THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 13599/2017

Before the Hon. Mr Justice Bozalek
Hearing: 30 and 31 August 2017
Judgment Delivered: 22 September 2017

In the matter between:

WILLIAM SOLOMON STEENKAMP	***1st Applicant***
OWEN CEDRIC TOBIAS	***2nd Applicant***

and

THE CENTRAL ENERGY FUND SOC LTD	***1st Respondent***
THE PETROLEUM OIL & GAS CORPORATION SOC LTD	***2nd Respondent***
THE MINISTER OF ENERGY	***3rd Respondent***

JUDGMENT

BOZALEK J

[1] The applicants in this matter are two former directors of the Petroleum Oil and Gas Corporation SOC Ltd ('PetroSA') who approached this Court on an urgent basis seeking the declaration as unlawful and the setting aside of their removal as directors of PetroSA on 5 July 2017.

[2] The first respondent is the Central Energy Fund SOC Ltd ('CEF'), a state-owned enterprise in terms of the Public Finance Management Act, 1 of 1999 ('the PFMA')

which is a national energy utility and the holding company of PetroSA. PetroSA is the second respondent, also a state-owned company and a public entity as contemplated in the PFMA and is described as the country's national oil and gas company.

[3] The third respondent is the Minister of Energy in her capacity as the political head of the Department of Energy which is CEF's primary shareholder. No relief is sought against the Minister and she abides the decision of the Court provided no costs order was sought against her. Similarly, PetroSA abides the decision of the Court on condition that no costs order is sought against it, which undertaking was duly made by the applicants.

[4] The applicants contend that they were unlawfully removed as directors in terms of the Companies Act, 71 of 2008 ('the Companies Act'). They also contend that their removal was unlawful in terms of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') and, in the alternative, in terms of the doctrine of legality. The applicants' urgent application sought in the first place immediate relief and, failing that, interim relief pending the final determination of review relief set out in Part B of their notice of motion. At the hearing of the matter the applicants advised that they sought final relief and were not seeking any form of deferred review relief. In effect, however, they seek the review relief as an alternative ground but without having obtained any record of the decision or having supplemented their papers.

Background

[5] The applicants were appointed to the PetroSA board with effect from 14 November 2014 at a time when PetroSA was experiencing considerable financial difficulties which manifested in huge losses and declining revenues. An important factor in this picture was the failure of a certain Project Ikhwezi, which entailed attempts to sink

new oil wells off Mossel Bay to replace existing wells which had been largely depleted over the years. In 2015 PetroSA suffered a larger than anticipated loss mainly due to a R14.5 billion impairment charge of which R11.7 billion related to the refinery, arising mainly from the failure of Project Ikhwezi.

[6] During 2015 the Minister requested that CEF and PetroSA jointly prepare a turnaround plan for PetroSA which became known as Project Apollo. Significant differences arose between the CEF board and the PetroSA board regarding the form and implementation of the turnaround plan. The relationship between the two boards became extremely strained. In January 2017 the Minister of Energy filled vacancies on the CEF board and appointed new directors. The two boards met on 1 March 2017 when PetroSA submitted a *'Corporate Plan'* to the CEF board which appears not to have been unconditionally accepted.

[7] The PetroSA board appeared before the Parliamentary Portfolio Committee on Energy ('the PPCE') on 14 March 2017 to account for the R14 billion impairment arising from the failure of Project Ikhwezi and to address the range of challenges facing the company.

[8] On 6 May 2017 PetroSA hosted the new Minister of Energy in Mossel Bay as part of her induction to PetroSA and the refinery in Mossel Bay. Some two months after the arrival of the new CEF board members, the PetroSA board received notices from CEF's new chairperson, Mr Makasi, dated 28 March 2017, requesting a general meeting to be convened for CEF as the shareholder i.e. a shareholders meeting, which proposed to remove the PetroSA board. The notice also requested the PetroSA board members to resign with immediate effect.

[9] The letter dated 28 March 2017 was headed *'Request to convene a meeting of the shareholders of (PetroSA)'*. It identified CEF as the sole shareholder of PetroSA and accordingly entitled to request PetroSA's board to convene a general meeting in terms of sec 71 of the Companies Act. CEF requested PetroSA's board to convene such a meeting not less than 15 days later and to circulate to every PetroSA board member a letter addressed to them by CEF's board requesting reasons why they should not be removed as directors of PetroSA. In that letter CEF expressed its concern about the *'strategic direction and the financial standing and management of PetroSA'* and outlined some of its main concerns.

[10] Under the heading *'Financial Management'* it recorded that PetroSA had been reporting losses, had failed to timeously communicate and appraise the CEF board of: its reasons for failing to meet agreed financial targets, for its losses and of its plans to turn around PetroSA's performance to stem such losses. Further details were cited.

[11] Under the heading *'Performance'* it was recorded that the PetroSA board had not met certain targets that were agreed with CEF in the 2016/2017 corporate plan and these were detailed. It was further recorded that the aforementioned targets were critical for the continued operational capacity of PetroSA.

[12] Dealing with the topic *'Filling Key Management Vacancies'*, the CEF board recorded that despite addressing several letters to the PetroSA board requesting the commencement of the recruitment of a permanent CEO for PetroSA, it had not received any feedback from the PetroSA board on the progress relating to this process. Referring to the *'Turnaround Plan and Corporate Plan'* the CEF board recorded that the PetroSA board had prepared and approved a corporate plan indicating that it would continue

making losses during the 2017/2018 to 2021/2022 corporate planning period which, the CEF's board alleged, indicated that the PetroSA board was unable to provide a tangible plan to improve its precarious financial position.

[13] The CEF board also complained that key elements and initiatives agreed in the strategic turnaround plan had not been implemented by PetroSA thus far. The letter concluded:

> *'In the light of the above the CEF board hereby requests that you tender your resignation as a director of PetroSA with immediate effect. Should you wish to continue as a director … you are requested to provided reasons in writing … and to make yourself available to make representations at the general meeting of PetroSA to be held on date advised.'*

[14] CEF also required PetroSA's board, in the notice convening the meeting of shareholders, to issue to its directors various draft resolutions proposing the removal of the various directors from PetroSA's board and appointing persons yet to be identified as new directors of the company.

[15] The preamble to the draft resolutions recorded that PetroSA was not currently performing to the satisfaction of CEF which was of the view that a successful turnaround of PetroSA could only be achieved through reconstituting the board of directors of PetroSA. It recorded further that each of the directors identified for possible removal would be given a reasonable opportunity to make a presentation, in person or through a representative at the shareholders meeting, before the resolution was put to a vote. Finally, it noted that depending on the outcome of the various directors' representations there might be a deficiency in the number of directors on the PetroSA Board in which event CEF might wish to make further appointments to the board.

[16] In response to the invitation to make representations PetroSA's board instructed legal representatives who duly prepared written representations in the form of a 150 page presentation comprising of 78 pages of closely typed text plus annexures.

[17] PetroSA's board originally scheduled a shareholders meeting for 2 June 2017, being more than two months after receipt of the original request from CEF to hold a shareholders meeting. This was unacceptable to CEF's board and eventually a compromise was reached whereby the meeting commenced on 22 May 2017.

[18] Prior thereto the CEF board chairperson wrote to PetroSA's board on 9 May 2017 seeking an undertaking that, prior to the shareholders meeting, PetroSA's board would take no steps to place it under business rescue, appoint any person in a senior managerial position or dispose of any of PetroSA's material assets. The correspondence which passed between the respective chairpersons of the boards in this and other respects at the time clearly illustrated a strained relationship between the respective boards.

[19] At the general shareholders meeting on 22 May 2017 and through its counsel, the PetroSA board partly presented its oral representations whereupon the meeting was postponed to 6 June 2017 but was not completed on that date. In the interim all the directors save for the applicants resigned and by the latter date only the applicants remained as directors. On 27 June 2017 the applicants were advised that the shareholders meeting would be reconvened the following day but it could not proceed due to the unavailability of the applicants at such short notice. The applicants then received short notice reconvening the shareholders meeting on 5 July 2017. The notice contained a number of proposed resolutions two of which were to remove the applicants from the board of directors of the company with effect from the date of passing the proposed

resolution whilst a further resolution proposed the appointment of unidentified new directors in their place.

[20] In the event, the applicants did not attend the reconvened meeting on 5 July 2017 but later that day received from the CEF board letters of removal as directors. In the letters it stated that the shareholder (CEF) had reviewed and considered the directors' representations as presented by their counsel as well as the written representations circulated but had, however, resolved to reconstitute the PetroSA board with immediate effect. Accordingly the applicants' terms as directors of PetroSA would cease effective from 5 July 2017. I shall also refer to this as the *'impugned decision'*.

[21] It was common cause that the usual term of a PetroSA director was three years and therefore it was accepted by the applicants that any setting aside or declaration as unlawful of the termination of their directorships would have the effect of reinstating them in that position only up until 14 November 2017.

[22] As mentioned earlier the primary relief sought by the applicants is the reviewing, declaring unlawful and setting aside of their notices of removal and the decision by CEF's board removing them as directors of PetroSA. They also seek an order directing CEF's board to reinstate them as directors of PetroSA.

The applicants' case

[23] On behalf of the applicants it is contended that the basis of their removal from the PetroSA board was the *'reasons'* recorded in the letter of 28 March 2017 from CEF's board. It is further contended that the complaints in that letter effectively accuse PetroSA's directors of incompetence, negligence and a dereliction of their duties as directors.

[24] The applicants' case is founded upon two bases. In the first place the submission is that CEF failed to comply with the relevant provisions of the Companies Act, more particularly in that the directors should have been removed in terms of sec 71(8) and not 71(1), the subsection which is relied upon by CEF.

[25] The relevant provisions of sec 71 of the Companies Act read 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) has become-

(i) ineligible or disqualified ... ; or

(ii) incapacitated ... ; or

(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.

(4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given-

(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

(5) ...

(6) ...

(7) ...

(8) If a company has fewer than three directors-

(a) subsection (3) does not apply to the company;

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and

(c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

(9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for-

(a) loss of office as a director; or

(b) loss of any other office as a consequence of being removed as a director.

(10) ... '

[26] Applicants' counsel, Ms Golden, noted that various notices and proposed resolutions received by the applicants referred merely to sec 71 of the Companies Act and she submitted that the nature of the allegations made against the applicants involved incompetence, negligence and dereliction of their duties as directors. Accordingly, she contended, the applicants could not lawfully have been removed in terms of sec 71(1) and (2) of the Companies Act as is alleged by CEF. Instead, counsel submitted further, the nature of the allegations triggered the procedural regime contemplated in sec 71(3) read with sec 71(8). These submissions were made on the additional basis that when the CEF board took the impugned decision at the shareholders meeting PetroSA only had two directors remaining i.e. the applicants. The argument proceeds that in the light of this fact the CEF shareholder had no obligation but to apply to the Companies Tribunal for any determination that the applicants had neglected or been derelict in the performance of their functions as directors.

[27] There is no merit in these arguments which are based upon a misreading of sec 71. A primary distinction is made in sec 71 between meetings of shareholders, where a resolution is considered for the removal of a director, and meetings of the board of a company which may also consider a resolution for the removal of one or more of its directors. Subsections 71(1) and (2) deal only with shareholders meetings whereas sec 71(3) to (8) deal primarily with meetings of a company's board of directors.

[28] In the present matter the only relevant meeting ever held was the shareholder meeting called by CEF's board as the sole shareholder of PetroSA and therefore the provisions of sec 71(3) - (8) were of no direct application.

[29] That PetroSA at one point had only two directors is irrelevant. It is indeed so that the provisions of sec 71(3) and 71(8) clearly contemplate that only a majority of directors can remove a fellow director at a meeting of a company's board of directors. Where there is only one or two directors the determination of whether there is cause to remove a director cannot be left to the board and must be referred to the Companies Tribunal. But since no PetroSA board meeting ever dealt with the removal of directors, this was irrelevant.

[30] In this regard I was initially puzzled by the words *'a shareholder'* in sec 71(3) and *'or shareholder'* in sec 71(8)(b) which could be seen as indicating that shareholders dissatisfied with a director must exercise their right to seek his or her removal through 71(3) or (8), as the case may be. However, on reflection, these provisions are clearly there to cater for the situation where a shareholder (presumably a minority shareholder) seeks to persuade the company's board to remove a director for a particular reason/s rather than seeking his/her removal through the mechanism of a shareholders meeting.

[31] It would also appear that the shareholders of a company, acting through a shareholders meeting, have a wider discretion or power to remove directors than does the company itself acting through its board of directors. In the case of the board it would appear to be a requirement for the removal of a director that he or she has become ineligible in terms of sec 69 of the Companies Act, or disqualified or incapacitated or has neglected or been derelict in the performance of his or her functions as a director. Section

71(3) is not made directly applicable to shareholders acting through a shareholders meeting as provided by sec 71(1) and (2). Be that as it may, there will obviously be cases where the shareholders are of the view, for example, that a director has neglected or been derelict in the performance of his or her functions as a director and that this provides grounds for his or her removal.

[32] I am prepared to assume that the circumstances of the present matter are such that the CEF board, as shareholder, was effectively making a case against the applicants (and their fellow directors before they resigned) that they had neglected or been derelict in the performance of their functions as directors as described in sec 71(3). Although these words are not used in the notices and letters directed by CEF to PetroSA's directors their contents are quite capable of such an interpretation.

[33] However, even if this assumption is made, as well as the further assumption that the applicants were entitled to the procedural rights referred to in sec 71(4)(a) *mutatis mutandis*, no case has been made out by them that they were not afforded all these rights and protections. The applicants were given detailed reasons why the shareholder was of the preliminary view that they should be removed as directors. They had a more than reasonable opportunity to make representations both in writing and an oral presentation to the shareholders meeting, which they did through legal representatives, before the resolution for their removal as directors was put to the vote.

[34] In the circumstances any challenge to their removal based on non-compliance with the provisions of sec 71 of the Companies Act must fail.

The administrative law challenge

[35] The second leg to the applicants' case is founded in administrative law, based on the assertion that their removal as directors amounted to administrative action and was subject to PAJA, alternatively was subject to the doctrine of legality. The applicants contend that *'the impugned decision'* constitutes administrative action and, when assessed against the reasons which motivated it, reveals that it was predetermined and a *fait accompli*. It is submitted further on behalf of the applicants that a decision to remove PetroSA's entire board, including the applicants, was unreasonable and disproportionate, arbitrary and irrational. As such, it is contended, the decision falls to be reviewed and set aside in terms of PAJA, alternatively the doctrine of legality.

[36] For their part CEF contends that its decision was not administrative action and thus not reviewable in terms of PAJA, nor for that matter is it even subject to the doctrine of legality as an exercise of public power. In the alternative, CEF contends that should it be found that the impugned decision amounts to administrative action or is subject to the doctrine of legality, the action taken by CEF meets both the procedural and substantive requirements of PAJA and the procedural and substantive tests for procedural fairness and rationality required by the doctrine of legality.

Did the impugned decision constitute an administrative action?

[37] The first question which thus arises is whether the impugned decision amounted to administrative action. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)*[1] the Constitutional Court held that a determination of whether action is administrative action or not should be decided on a case by case basis. It held further that the source of the power, the nature of the power, its

[1] 2000 (1) SA 1 (CC).

subject-matter, whether it involves the exercise of a public duty, and how closely it is related to policy matters (which are not administrative) or to the implementation of legislation (which is characteristic of administrative action), are all relevant considerations to be considered in the analysis.[2] The court stated:

> *'... What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. ... The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.'*[3]

[38] In *Minister of Defence and Military Veterans v Motau and Others ('Motau')*[4] the Constitutional Court found that the Minister of Defence and Military Veterans' removal of the chairperson and deputy chairperson from Armscor's board of directors was executive, rather than administrative action. The majority of the Court considered the nature, source and constraints on the Minister's power to appoint and remove the directors and found that it was an adjunct of the power to formulate defence policy and derived from her constitutional duty to exercise political responsibility for defence in South Africa. The Court was also of the view that the Minister was afforded a broad discretion to appoint and remove directors, which bolstered the view that the power was executive in nature.[5]

[39] In the present matter neither party contends that the decision taken by CEF's board was executive in nature. The question is rather, whether the decision was administrative in nature or non-administrative. As in all matters of this nature regard must first be had to the definition of administrative action in PAJA. To the extent that it is relevant, section 1 reads:

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[2] *SARFU* n 1 paras 141-143.
[3] *SARFU* n 1 para 141.
[4] 2014 (5) SA 69 (CC).
[5] *Motau* n 4 paras 46-51.

'1. Definitions ... "administrative action" means any decision taken, or any failure to take a decision, by -

(a) an organ of state ...

(b) 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 ...'

[40] The applicants chose to locate their case under (b) namely the decision-maker was a juristic person *'when exercising a public power or performing a public function in terms of an empowering provision'*. There was no serious argument from CEF that the impugned decision did not adversely affect the rights of the applicants or did not have a direct, external effect. The question then narrows down to whether, in taking its decision, CEF exercised a public power or performed a public function in terms of an empowering provision and whether the impugned decision falls within the definition of a *'decision'* in PAJA. There it is defined as meaning *'any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision'*.

[41] Notwithstanding how the applicants chose to present their case it should be noted that there is also room for the argument that the impugned decision constituted administrative action in terms of sec 1(a)(ii) of PAJA, namely, a decision taken by an organ of state when *'exercising a public power or performing a public function in terms of any legislation'*. I will however devote no further attention to this point since this argument was not made on behalf of the applicants.

[42] On behalf of CEF it was contended that the appropriate test to apply was the so-called seven point test enunciated in para 33 of *Motau's* case and in this regard it was

submitted that requirements (a) and (c) had not been met i.e. (a) it was not a decision of an administrative nature, and (c) that it had not been an exercise of public power or the performance of a public function. As to issue (a) it was further contended that, for the purposes of determining whether the impugned decision constituted administrative action, regard should be had to the fact that the CEF board was not operating in a *'law free zone'* but within the constraints of sec 71 of the Companies Act. CEF also drew support from the fact that those provisions were not specific to the relationship between CEF, as shareholder, and PetroSA.

[43] Although the primary question in *Motau* was whether the Minister's removal of Armscor's top executives was an executive or administrative action, there were similarities with the present matter amongst which was that Armscor was a wholly state-owned entity regulated by the Armscor Act. This situation is mirrored in relation to CEF which is a Schedule 2 state-owned enterprise in terms of the PFMA and a national energy utility reporting to the Department of Energy as its primary shareholder.

[44] CEF derives its mandate from the Central Energy Fund Act, 38 of 1977 ('the CEF Act'). As a holding company the CEF group oversees the governance of a group of subsidiaries, including PetroSA. As stated earlier, PetroSA too is a state-owned company in terms of sec 8(2) of the Companies Act and a public entity as contemplated in the PFMA.

[45] The preamble to the CEF Act states that it provides for the payment of certain monies into the Central Energy Fund and for the utilisation and investment thereof as well as for the imposition of a levy on fuel and for the utilisation and investment thereof. Section 1(3) provides that the affairs of CEF (Pty) Ltd shall be managed and controlled

by a board of directors which consists of a chairman appointed by the Minister of Mineral and Energy Affairs, two officers in that department also appointed by the Minister, and not more than five other directors similarly appointed by the Minister.[6] Section 1D provides for the share capital of CEF (Pty) Ltd and stipulates that shares therein shall be taken up by the state only.

[46] CEF (Pty) Ltd controls the Central Energy Fund into which is paid monies accruing into it by virtue of the Petroleum Products Act, 120 of 1977, the levy on fuel provided for by sec 1A of the CEF Act and such other monies as may accrue to the Fund from any other source.

[47] Subsection 1(2) provides that these monies:

> *'(a) ... shall be utilized in accordance with directions of the Minister ... for the financing or promotion of -*
>
> *(i) the acquisition of coal, the exploitation of coal deposits, the manufacture of liquid fuel, oil and other products from coal, the marketing of the said products and any matter connected with the said acquisition, exploitation, manufacture and marketing;*
>
> *(iA) the acquisition, generation, manufacture, marketing or distribution of any other form of energy, and research connected therewith;'*

Presumably it is under this latter provision that the affairs of PetroSA fall under the supervision or control of CEF (Pty) Ltd.

[48] In *Motau* the court went on to assess the nature of the power and stated that the concept of *'administrative action'* as defined in sec 1(i) of PAJA is the threshold for engaging administrative law review. The rather unwieldy definition can be distilled into the seven elements referred to earlier, namely that there must be:

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[6] Section 1(4).

'(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 effects rights;

(f) that has a direct, external legal effect; and

(g) that does not fall under any of the listed exclusions'.[7]

[49] As mentioned, on behalf of CEF Mr Motau conceded that all the elements in the above list were met save for (a) and (c). CEF's counsel's concession that requirements (b) and (d) to (g) have been met are, I consider, correctly made. What remains to be decided then is whether the impugned decision was one of an administrative nature and whether it involved the exercise of a public power or performance of a public function. In discussing the requirement under (a), the Court in *Motau* quoted with approval from *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others*[8] where Wallis J (as he then was) observed that by asking whether a particular decision is of an administrative nature has two important functions: firstly, it obliges courts to make *'a positive decision in each case whether a particular exercise of public power … is of an administrative character'* and secondly, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in sec 1(i) of PAJA.[9] As the Constitutional Court put it *'(i)n other words, the*

[7] *Motau* n 4 para 33.
[8] 2010 (5) SA 574 (KZP).
[9] *Motau* n 4 para 34. See also *Sokhela* n 8 para 61.

requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration'.[10]

[50] The Constitutional Court concluded:

> *'[44] In summary, the important question in this context is whether the power is more closely related to the formulation of policy, which would render it executive in nature, or the implementation of legislation, which would make it administrative. Underpinning this enquiry is the question whether it is appropriate to subject the power to the more rigorous, administrative-law review standard. The other pointers - the source of the power and the extent of the discretion afforded to the functionary – are ancillary in that they are often symptoms of these bigger questions.'*

[51] Of great relevance in the present matter is CEF's statutory position as the state-owned enterprise controlling the Central Energy Fund and, as shareholder, other energy utilities including PetroSA, also a state-owned enterprise. The impugned decision does not appear to bear a close relationship to the formulation of policy and is much closer to the implementation of legislation, namely the CEF Act, in particular sec 1(2)(iA) thereof which is concerned with the financing and promotion of the acquisition, generation, manufacture, marketing or distribution of any other form of energy, in this case gas, in the national interest.

[52] In my view the removal of directors serving on the board of a state-owned entity concerned with national energy matters and which entities, by their very nature, are wholly funded by taxes or levies imposed upon the public, is a decision of an administrative nature. Insofar as the decision was taken by the CEF's board which in turn is directly answerable to the executive in the person of the Minister, I do not consider the power to be of an executive nature. It does not follow, however, that since the power is

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[10] *Motau* n 4 para 34.

not executive it must therefore be administrative in nature. One enquiry which must be made in this regard is whether it is appropriate to subject the power to the more rigorous administrative law review standards. In my view the answer must be in the affirmative. The decision to remove the PetroSA board's directors was not, in my view, directly connected to policy matters in the field of energy. Furthermore, the removal of a director or as in this case, a board of directors, can have a profound influence on the manner in which a state-owned enterprise fulfils its functions in an area of vital national interest, i.e. energy, and thus for the public as a whole.

[53] It was contended on behalf of CEF that a contra-indication that the impugned decision was of an administrative nature was the fact that it was taken in terms of sec 71 of the Companies Act which contains its own constraints on the exercise of such power. This alone does not in my view detract from the administrative nature of the decision although it is undoubtedly a relevant factor. CEF's power to remove a director/s is exercised through sec 71(1) and (2) but it does not follow that, because there are certain constraints in exercising a power under these provisions, the decision is immune to administrative review as not being one of an administrative nature. As was stated in a different context in Motau *'(t)he fact that the power is sourced in legislation is, as noted above, not in itself determinative, and thus does not dilute the force of the other considerations canvassed'*.[11]

[54] It is also not without significance that the powers of a majority shareholder, such as the state enjoys in the present instance in terms of sec 71(1) and (2), are wide and certainly less constrained than those exercised by a board of directors in terms of the balance of the provisions of sec 71. To subject the CEF board's power, as shareholder, to

[11] *Motau* n 4 para 50.

remove the directors of PetroSA to the test of rationality as well as the procedural requirements provided for by PAJA, does not appear to be in any way inappropriate.

[55] A further important consideration is that when the state acts as a shareholder in removing directors it is not subject to the same commercial restraints as a shareholder which has risked its own capital in the company and from whose board it wishes to remove directors. The state as shareholder is utilising public capital derived from the fiscus and therefore, ultimately, the general public.

[56] The remaining consideration is whether the impugned decision involved the exercise of a public power or the performance of a public function. Most of the cases dealing with this issue have concerned either powers exercised by public bodies in a private law setting (mainly contractual) or private bodies exercising public powers. It is the second area which is more relevant to the present matter, if at all. Both CEF and PetroSA, as companies incorporated under the Companies Act, have some characteristics of a private body. However, PAJA explicitly contemplates the inclusion of such bodies where, in the definition of administrative action, reference is made to *'a natural or juristic person, other than an organ of state'*. But as Professor Hoexter[12] puts it, the courts are currently answering, in an incremental fashion, what gives a power its *'public'* character. In this area the courts have found that a stock exchange, a non-statutory body, was under a statutory duty to act in the public interest and that its decisions were open to administrative review.[13] Similarly in *Coetzee v Comitis and Others*[14], the court found that a voluntary association, the national soccer league, performed a public function and its activities were of public interest. This approach was upheld by the Constitutional Court

[12] C Hoexter *Administrative Law in South Africa* 2nd ed (2012) Juta at p 189.
[13] *Dawnlaan Beleggings (Edms) BPK v Johannesburg Stock Exchange and Others* 1983 (3) SA 344 (W) at 364B-D.
[14] 2001 (1) SA 1254 (C) para 17.8.

in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*,[15] the following passage being particularly relevant:

> *'The provisions of the memorandum and articles of association fade into insignificance as an indicator of the nature of the Council in light of the overwhelming evidence of the true nature of the Council's functions. The fundamental difference between a private company registered in terms of the Companies Act and the Council is that the private company, while it has to comply with the law, is autonomous in the sense that the company itself decides what its objectives and functions are and how it fulfils them. The Council's composition and mandate show that, although its legal form is that of a private company, its functions are, essentially, regulatory of an industry. These functions are closely circumscribed by the ministerial notice. I strain to find any characteristic of autonomy in the functions of the Council equivalent to that of an enterprise of a private nature. The Council regulates, in the public interest and in the performance of a public duty'.*

[57] It seems to me that by analogy this dictum and reasoning is applicable to the present matter inasmuch as, although to a certain extent CEF and PetroSA function as companies in the private law sphere, they are both owned and controlled by the state and perform vital functions in the state's overall energy policy and programmes.

[58] In *Sokhela* Wallis J held that an MEC was '*clearly exercising a public power'* when he suspended members of a statutory wildlife conservation board, as the power was given in the interest of the proper conduct of the affairs of the board and of the province's conservation service more generally.[16] In the present matter, CEF's powers as shareholder exercised through sec 71 of the Companies Act, were given in the interests of the proper conduct of the affairs of PetroSA, an important component of the state's energy policy and programmes, and a utility which has absorbed and continues to absorb considerable state financial resources. In these circumstances it appears to me there can

[15] 2007 (1) SA 343 (CC) para 45.
[16] *Sokhela* n 8 para 63.

be little doubt that in exercising its power, the board of CEF was exercising a public power or performing a public function.

[59] For these reasons I consider that the impugned decision constituted administrative action and as such is subject to the provisions of PAJA.

Was the applicants' removal unlawful in terms of PAJA?

[60] As mentioned the basis of the applicants' case in this regard was that the removal of the directors was clearly a predetermined decision. In terms of PAJA this would equate to the decision being taken in bad faith or for an ulterior purpose or motive. In support of this argument the applicants' counsel argued that the representations presented to CEF's board on behalf of the applicants in writing at the shareholders meeting *'firmly refuted'* the accusations of incompetence, negligence and dereliction of duty. Since the initial proclaimed basis for the applicants' removal thus fell away, CEF's subsequent exercise of its discretion to remove the applicants as directors was an abuse of power motivated by an ulterior purpose and motive and was the only way in which it could rid itself of directors with whom it did not see eye to eye. Finally, it was argued that CEF's decision to remove the entire board was so unreasonable and disproportionate as to be arbitrary and irrational.

[61] In argument it was repeatedly contended on behalf of the applicants that the *'reasons'* advanced on behalf of CEF in its initial letter to PetroSA's board of directors on 28 March 2017 constituted its reasons for their eventual removal. This is not accurate for a number of reasons. Firstly, that letter, being CEF's prior written motivation as to why it proposed to remove the board of directors, cannot automatically be taken to constitute its reasons for the decision eventually taken. In the process of inviting

representations from the applicants and their fellow directors and considering these, there was at the very least the theoretical possibility of some of these preliminary reasons falling away or others coming to the fore. It was after all, or should have been, a dynamic process of engagement. Secondly, prior to the litigation being commenced, CEF was neither asked for, nor provided, reasons for the impugned decision. Its reasons first appear in para 34 of its answering affidavit which reads as follows:

> *'Although we seriously considered the applicants' representations, we were not persuaded the applicants should remain on the PetroSA board, for the following reasons:*
>
> *34.1* *As PetroSA's shareholder, the CEF is ultimately responsible for PetroSA and its assets, and must account to the Minister. The CEF has been (and remains) deeply concerned about PetroSA's ability to recover financially. Over time, it appears that PetroSA's financial position has continued to worsen. This has a direct impact on the CEF Group's balance sheet and required urgent redress;*
>
> *34.2* *The PetroSA Board and the CEF Board have quite clearly been at odds on how best to attend to PetroSA's problems. Indeed, the PetroSA Board (and, in particular, the applicants) appeared to have a fundamentally different vision for PetroSA from that of the CEF;*
>
> *34.3* *The CEF Board thus had very real concerns about the PetroSA Board's reliability, and their ability to implement a successful turnaround strategy for PetroSA and to improve PetroSA's parlous financial and corporate governance state. It formed the preliminary view that board-level changes may be required at PetroSA to turn the situation around. Hence the CEF's invitation to the PetroSA Board members to make representations on why they should not be removed from their positions;*
>
> *34.4* *Rather than alleviating the CEF's concerns, the representations (and indeed this application) confirmed that the applicants did not share the CEF's vision for PetroSA and had in fact actively sought to undermine the CEF's functions and decisions, and to engage with the Minister in the CEF's absence. It became clear that the relationship between the CEF and the applicants had deteriorated beyond repair, and that there was no realistic prospect of*

returning to a functional trust relationship – particularly given the short time remaining of the applicants' terms.

35. The CEF accordingly resolved that it should remove the applicants from the PetroSA Board and appoint a new Board to stabilize and re-energise PetroSA.'

[62] These reasons, although of a general nature, echo at least some of the concerns and complaints expressed by the CEF board in its letter of 20 March 2017. They are dealt with at some length in the applicants' replying affidavits, but not in my view convincingly so, an issue to which I shall return.

[63] However, the first argument that must be dealt with is that the impugned decision was predetermined as reflected in the form of the CEF board's initial letter which required the directors to provide reasons why they should continue as directors and which demanded the directors' resignation with immediate effect.

[64] I do not consider that these factors justify the conclusion that the impugned decision was predetermined. The CEF board had formed at least a preliminary view that the board was not performing satisfactorily. If this were not the case they would not have taken steps to convene a shareholder meeting, and to have failed to communicate this preliminary view would have been disingenuous. For similar reasons the fact that the initial letter called upon the applicants to furnish reasons why they should continue as directors does not in itself necessarily serve to taint the later decision of the CEF board to remove the applicants, provided of course that the CEF board kept an open mind on the issue before it.

[65] A further reason cited by the applicants in support of their argument was the fact that at the commencement of the shareholders meeting the CEF chairperson renewed the call for the directors to resign and was unwilling to negotiate a compromise that they

should be allowed to serve out their full term until November 2017, a period of some six months. On the assumption that the CEF board had good grounds for being dissatisfied with the performance of PetroSA's directors I can see no basis why it was obliged to enter into a compromise or why renewing its call for their resignation necessarily tainted its ultimate decision. A further reason advanced by the applicants for the impugned decision being predetermined was the CEF board's initial refusal to grant the PetroSA board more time to prepare their detailed representations. However the facts are that the applicants were afforded a more than adequate opportunity to present their representations, and in fact more time than was initially envisaged by the CEF board.

[66] Finally, the applicants also sought to rely on the correspondence between the CEF chairman and the PetroSA board chairman during May 2017 when, as previously mentioned, the latter was instructed not to take certain steps in relation to PetroSA without first notifying the CEF board. In my view, however, in a situation where there was an impending shareholders meeting to discuss the possible removal of PetroSA's directors, the CEF board was within its rights to require of the PetroSA board that they give an undertaking that they would not, in the meantime, dispose of any of PetroSA's material assets or apply for it to be placed in business recovery etc.

[67] The main argument advanced on behalf of the applicants to the effect that the impugned decision was arbitrary was that the PetroSA board's written representations *'firmly refuted'* the accusations of director incompetence, negligence and dereliction of duties. This was not substantiated in argument on behalf of the applicants, but merely stated as a conclusion. Similarly, the content of these representations, which allegedly '*refuted'* the complaints of the CEF's board as contained in its letter dated 28 March 2017, together with its annexures, are not directly dealt with in the applicants' papers.

They are merely attached as an annexure qualified by the sentence *'(t)o avoid a prolix record, I do not repeat these detailed submissions in the affidavit'*.

[68] As mentioned the representations are extremely lengthy and detailed, totalling, without annexures, some 75 closely typed pages. It is simply not feasible for this, or any court to determine on paper whether the complaints made by the CEF board were adequately dealt, let alone *'refuted'*, with by the applicants or not. There is, at one and the same time, simply too much detail and not enough background. The present proceedings are not an appeal and such a determination lies outside the ambit of what are truncated review proceedings particularly taking into account that no formal record of the decision exists as well as the applicability of the Plascon Evans rule.

[69] The principal test in PAJA in relation to a review of the substantive merits of an administrative action is whether the decision (or action) was rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the decision-maker or the reasons given for it by the administrator. As mentioned earlier such reasons were first set out in CEF's opposing affidavit. The first reason related to PetroSA's continually deteriorating financial position. In essence the applicants' response to this allegation was not to dispute that PetroSA's financial position was dire but to point out that this was a long standing problem, related in the main to the failure of Project Ikhwezi and that the decision to implement that project preceded their appointment to PetroSA's board. Needless to say it is by no means a complete answer for an existing board to point out that the difficulties which it may have failed to deal with arose out of a decision taken by a board prior to their appointment. The real question is whether they and their fellow directors have been able to effectively deal with the problem during the currency of their appointment.

[70] Secondly in this regard, the applicants state that PetroSA's financial difficulties appeared to concern CEF only to the extent that it directly impacted on its balance sheet. Inasmuch as PetroSA was in effect its wholly-owned subsidiary, the CEF board, as shareholder, would appear to be well within its rights in being concerned about the impact of PetroSA's financial problems on its (i.e. CEF's) financial statements or balance sheet.

[71] The applicants also complained that the reasons furnished by CEF differs from those set out in its initial letter in March 2017. This argument is contradictory inasmuch as one of the main criticisms by the applicants of the impugned decision is that the CEF board formulated its reasons for the termination of their directorships in advance without first hearing their representations. On the other hand, they also argue that CEF's reasons changed between CEF's initial letter and when it set out its reasons in its opposing affidavit. In my view there was no discrepancy in the reasons furnished by CEF for the impugned decision. The grounds for possible termination initially set out by CEF in March 2017 were not reasons for the impugned decision but merely the grounds for their preliminary view.

[72] CEF's reasons for the impugned decision were those furnished in the opposing affidavit and, to the extent that they differ from those informing its preliminary view, are not necessarily irregular nor betray *mala fides* or an improper motive. Between these two stages the CEF board sought and considered detailed representations from the PetroSA's directors. There was also correspondence and interaction between the CEF's board and PetroSA's board. In these circumstances it is not surprising that CEF's eventual reasons were, to a certain extent, based upon somewhat different grounds to those supporting

their preliminary view. If anything this indicated that the process of calling for and considering the directors' representation involved a genuine dialogue between the parties.

[73] The second reason furnished by the CEF board for the impugned decision was that the applicants appeared to have a fundamentally different vision for PetroSA from that of CEF. The applicants' response was that this was not one of the *'reasons'* initially provided by CEF's board. As indicated this point has no merit. The applicants' further response is to delve into the background and history of the differences between the CEF board and the PetroSA board and to rely, to a large extent, on positions or views held by the previous Minister of Energy in relation to the proper roles of these two companies. In my view these factors are largely irrelevant and do nothing to detract from the fact that the two boards were at loggerheads.

[74] The third and fourth reasons furnished by the CEF board were its concerns about the PetroSA board's reliability and in particular their ability to implement a successful turnaround strategy for PetroSA and to improve the state of its financial and corporate government. In this regard the CEF board considered that the representations made on behalf of PetroSA's board confirmed that the two camps did not see eye to eye and that the relationship between CEF and the applicants had deteriorated beyond repair. Here again the applicants' response to these two reasons was largely to *'confess and avoid'* and to rely on what a previous Minister had envisaged as the proper manner in which the two boards should work together. The applicants maintain that a strategic turnaround plan, as proposed by the PetroSA board would succeed. It is not this Court's function, in considering a review challenge to the CEF board's decision, nor is it possible, to determine whether this view has merit or not. Similar considerations apply to the question of whether a functional trust relationship still exists between the applicants as

PetroSA directors and the CEF board and the related question of whether the applicants were the cause of the deterioration inasmuch as they had reported to the previous Minister in regard to differences between the two boards. Again this is not a matter which is appropriate for this Court to determine, even assuming this was possible on the papers before the Court.

[75] The applicants devoted a good part of their founding and replying affidavits to dealings they had with officials of the Department and CEF officials during the period between November 2016 and June 2017 regarding a particular plan emanating from CEF to sell a 70% interest in the rights to certain of PetroSA's off-shore oilfield holdings to a state-owned Russian company, JSC Rosgeologia ('Rosgeo'), for surveying and possible exploitation. They allege that it was because of their resistance to this proposed plan and for reasons of political intrigue that the CEF board turned against them and ultimately terminated their directorship. These allegations were specifically dealt with and the allegations of impropriety were strenuously denied by CEF in its answering affidavits. Disturbing as these allegations are, CEF's denials are not so far-fetched or lacking in detail that they can be dismissed out of hand on these papers. The issue as a whole, was in the event, not relied upon or pursued by the applicants in argument. Once again, bearing in mind the strictures of the Plascon Evans rule it is not possible for this Court to make any findings based on this aspect of the case.

[76] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,[17] the Constitutional Court, per O'Regan J, stated that the proper constitutional meaning which should be attached to sec 6(2)(h) of PAJA was that it

[17] 2004 (4) SA 490 (CC).

required a simple test, namely, that an administrative decision will be reviewable if it is one that a reasonable decision-maker could not reach. The court went on to state,

> *'[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'*

[77] Applying these principles I consider that the applicants have failed to establish that the impugned decision is one which a reasonable decision-maker could not have reached, particularly in the light of the very substantial financial difficulties in which PetroSA found itself and what was, at best, the strained relationship between the PetroSA board and the CEF board. I consider further that the applicants have failed to establish that it was not justifiable or reasonable to replace them as directors, some five or six months short of the end of their term. Bearing in mind that the issues in this matter must be determined on the basis of the principles in Plascon Evans, the reason for the impugned decision furnished by the respondents in their answering affidavit cannot simply be dismissed out of hand as irrational or unreasonable or any such configuration.

[78] To the extent that the main thrust of the applicants' case, at least on the administrative law leg, was that it was a predetermined decision, unreasonable and disproportionate, arbitrary and irrational, the applicants have failed to make out such a case on the papers.

[79] In the result for these reasons the applicants' challenge to the impugned decision based on administrative law grounds cannot succeed.

Costs

[80] CEF seek its costs in the event of the applicants not prevailing in the application. CEF's counsel, Mr Motau, recognised that private litigants who bona fide seek to ventilate issues of public importance are usually immunised from an adverse costs order under the Biowatch principle.[18] He contended, however, that the applicants had acted purely in their own interests to secure an additional period of their term as directors of PetroSA and had been unable to identify any public interest that justified them bringing these proceedings, either urgently or at all.

[81] On an overall reading of the papers I am not persuaded that the applicants have brought this application merely to further their own interests. At stake here was no more than the applicants' continuation as directors until the end of their term of office, a period of merely five or six months. There is nothing in the papers regarding what this would have meant for the applicants by way of directors fees or other benefits and thus nothing to suggest that they were motivated solely by financial or personal considerations. In fact, the applicants appear to have been genuinely concerned that their positions as directors were improperly threatened by the CEF board's actions and what they saw as its misconceived view of the relationship between the PetroSA board and the CEF board.

[82] Where directors of a state-owned enterprise are removed at the instance of another state-owned enterprise, acting in its capacity as shareholder, because the two boards do not see eye to eye, the potential for the shareholder board to act irrationally or with an ulterior purpose, as opposed to the best interests of the state-owned enterprise, is not

[18] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).

something which can be discounted as fanciful. Events over the last few years, many of which have culminated in judgments of our courts, have shown that the boards of some parastatals have been afflicted by internecine struggles, allegations of corruption and abuses of power involving public resources, often on a grand scale. I consider that to make a costs order in the present matter against the applicants could well have a chilling effect on directors who find themselves in a similar or more adverse situation and could incline them to simply accept the shareholder decision no matter how irrational, poorly motivated or self-serving it may be. This would not be in the interest of the good governance of state-owned enterprises.

[83] Taking these general factors into account as well as the particular circumstances of this matter, I consider that it would be inappropriate to make a costs order against the applicants. I hasten to add that this ruling should not be interpreted as meaning that no costs order will ever be made against directors who find themselves in a situation similar to that of the applicants, no matter how ill-advised, lacking in merit or self-serving their decision to challenge a decision to terminate their appointments may be.

Order

[84] In the result the following order is made:

(a) The application is dismissed;

(b) The applicants and the first respondent will bear their own costs.

BOZALEK J

APPEARANCES

For the Applicants	:	*Adv T Golden (SC)* *Adv CA Daniels*
As Instructed by	:	*Adriaans Attorneys* *Ref: A Adriaans*
For the 1st Respondent	:	*Adv T Motau (SC)* *Adv I Goodman* *Adv R Tshetlo*
As Instructed by	:	*Bowman Gilfillan Inc* *Ref: C Mkiva*