors.[8] In its heads of argument, the applicant submits (emphasis supplied):[9]

"The effect of the aforegoing is that even on the Respondents' version, they were not directors ever of the company as the resolution which brought them into office had lapsed and the only director of the company would then be the father."[10]

[17]The respondents' version that at the so-called meeting of 20 September 2010 Mr Moola senior voluntarily resigned[11] can, in my view, be rejected on the papers. The unsatisfactory explanation surrounding the clear discrepancy in Mr Moola senior's signature;[12] the putting up of the documents concerning the 2 March 2012 meeting as an attempted panacea to the

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[7] Founding affidavit, p24 para 19 ff.
[8] Founding affidavit, p17 para 8.5.
[9] Para 32.
[10] This submission relies on the supposed obligation in terms of the old s.220 to register a special resolution within one month of the resolution having been taken. The old Act does not actually require a special resolution, but rather a resolution at a meeting of which special notice will have been given. But since it is common cause that such special notice was in fact not given, and so the legal effect is the same.
[11] See annexure FA 4 to the founding affidavit in the review application, p148: *"Nature of change: Resigned as director."*
[12] Compare p63 with p214.

suspicions about 20 September 2010; and ultimately the failure to respond to the inspectors' letter of 9 March 2012, amongst other things, all give the lie to that aspect of their version.

[18]So it seems to be plain then that the 20 September 2010 resolution did not, as a matter of fact or law, happen.[13] Accepting then that the Moola brothers did not then become directors of CCE,[14] the substrate of the CIPC application against the first and second respondents must fall to the ground.

[19]The case against the third respondent, who is not a brother, is based on him allegedly having been a party to and having acquiesced in the actions of the first two respondents.[15] In a sense, the case is therefore that he acted, as it were, as an accessory or accomplice. He too was not a director of the company; he was merely acting as the company secretary.

[20]The relief sought against the third respondent is for a declaration of delinquency on the basis of s.162(3)(a) of the Act, read with s.162(5)(c)(iv)(bb) of the Act.[16] This latter paragraph refers back to s.77(3)(a), (b), and (c). These three paragraphs impose liability on a director for loss, damages or costs sustained by the company of which s/he is a director, if this was sustained directly or indirectly in consequence of specified objectionable conduct in relation to the very company concerned.

[21]I accordingly fail to see how that case and that relief can be maintained against the third respondent if the third respondent was not also a director of the very company in which the objectionable conduct occurred.

[22]It follows that in my view the applicant's case for declarations of delinquency in respect of all three respondents must fail.

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[13] As the applicant itself actually submits; heads of argument, para 49.

[14] As under the old Act, a *"director"* is defined under the new Act as including a person who occupies the position of a director. But there is no case made out in the founding affidavit that by dint of appropriate facts, the respondents occupied the positions of directors, even albeit that they were never legally appointed as such. They may have managed the company, but that makes them managers, not directors.

[15] Founding affidavit in the delinquency application, p29, para 26.2.

[16] See notice of motion in the delinquency application, prayer 1.

Discussion: the respondents' case

[23]If that happens, the question arises as to whether the application by the respondents succeeds. I do not think so, for the reasons that now follow. That application is to set aside the inspectors' report as well as the applicant's decision to adopt it, to make recommendations following on it, and to institute the present proceedings pursuant to it.

[24]The respondents' application is brought squarely under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Reviewable *"administrative action"* under PAJA is required to fall within the definition of that concept. And that definition, in relevant part, provides (emphasis supplied): *"...means any decision taken, or any failure to take a decision, ... which adversely affects the rights of any person and which has a direct, external legal effect, ...".*

[25]The substance of the review relief claimed by the respondents is to set aside the report of the two inspectors, and to set aside the acceptance by commissioner of that report. The report recommended that the applicant refer the matter to the National Prosecuting Authority, and that the applicant consider applying to court for a delinquency order.

[26]Before dealing with the submissions on behalf of the respondents, two propositions[17] are apposite. The first is perhaps self-evident: not all conduct, including decisions, of the administration is reviewable under s.6 of PAJA. The administration in action is not to be conflated with administrative action; the latter is potentially reviewable, the former not.

[27]The second is that the time when an applicant seeks to invoke PAJA may be determining of the relief to which it is entitled. Take the present matter: assume in favour of the respondents that inspectors appointed under s.169(2) of the Act, or the commission itself after receiving a report from inspectors so appointed, have the power under the Act to arrive at a decision *"which adversely affects the rights of any person and which has a direct, external legal effect"*, and assume such a decision had as a fact not yet been taken; then

[17] They may conceptually be only one, but for the sake of at least purported clarity, they are articulated as two.

the respondents might have been entitled to approach a court for a declaration that they are entitled to the rights identified in s.3 of PAJA.

[28]They would then argue that although a decision as envisaged in the definition of *"administrative action"* had not yet been taken, the particular statute under which the inspectors were functioning gave them the power potentially to arrive at such a decision. A court may then grant an order invoking s.3 of PAJA on the basis that although the future decision had not yet been taken, and so one did not yet know whether it would qualify under the definition of *"administrative action"*, the decision could conceivably so qualify. And so PAJA would be applicable.

[29]But if in fullness of time the decision proves in fact not to have the qualities that make the grade under *"administrative action"*, and the respondents were then to approach a court for a review under s.6, the application will be unsuccessful; PAJA would not be applicable. The point is, the mere fact that an applicant is entitled to fair process under PAJA along the way to a decision being taken, does not mean that the decision ultimately and actually taken is reviewable under PAJA; it would not avail the respondents to argue that although in fact the decision might not qualify as *"administrative action"*, at some earlier stage it potentially did.

[30]The respondents have submitted here that the recommendations of the inspectors and the decisions of the commission following on them are both reviewable under PAJA, on the basis that those decisions adversely affect their rights and have direct, external legal effect. In the course of their submissions the respondents referred amongst others to Cora Hoexter, Administrative Law in South Africa, 2nd ed, Juta & Co, 2012; and especially to Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga, and Others.[18]

[31]Their proposition was that, accepting that the report here is interim, in the sense that before the respondents might be prosecuted the NPA first has to take the decision to do so; and before they might be declared delinquent a court of law must first decide that they should

[18] 2008(2) SA 570 (TPD).

so be declared; nonetheless the report has a direct external legal effect because they are, in effect, defamed in it.

[32]The starting point of this discussion seems to me the important caution by Mogoeng, J (as he then was) in Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another (emphasis supplied):[19]

"Whether or not administrative action, which would make PAJA applicable, has been taken cannot be determined in the abstract. Regard must always be had to the facts of each case. [38] Detecting a reasonable possibility of a fraudulent misrepresentation of facts, as in this case, could hardly be said to constitute an administrative action. It is what the organ of State decides to do and actually does with the information it has become aware of which could potentially trigger the applicability of PAJA. It is unlikely that a decision to investigate and the process of investigation, which excludes a determination of culpability, could itself adversely affect the rights of any person, in a manner that has a direct and external legal effect."

[33]So one starts with the facts. Here the recommendations of the inspectors were that the applicant *"refer the matter to the National Prosecuting Authority, as provided for in section 170(1)(f) of the Act for the contravention of section 215(2)(e) of the Act..."*;[20] and that the applicant *"consider applying to court for an order declaring* ... (the respondents) ... *delinquent..."*.[21]

[34] Certainly these decisions do not have *final* effect, because in the former instance, the NPA may yet decide not to act on the reference; and so too the applicant in the latter instance. And in both instances, even if both referees decided to act positively on the references, the relevant court may yet dismiss the cases against the respondents.

[35]The value of Oosthuizen's case for the present matter, with respect, is that it lays down that finality of the decision is not the threshold for PAJA invocation.[22] But it must be appreciated that Oosthuizen's case is a decision given in the context of multi-staged decision-making by

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[19] 2011(1)(SA 327 (CC) at [37].
[20] Review application, p72, para 6.1.1. S.215(2)(e) of the Act refers to knowingly providing false information to the commission or an inspector.
[21] Review application, p72, para 6.1.2.
[22] See Hoexter op cit, pp441, 442.

an administrator, an organ of state, on the way to a final decision by a different organ of state, perhaps elevated in the administrative hierarchy. In other words, the interim decision pends the final decision by either the same or another organ of state, whose final decision is still by definition *"administrative action"* as defined.

[36]It is suggested however that in the present matter the *final* decision can axiomatically not aspire to *"administrative action;"* first because a decision to institute a prosecution is of itself not a reviewable decision,[23] and second because, fundamental to our constitutional order, a court is not an organ of state.[24]

[37] What about the interim decisions here? Do they have *"direct external legal effect"*? It is popular to refer in this context to the dicta of Lord Denning in Re Pergamon Press Ltd,[25] but two points are relevant. First, one is not dealing in this case with an application to secure fairness requirements in terms of PAJA on the way to a decision that might in the future qualify as *"administrative action"*; and second, one must bear in mind that Lord Denning's *dicta* were approved locally by the then Appellate Division in pre-PAJA days.[26]

[38]In the post-PAJA era, the Supreme Court of Appeal has said, of the reference by the Competition Commissioner of a contravention of the Competition Act 89 of 1998 to the Competition Tribunal, the following (emphasis supplied):

"Care must be taken here not to conflate two different aspects of the definition of administrative action in PAJA, namely, the requirement that the decision be one of an administrative nature and the separate requirement that it must have the capacity to affect legal rights. I consider that Telkom has failed to establish both requirements. As to the second of these although the complaint referral indeed affects Telkom in the sense that it may be obliged to give evidence under oath, be subject to a hearing before the Tribunal, and be required to submit its business affairs and documentation to public scrutiny it cannot be said that its rights have been affected or that the action complained of had that capacity."[27]

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[23] See para (ff) of the definition of *"administrative action"*.
[24] See s.239 of the Constitution, *"organ of state."*
[25] [1970] 3 All ER 535 (CA) at 539 d – f; also referred to by Prof Hoexter op cit at p437 in the context of *"multi-staged decision-making"*.
[26] Du Preez v TRC, 1997 (3) SA 204 (A).
[27] Competition Commission of SA v Telkom Ltd and another **[2010] 2 All SA 433** (SCA), at [10], per Malan, JA.

It seems to me that this judgment is in point in the context of the question whether a decision of a recommendatory nature has direct external legal effect, and could adversely affect rights.

[39]The applicant, in opposing the respondents' submission that the recommendations did have a direct and external legal effect, referred to the Supreme Court of Appeal judgment in Corpclo 2290 CC t/a U-Care v Registrar of Banks.[28] There Southwood, AJA said, in the context of whether an investigation by the Registrar of Banks constituted *"administrative action"* (emphasis supplied):

"[26] Even if the argument could be found to relate in some way to the interpretation of the sections, the appellants' reasoning is seriously flawed. First, it will be remembered that the Registrar's cause of action in the court a quo was simply the contravention of s 11 of the Act read with the Notice and s 81 of the Act. The Registrar's decision to investigate the appellants' business was of no relevance whatsoever. Secondly, the Registrar's decisions to investigate the appellants' business and institute proceedings against the appellants for an interdict in terms of s 81 of the Act were not administrative actions for the purposes of PAJA as they did not (as required by the definition of 'administrative action' in s 1 of PAJA) adversely affect the rights of the appellants or have a direct, external legal effect or have that capacity. Whether or not administrative action, which would make PAJA applicable, has been taken, cannot be determined in the abstract. Regard must always be had to the facts of the case. A decision to investigate and the process of investigation, which exclude a determination of culpability, could not adversely affect the rights of the appellants in a manner that has a direct and external legal effect. So too a decision to institute proceedings in the high court for an interdict does not affect the rights of the appellants or have that capacity. It is the high court which decides that the Act is being contravened and decides to grant the interdict."

[40]I suggest that this judgment is also in point; and that it is authority for the central proposition made here, which is that a recommendation that a matter be referred to a court for determination would ordinarily imply that no direct external legal effect could yet have resulted, nor could rights have been adversely affected.

[41]Likewise in this case, concerning the recommendation by the inspectors to the applicant to *"consider applying to court"* for a delinquency order, it seems to me that it cannot be said that the effect of that recommendation is *"direct"* or *"external"*, nor that it *"adversely*

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[28] [2013] 1 All SA 127 (SCA).

affects" their rights. Since the very recommendation is that a court be engaged, it follows that before a court will actually have made an order of delinquency against the respondents, the effect of the recommendation will not have had any of these qualities.[29]

[42]These considerations apply equally to the decision of the applicant to accept the report of the inspectors. That acceptance of itself has no quality of being *"direct"* or *"external,"* or of *"adversely"* affecting their rights, again because no binding decision has followed.

[43]The proposition in Grey's Marine,[30] that administrative action is reviewable if it has the mere *"capacity"* to affect legal rights of the subject, does not avail the Moolas either. The recommendation here has no capacity to affect legal rights, because it is not the interim decision of an organ of state on the way to another, final decision by another organ of state, both decisions being potentially *"administrative action"* as defined. Both the recommendation and the acceptance of the report envisage in terms engaging not an organ of state, but legal proceedings before a court of law, where their rights will be definitively determined by the judicial authority.

[44]Courts are vested with the judicial authority, and so charged with the very duty to define the lawful boundaries of parties' legal rights. The Moolas have the right to defend the action(s), and as it happens in this matter they will have done so successfully.

[45]Similarly, it would be a foreign notion if a potential accused in a potential criminal trial were entitled to exact that the very recommendation to the NPA that s/he be prosecuted, first passes PAJA review muster.

[46]Accordingly, in my view both applications must inevitably fail, in each instance with costs, including the costs consequent upon the employment of two counsel, and such an order issues.

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[29] Compare Podlas v Cohen and Bryden NNO and others, 1994 (4) SA 662 (TPD) at 675 D – H; Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd, 2001 (4) SA 661 (W).

[30] Grey's Marine Hout Bay and Others v Minister of Public Works and Others, 2005 (6) SA 313 (SCA).

WHG van der Linde
Judge, High Court
Johannesburg

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