CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 133/13

In the matter between:

MINISTER OF DEFENCE AND MILITARY VETERANS Appellant

and

MAOMELA MORETI MOTAU First Respondent

REFILOE MOKOENA Second Respondent

ARMAMENTS CORPORATION OF SOUTH AFRICA (SOC) LIMITED Third Respondent

Neutral citation: *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18

Coram: Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, Van der Westhuizen J and Zondo J

Heard on: 17 February 2014

Decided on: 10 June 2014

S**umma**ry: Armaments Corporation of South Africa Limited Act 51 of 2003 — section 8(c) — Minister's power to dismiss board member "on good cause shown" — Minister had good cause to dismiss the first and second respondents

Promotion of Administrative Justice Act 3 of 2000 — section 1 — definition of administrative action — distinction between

administrative and executive action — Minister's power to dismiss is executive action

Companies Act 71 of 2008 — section 71 — section regulates procedure by which board members may be dismissed by shareholders — section must be read with section 8(c) of the Armaments Corporation of South Africa Limited Act — Minister did not comply with section 71's procedural requirements

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ORDER

On appeal from the North Gauteng High Court, Pretoria (Legodi J):

1. Condonation for the late filing of the written submissions of both General Motau and Ms Mokoena, and of the Armaments Corporation of South Africa (SOC) Limited (Armscor), is granted.
2. The appeal is upheld to the extent set out below.
3. The order of the High Court is set aside and replaced with the following:

   "(a) It is declared that the Minister acted unlawfully insofar as she terminated the services of General Motau and Ms Mokoena on the Armscor Board without following the procedure set out in section 71(1) and (2) of the Companies Act.

   (b) The Minister's decision to terminate the services of General Motau and Ms Mokoena on the Armscor Board is not set aside.

   (c) The Minister is ordered to pay the costs incurred by General Motau and Ms Mokoena in the High Court."

4. There is no order as to costs in this Court.

JUDGMENT

KHAMPEPE J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Majiedt AJ and Van der Westhuizen J concurring):

Introduction

[1] This is a case about accountability. To what standard of performance may a Minister, as the responsible member of the Executive, hold the leadership of a state-owned entity that falls under her supervisory control? And to what standard should a court of law hold that Minister when she exercises her powers of oversight in relation to that state-owned entity? These are important questions for any democracy that takes seriously the values of accountability and good governance.

[2] This matter comes before us by way of an application for leave to appeal directly against a judgment of the North Gauteng High Court, Pretoria (High Court).[1] It relates to the decision of the appellant, the Minister of Defence and Military Veterans (Minister), to remove the first and second respondents (General Motau[2] and Ms Mokoena) from the Board of Directors (Board) of the third respondent, the

[1] *Motau and Another v Minister of Defence and Military Veterans and Another*, Case No: 51258/13, 18 September 2013 (High Court judgment).

[2] The first respondent is referred to as "Lieutenant General (Retired) Maomela Motau" in the first and second respondents' papers in the High Court. I simply refer to him as "General Motau" in this judgment.

Armaments Corporation of South Africa (SOC) Limited (Armscor). General Motau and Ms Mokoena served as the Chairperson and Deputy Chairperson of the Board respectively.

Facts

[3] Armscor is a wholly state-owned entity regulated by the Armscor Act.[3] The state exercises ownership control of Armscor through the Minister.[4] Armscor was incorporated primarily to provide South Africa's armed services with military material, equipment, facilities and services,[5] as well as to meet the "defence technology, research, development, analysis, test and evaluation requirements" of the

[3] Armaments Corporation of South Africa Limited Act 51 of 2003 (Armscor Act). Armscor was established in terms of section 2(1) of the Armaments Development and Production Act 57 of 1968. In terms of section 3(1) of that Act, the corporation's object was "to meet as effectively and economically as may be feasible the armaments requirements of the Republic, including armaments required for export". Section 23 of the Armscor Act, read with the Schedule of the Act, repealed the Armaments Development and Production Act. However, section 2 of the Armscor Act provides for the "Continued existence of Corporation", and reads in relevant part:

> "(1) [Armscor] established by section 2 of the Armaments Development and Production Act continues to exist under that name despite the repeal of that Act.
>
> . . .
>
> (3) The Corporation is a juristic person capable of suing and being sued in its own name.
>
> (4) Subject to this Act, the Corporation may—
>
> (a) purchase or otherwise acquire, hold or alienate property, movable or immovable; and
>
> (b) perform such acts as are necessary for or incidental to the carrying out of its objectives and the performance of its functions."

[4] Section 2(2) of the Armscor Act reads as follows:

> "(a) The State remains the sole shareholder of the Corporation.
>
> (b) The Minister exercises ownership control over the Corporation on behalf of the State."

[5] Defined in section 1(g) of the Armscor Act as "defence matériel".

Department of Defence (Department).[6] In essence, Armscor is the Department's armaments and technology procurement agency.[7]

[4] Armscor's affairs are managed and controlled by its Board, comprising nine non-executive members and two executive members (a chief executive officer (CEO) and a chief financial officer (CFO)).[8] General Motau and Ms Mokoena were appointed to the Board (as non-executive members) by the Minister's predecessor in terms of section 7(1) and (2) of the Armscor Act. Those provisions read as follows:

> "(1) The non-executive members of the Board must be appointed by the Minister on the grounds of their knowledge and experience which, when considered collectively, should enable them to attain the objectives of [Armscor].
>
> (2) The Minister must designate one of the non-executive members of the Board as chairperson of the Board and another one as deputy chairperson of the Board."

In terms of section 7(5)(a) of the Armscor Act, non-executive Board members are appointed for a period of three years. On 1 May 2011 General Motau was designated as Chairperson and Ms Mokoena was designated as Deputy Chairperson. The terms of General Motau and Ms Mokoena expired on 30 April 2014.

[6] These objectives are set out in section 3(1) of the Armscor Act.

[7] See section 4(2) of the Armscor Act.

[8] Section 6(1) of the Armscor Act. The High Court judgment erroneously states that the Armscor Act requires two further Board members: the Secretary of Defence and the Chief of the South African National Defence Force. The provision stipulating this requirement – section 6(1)(c) of the Armscor Act – was repealed with effect from May 2006.

[5] The Minister took office on 12 June 2012. At that time, there was a live dispute between General Motau and the Minister's predecessor, who had attempted to dismiss General Motau as the Chairperson and appoint Ms Mokoena in his stead. General Motau, however, refused to accept his dismissal, asserting that it was vitiated by a procedural irregularity.

[6] In order to resolve any uncertainty at the start of her tenure, the Minister, having discussed the matter with the Board, appointed a committee consisting of three of its members to resolve the issue. After consulting the affected parties, the committee recommended that General Motau be retained as Chairperson and that Ms Mokoena remain as Deputy Chairperson. This was accepted by the Minister and communicated to the parties.

[7] In order to address various governance issues, the Minister convened three meetings with the Board (on 19 March 2013, 28 March 2013 and 4 June 2013), none of which was attended by General Motau. Ms Mokoena failed to attend the meeting held on 4 June 2013. The Minister expressed her displeasure to General Motau in a letter dated 11 June 2013. In reply the following day, General Motau bemoaned the late notice which the Minister had given of the meetings and explained that he had been away when the meetings were held. He also reminded her that Board members "make a living in other endeavours", and asked that she schedule future meetings with the Board through him, as the Chairperson.

[8] On 8 August 2013, by letter, the Minister terminated General Motau and Ms Mokoena's membership of the Board in terms of section 8(c) of the Armscor Act. Section 8(c) provides that "[a] member of the Board must vacate office if his or her services are terminated by the Minister on good cause shown." The letter to General Motau explained that—

> "the manner in which you exercised your powers, through your managerial style and the decisions you took . . . has resulted in a situation where [Armscor] has not been able to meet the defence matériel requirements of the Department effectively, efficiently and economically."

[9] The Minister justified her decision on three bases. First, she cited various procurement projects which had failed to progress timeously, allegedly as a result of the Board's decisions or inaction.[9] The Minister further listed nine projects as examples of this trend, placing particular emphasis on Project Swatch and Project Porthole. Project Swatch was initiated to replace obsolete camping equipment for deployed South African National Defence Force (SANDF) troops. Owing in large part to the Board's failure to grant the necessary approvals, the project had been delayed by 36 months, during which time no funds could be spent. Ultimately, less equipment could be procured with the funds allocated for the project because of inflation.

[9] According to the Minister, in a speech made at a meeting with the Board on 14 August 2013, delays in the procurement of defence matériel "had a direct impact on deployed troops around the continent" and in particular on troops deployed in the Democratic Republic of Congo.

[10] Project Porthole, a "high priority project" for the South African Special Forces, was established to acquire a specialised high-altitude parachute system. The system had become outdated and was in need of replacement. Due to delays in the contracting process, the funds of the Special Forces Portfolio were not used to acquire the parachuting equipment in the 2011/12 and 2012/13 financial years. It appears that the equipment had still not been procured when the Minister removed General Motau and Ms Mokoena. The Department estimates the financial loss flowing from the delays to be in excess of R70 million.

[11] The details of the delays were confirmed before the High Court in an affidavit attested to by the Department's Chief of Defence Matériel, Mr Visser. He had been tasked by the Secretary of Defence, at the Minister's behest, to investigate and report on procurement delays at Armscor. Although the report and the procurement projects were classified as confidential, with the result that the report could not be attached to his affidavit, Mr Visser was given licence to talk to three of the most important projects. In addition to Projects Porthole and Swatch, Mr Visser discussed delays in relation to Project Vagrant (one of the nine projects referred to in the Minister's correspondence).[10]

[10] The Project, which related to the acquisition of protection technology for the South African Air Force and "deployed elements", had not progressed since Armscor had made a submission to the Board on its preferred bidder in November 2011. After a work session convened between Armscor and the Department's Defence Matériel Division on 18 June 2013, Armscor and the Department "agreed to disagree" on the way forward. It was thus decided that the matter would be submitted to the Secretary of Defence and the Chairperson of the Board to seek ministerial intervention so that Armscor and the Department could come to a mutually acceptable agreement.

[12] Second, the Minister was unhappy that Armscor had not been able to conclude a service level agreement with the Department as required by section 5 of the Armscor Act. In particular, she cited the latest proposal by the Board for a service charge to be included in the agreement, which the chief financial officer of the Department had described as "unaffordable". She partially ascribed the inability to conclude a service level agreement to the manner in which General Motau and Ms Mokoena had been leading Armscor.

[13] Lastly, the Minister's decision was premised on complaints she had received about Armscor from members of the defence industry. From these she inferred that the Corporation's relationship with the industry had broken down.[11] This, it was suggested, rendered Armscor unable to "provide marketing support to defence-related industries in respect of defence matériel" as required by the Armscor Act.[12]

[14] The Minister concluded her correspondence by stating that, in her opinion, General Motau and Ms Mokoena had "not acted in the best interests of the Department" and that their services as Chairperson and Deputy Chairperson of the Board were therefore terminated.

[11] The Minister does not elaborate on the breakdown of this relationship in her letter. However, from her subsequent meeting with the Board on 14 August 2013, it seems that the breakdown related to a range of disputes and matters of contention between Armscor and various stakeholders in the defence industry, including the Department, the South African Aerospace Maritime and Defence Industries Association, Denel and "organised labour". Most of these disputes apparently emanated from the "provisions contained in the draft Armscor business strategy".

[12] Section 4(2)(k) reads:

> "[Armscor] must provide marketing support to defence-related industries in respect of defence matériel, in consultation with the Department and the defence-related industries in question".

[15] Following the termination of General Motau and Ms Mokoena's services, the Minister convened a meeting on 14 August 2013 with the remaining members of the Board. In a statement made at the start of the meeting, the Minister explained her decision in much the same terms as she had in her correspondence with General Motau and Ms Mokoena. In addition, however, the Minister made some remarks which became points of contention in the High Court and in this Court. First, the Minister said she believed that the removal of General Motau and Ms Mokoena was "not a legal matter", but a "political matter . . . informed by [her] experience". She expressed the hope that the matter would not get to a point where the Department would need to "engage a legal rep" as she did not think that this was necessary. In relation to the removal of Ms Mokoena, the Minister also made the following statement:

> "For me it was the correct thing to do that when I removed the chair, I removed both the chair and the deputy. Because I also think there would have been an expectation that I had an obligation to appoint the deputy chair because I'm removing the chair."

This expectation, the Minister seemed to reason, arose from Ms Mokoena's previous temporary appointment as Chairperson and was evinced in a letter penned by Ms Mokoena on 27 February 2013, in which she requested clarification from the Minister on her "decision on the chairmanship of Armscor." The Minister understood this letter to intimate that Ms Mokoena still had aspirations of being Chairperson.

[16] The Minister also explained her decision to target General Motau and Ms Mokoena for dismissal, rather than relieving the entire Board. While she acknowledged that the Board as a collective might be blamed for some of Armscor's failings, the Minister stated that she was concerned about the impact of the wholesale dismissal of the Board on the continued functioning of the Corporation.

In the High Court

[17] Following the Minister's decision to terminate their services, General Motau and Ms Mokoena approached the High Court for urgent relief. They sought to have the Minister's decision set aside on the basis that it was unlawful, unconstitutional and invalid. They also sought a declarator confirming them in their respective positions as Chairperson and Deputy Chairperson of the Board. The only opposition came from the Minister. Armscor, although cited, did not participate.

[18] Legodi J granted judgment in favour of General Motau and Ms Mokoena. He concluded that the Minister's decision was administrative rather than executive action. This was because the decision met the positive requirements of the administrative-action definition and because it was not expressly excluded from the ambit of the Promotion of Administrative Justice Act[13] (PAJA), as are some other forms of conduct by members of the National Executive.

[13] 3 of 2000.

[19] Flowing from that conclusion, the High Court held that the decision fell to be set aside on several grounds. First, the Minister committed an error of law[14] in terminating the services of General Motau and Ms Mokoena insofar as she acted under the misapprehension that her conduct was executive rather than administrative in nature. Second, the Minister acted unfairly[15] in failing to give General Motau and Ms Mokoena an opportunity, with appropriate notice, to explain why their appointments should not be terminated. Third, the Minister acted on the basis of an ulterior motive[16] in that she expressly acknowledged that the removal of General Motau and Ms Mokoena was a "political" rather than a legal matter.[17] Fourth, in relation to Ms Mokoena, the Minister's decision to dismiss her was not rational[18] to the extent that her membership of the Board was "terminated simply on the basis that the Minister [did] not know what to do with her."[19]

[20] Non-compliance with PAJA was not the only source of unlawfulness identified by the High Court. It also found that it was inappropriate for the Minister to have singled out General Motau and Ms Mokoena for termination of their membership on

[14] Section 6(2)(d) of PAJA allows a court to review an administrative decision if it was "materially influenced by an error of law".

[15] Section 3(1) of PAJA requires that administrative action be procedurally fair. Section 6(2)(c) in turn provides that administrative action may be reviewed if it is procedurally unfair.

[16] Section 6(2)(e)(ii) of PAJA allows administrative action to be reviewed if it "was taken for an ulterior purpose or motive".

[17] This finding was based on the High Court's consideration of the minutes of a meeting held between the Minister and the remaining members of the Board following her termination of the services of General Motau and Ms Mokoena. See [15] above.

[18] Section 6(2)(f) of PAJA provides that an administrative decision may be reviewed if it was not rationally connected to the purpose for which it was taken; the purpose of the empowering provision; the information before the administrator; or the reasons given for it by the administrator.

[19] High Court judgment above n 1 at paras 72-3.

the Board. This was because of the Board's collective responsibility for the management of Armscor, and the fact that there are two executive directors (the CEO and the CFO) who are responsible for the management and control of Armscor's daily affairs. It reasoned that the Minister failed to identify particular occurrences for which General Motau and Ms Mokoena were directly responsible, and thus failed to show the good cause required by section 8(c) of the Armscor Act.

[21] Finally, the High Court granted a punitive costs order (on an attorney-and-own client scale) against the Minister. As justification it cited the Minister's failure to observe the requirements of procedural fairness, which it deemed to be unreasonable; her failure to respond to a letter General Motau had addressed to her, which supposedly conveyed the respect the Board had for the Minister; and the Minister's comments during the meeting of 14 August 2013,[20] which revealed that she had no rational basis for terminating General Motau and Ms Mokoena's services.

Preliminary matters

[22] In terms of an order dated 8 November 2013 the Minister was granted leave to appeal directly to this Court. Therefore, nothing further needs to be said in this regard.

[23] All the respondents have filed applications for condonation. Armscor filed their written submissions two weeks out of time. Counsel for General Motau and

[20] See [15] above.

Ms Mokoena also filed their submissions late. The Court would like to thank Advocates Dewrance and Muvangua of the Johannesburg Bar Society, who appeared pro bono on behalf of General Motau and Ms Mokoena, for their valued assistance in this matter.[21]

[24] It would not be in the interests of justice[22] to refuse condonation in this case. This is a matter of great public importance,[23] and we should be slow to refuse argument that might provide assistance on complex issues. The Minister did not object to the granting of condonation to any of the respondents, nor did she cite any prejudice suffered as a result of the respondents' delays.[24] The applications for condonation are therefore granted.

Issues

[25] Having already thus disposed of the preliminary issues regarding jurisdiction and condonation, we are required to determine the following in order to resolve this dispute:

[21] After no notice of opposition or submissions were received from General Motau and Ms Mokoena, a letter was directed to the Chairperson of the Pretoria Society of Advocates requesting that it appoint one of its members to assist the Court by making submissions on their behalf. The matter was then referred to the Johannesburg Bar Society for their assistance.

[22] See *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2014 (3) SA 240 (CC); 2013 (5) BCLR 497 (CC) at paras 24-5, relying on *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC).

[23] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) at para 8.

[24] See in this regard *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC); 2013 (1) BCLR 14 (CC) at paras 16-9.

(a) Does the Minister's decision to dismiss General Motau and Ms Mokoena constitute administrative or executive action?

(b) Has the Minister shown good cause for her decision to terminate the services of General Motau and Ms Mokoena, as required by section 8(c) of the Armscor Act?

(c) Was the Minister bound by any procedural constraints in exercising her section 8(c) power?

The distinction between administrative and executive action

[26] The Minister argues that the power to appoint and dismiss members of the Board is conferred especially on her for the effective pursuit of government business, particularly the national and territorial security of South Africa.[25] She submits that her decision to terminate General Motau and Ms Mokoena's services constituted executive action as contemplated in the Constitution[26] and is excluded from administrative-law scrutiny under PAJA.[27] The respondents, on the other hand, argue that the Minister's section 8(c) power does not involve "policy considerations" but the implementation of the Armscor Act. They contend that the decision was administrative action as it meets the definitional requirements in PAJA.

[25] The Minister is the member of Cabinet responsible for the defence of South Africa (see section 201(1) of the Constitution read with the definition of "Minister" in section 1 of the Defence Act 42 of 2002). She notes that, in terms of section 200(2) of the Constitution, the primary object of the SANDF "is to defend and protect [South Africa], its territorial integrity and its people in accordance with the provisions of the Constitution and the principles of international law regulating the use of force."

[26] Section 85(2)(e).

[27] By virtue of the exclusion in section 1(i)(aa) of the definition of administrative action in PAJA.

[27] Does the Minister's decision amount to administrative or executive action? Answering this question is important. If it amounts to administrative action, it is subject to a higher level of scrutiny in terms of PAJA. If it is executive action, it is subject to the less exacting constraints imposed by the principle of legality.[28] I undertake this enquiry in three stages. First, I consider the powers and functions provided for in section 85 of the Constitution and their relevance to PAJA. Second, I set out the means by which we should assess the nature of the power in question. Finally, I apply the principles that emerge from our jurisprudence to the facts of this case.

Section 85(2) of the Constitution and PAJA

[28] Section 85 of the Constitution, entitled "Executive authority of the Republic", reads:

> "(1) The executive authority of the Republic is vested in the President.
>
> (2) The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
>
> (b) developing and implementing national policy;
>
> (c) co-ordinating the functions of state departments and administrations;
>
> (d) preparing and initiating legislation; and

[28] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) at para 148. The correct order of enquiry is to consider, first, whether PAJA applies, and only if it does not, what is demanded by general constitutional principles such as the rule of law. As noted by O'Regan J in *South African National Defence Union v Minister of Defence and Others* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) at para 52, "a litigant who seeks to assert [a constitutional right] should in the first place base his or her case on any legislation enacted to regulate the right, not [the Constitution]."

> (e) performing any other executive function provided for in the Constitution or in national legislation."

As is apparent from the scheme of chapters 4 to 8 of the Constitution, the purpose of section 85(2) is to allocate functions to the executive arm of government – the National Executive in particular – just as the Constitution allocates functions to the Legislature and the Judiciary. The adjective "executive" thus indicates that the enumerated powers inhere in the President and the Cabinet rather than in Parliament or the Courts. The section selects the functionary to whom the powers are allocated, rather than determining the nature of the power. Put differently, the section should not be read as categorising all powers referred to in it as executive action, as opposed to administrative action, for the purpose of determining the appropriate standard of judicial review. That is not to say that section 85 of the Constitution is irrelevant in the administrative action enquiry, since it is referred to in PAJA.[29]

[29] PAJA gives content to the right to just administrative action in section 33 of the Constitution.[30] The Act categorises certain powers as administrative (through a rather complex taxonomy) and thereby determines the appropriate standard of review.[31] Among the powers excluded from this category and the Act's remit are—

> "the *executive powers or functions of the National Executive*, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i)

[29] See section 1(i)(aa) of PAJA, which is discussed immediately below.

[30] Section 33 is quoted in relevant part at n 41 below.

[31] This is done through the definition of "administrative action", which is set out in more detail at [33] below.

> and (k), *85(2)(b), (c), (d) and (e)*, 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution".[32] (Emphasis added.)

[30] PAJA thus expressly excludes the "executive powers or functions of the National Executive" from administrative-law review. In addition to this general exclusion, the section lists particular executive powers that are excluded. This list includes those powers bestowed upon the National Executive in terms of section 85(2)(e) of the Constitution.

[31] The power to implement national legislation under section 85(2)(a) of the Constitution is, however, conspicuously absent from PAJA's list of excluded executive powers. The failure expressly to exclude the implementation of legislation by the National Executive was deliberate.[33] This Court has held that the implementation of legislation by a senior member of the Executive ordinarily constitutes administrative action.[34] Had PAJA excluded section 85(2)(a) from its reach, it would have excluded what has been described as the "core of administrative action" and may well have rendered PAJA inconsistent with section 33 of the Constitution.[35]

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[32] Section 1(i)(aa) of PAJA.

[33] Chaskalson CJ in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (8) BCLR 872 (CC) (*New Clicks*) at para 126. See also the judgment of Ngcobo J at para 461.

[34] *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC) (*Ed-U-College*) at para 18 and *SARFU* above n 28 at para 142.

[35] Chaskalson CJ in *New Clicks* above n 33 at para 126.

[32] Nevertheless, the fact that a functionary performs a certain act in terms of an empowering legislative provision does not, without more, mean that the functionary is implementing legislation. This is evident from the fact that section 85 contemplates a distinction between "implementing national legislation", under section 85(2)(a), and "performing any other executive function *provided for . . . in national legislation*", under section 85(2)(e).[36] As appears from a close reading of the provisions, the distinguishing feature is the verb "implement" in section 85(2)(a), and the content of this distinction is discussed below.

Assessing the nature of a power

[33] The concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review. The rather unwieldy definition can be distilled into seven elements: there must be (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.[37] In the present matter there are two elements in dispute: whether the

[36] Emphasis added. This is also apparent from the decisions of this Court. See, for example, *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* [2013] ZACC 13; 2013 (7) BCLR 762 (CC) (*ARMSA*) at paras 40-2 and *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) at para 26 where, notwithstanding the fact that a power derived from legislation, it was considered executive in nature.

[37] *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) at para 181 (per Langa CJ); *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) (*Grey's Marine*) at para 21; and *Sokhela and Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others* [2009] ZAKZPHC 30; 2010 (5) SA 574

Minister's decision under section 8(c) of the Armscor Act is of an administrative nature (element (a)) and whether it falls under any of the listed exclusions (element (g)). Both can be answered by interrogating the nature of the power.

[34] To determine what constitutes administrative action by asking whether a particular decision is of an administrative nature may, at first blush, appear to presuppose the outcome of that enquiry. But the requirement has two important functions. First, it obliges courts to make a "positive decision in each case whether a particular exercise of public power . . . is of an administrative character".[38] Second, it makes clear that a decision is not administrative action merely because it does not fall within one of the listed exclusions in section 1(i) of PAJA. In other words, the requirement propels a reviewing court to undertake a close analysis of the nature of the power under consideration.[39]

[35] As a starting point, in *New Clicks* Chaskalson CJ suggested that the definition of administrative action under PAJA must be "construed consistently" with the right to administrative justice in section 33 of the Constitution.[40] As section 33 itself

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(KZP) (*Sokhela*) at para 60. See also Hoexter *Administrative Law in South Africa* 2ed (Juta & Co Ltd, Cape Town 2012) at 197.

[38] *Sokhela* id at para 61. See also *ARMSA* above n 36 at para 41.

[39] Id.

[40] *New Clicks* above n 33 at paras 100 and 128. See also para 466 (per Ngcobo J) and *Grey's Marine* above n 37 at para 22.

contains no express attempt to delimit the scope of "administrative action",[41] it is helpful to have reference to jurisprudence regarding the interpretation of that section.

[36] It is the function rather than the functionary that is important in assessing the nature of the action in question.[42] The mere fact that a power is exercised by a member of the Executive is not in itself determinative. It is also true that the distinction between executive and administrative action is often not easily made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula.[43]

[37] Executive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. The initiation of legislation is another.[44] By contrast, "[a]dministrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state, which necessarily involves the application of policy, usually after its translation into law, with direct and immediate

[41] Section 33 of the Constitution provides in relevant part:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

It is apparent that, while using the term "administrative action", the section makes no positive attempt to define the term's scope.

[42] *SARFU* above n 28 at para 141.

[43] Id at para 143.

[44] See *Ed-U-College* above n 34 at para 18 and *SARFU* above n 28 at para 142.

consequences for individuals or groups of individuals."[45] Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. The implementation of legislation is a central example. The verb "implement", which also appears in section 85(2)(a) of the Constitution and distinguishes it from section 85(2)(e), may serve as a useful guide: administrative powers usually entail the application of formulated policy to particular factual circumstances. Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation.

[38] In determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative.[46] In *SARFU*, the Court was ultimately swayed by the fact that the President's power to appoint a commission of inquiry was closely related to his broad, policy-formulating function in concluding that it was an executive power. In the words of the Court—

> "[a] commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice."[47]

[45] *Grey's Marine* above n 37 at para 24. See also *ARMSA* above n 36 at para 43.

[46] *SARFU* above n 28 at para 142.

[47] Id at para 147.

[39] As further assistance, a number of pointers can be extracted from previous decisions which are helpful in assessing the nature of a particular power. First, it may be useful to consider the source of the power.[48] Where a power flows directly from the Constitution, this could indicate that it is executive rather than administrative in nature, as administrative powers are ordinarily sourced in legislation.[49] In *Masetlha* Moseneke DCJ held that the President's power to dismiss the Director-General of the National Intelligence Agency was sourced in and flowed from section 209(2) of the Constitution.[50] This was partly the basis for the conclusion that the power under consideration was an executive power as contemplated in section 85(2)(e) of the Constitution, despite the fact that section 209(2) had an analogue in national legislation.[51]

[40] Special care must, however, be exercised when reliance is placed on this factor. While administrative powers more commonly flow from legislation, PAJA's definition of administrative action expressly contemplates that the administrative power of organs of state may derive from a number of sources, including the Constitution.[52] Conversely, and as borne out by section 85(2)(e) of the Constitution read with section 1(i)(aa) of PAJA, an executive power may be sourced in legislation. This feature of a power is thus only useful in this context, if at all, as a tentative

[48] Id at para 143.

[49] *Ed-U-College* above n 34 at para 21.

[50] *Masetlha v President of the Republic of South Africa and Another* [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC) at paras 65 and 69-70.

[51] Id at paras 69 and 75-6.

[52] Section 1(i)(a)(i) of PAJA.

signpost: constitutional powers are often wide-ranging and direction-giving, while statutory powers are generally more narrow and the concretisation of formulated policy.

[41] Second, the constraints imposed on the power should be considered. The fact that the scope of a functionary's power is closely circumscribed by legislation might be indicative of the fact that a power is administrative in nature. In *Ed-U-College* this Court considered the nature of a Member of the Executive Council's power to determine a formula for the payment of subsidies to independent schools. It was persuaded that the power was administrative by, among other things, "the constraints upon [the] exercise [of the power]", as well as its relatively restricted scope.[53]

[42] Again, caution is required when reliance is placed on the absence of constraints or the level of discretion afforded to a functionary. This factor's utility is that, when a discretion is particularly broad, it suggests that the exercise of the power is akin to the formulation of policy. However, while the presence of a wide-ranging discretion is often indicative of a broad policy-making power, it may equally be an incident of the subject matter on which it is brought to bear. A functionary may, for example, be afforded a considerable discretion in the exercise of a certain power simply because its

[53] *Ed-U-College* above n 34 at para 21.

exercise is heavily dependent on the factual circumstances that obtain in a particular case.[54] Context is thus crucial in assessing the relevance of this factor.

[43] Third, it should be considered whether it is appropriate to subject the exercise of the power to the higher level of scrutiny under administrative-law review. It may be that this level of scrutiny is not appropriate given that the power bears on particularly sensitive subject matter or policy matters for which courts should show the Executive a greater level of deference. Thus, this Court has found that administrative-law review is not appropriate where the power under consideration: is legislative in nature and influenced by political considerations for which public officials are accountable to the electorate;[55] is based on considerations of comity or reciprocity between South Africa and foreign states, involving policy considerations regarding foreign affairs;[56] is closely related to the special relationship between the President and the Director-General of a security agency;[57] or involves the balancing of complex factors and sensitive subject matter relating to judicial independence.[58]

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[54] For example, in terms of section 36(1) of the Cape Land Use Planning Ordinance 15 of 1985, planning officials may approve and refuse land-use applications purely on the basis of whether they consider the particular development to be "desirable". This requirement imports a large degree of discretion in the evaluation of land-use applications, but it cannot seriously be contended that the taking of decisions in relation to such applications constitutes anything other than administrative action. See also *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*). As noted by O'Regan J at para 53, a broad discretionary power may equally be conferred "where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance", where the relevant factors are "indisputably clear" or "where the decision-maker is possessed of expertise relevant to the decisions to be made."

[55] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at paras 41 and 45.

[56] *Geuking* above n 36 at paras 26-7.

[57] *Masetlha* above n 50 at paras 77 and 86.

[58] *ARMSA* above n 36 at paras 43-5.

[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.

Was the Minister's decision administrative or executive action?

[45] In order to determine the nature of the Minister's section 8(c) power, we must have regard to the legal framework imposed by the Armscor Act. The Minister's powers under the Act are fairly broad. For example, she "exercises ownership control . . . on behalf of the State";[59] imposes such conditions on Armscor's interactions with foreign states "as may be necessary in the national interest";[60] appoints the non-executive members of the Board and designates the Chairperson and the Deputy Chairperson from their number;[61] is consulted by the Board in its selection of the CEO;[62] determines Armscor's share capital;[63] and approves the formation and disposal of subsidiaries.[64] She is also empowered to make regulations stipulating "conditions

[59] Section 2(2)(b) of the Armscor Act.

[60] Id section 4(3)(b).

[61] Id section 7(1) and (2).

[62] Id section 10(1).

[63] Id section 15(1)(a).

[64] Id section 21.

or restrictions subject to which the Board must manage and control the affairs of the Corporation".[65]

[46] The business of military procurement, on the other hand, is left to the Board. Thus, while it is Armscor's responsibility to see to the practical aspects of procuring defence matériel in order to meet the needs of the SANDF, the Minister is charged with the high-level supervision of the Corporation to ensure that it discharges its statutory mandate and operates in the national interest. This, in turn, must be understood in the context of the Minister's political responsibility and constitutional duty to see to the defence of the Republic, its territorial integrity and its people.[66]

[47] In the light of the aforegoing and for the reasons that follow, I am of the view that the Minister's decision is executive rather than administrative in nature. First, the Minister's section 8(c) power is an adjunct of her power to formulate defence policy.[67] In terms of this power, the Minister formulates policy on, among other things, the acquisition and maintenance of "air navigation systems"[68] and "arms, ammunition, vehicles, aircraft, vessels, uniforms, stores and other equipment".[69] Of course, this is policy in the broad sense: overarching and direction-giving, with the minutiae of individual procurement decisions left to Armscor.

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[65] Id section 18(1)(b).

[66] Section 201(1) read with section 200(2) of the Constitution.

[67] Regarding the inclusion of policy formulation and adjuncts thereto within the notion of "executive action", see *SARFU* above n 28 at para 147.

[68] Section 80(2)(b) of the Defence Act.

[69] Id section 80(2)(c).

[48] As is apparent from the scheme of the Armscor Act, the Minister does not provide direction through interventions in individual projects or by prescribing particular procurement policies. Rather, she discharges her political responsibility to ensure that the Department's procurement agency meets its statutory obligations by appointing and dismissing leaders who have the "knowledge and experience which . . . should enable them to attain the objectives of the Corporation".[70] The Minister must have in mind the Department's policy aims when selecting Board members, including the Chairperson and Deputy Chairperson. She must select people who are capable of carrying out those aims and who share the Department's policy vision. Similarly, the Minister arrests the failure to follow proper policy by terminating the directorships of people who have not assisted Armscor to discharge its statutory functions.[71] The formulation of defence procurement policy and the appointment and dismissal of people who will supervise the implementation of that policy are thus closely linked.[72] While the appointment and dismissal of Board members is not the formulation of policy as such, it is the means by which the Minister gives direction in the vital area of military procurement, and is therefore an adjunct to her executive policy formulation function.

[70] Section 7(1) of the Armscor Act.

[71] As noted in *Masetlha* above n 50 at para 77, the power to dismiss is "a corollary of the power to appoint".

[72] Compare *Sokhela* above n 37 at para 76. Similar reasoning is contained in the judgment of the KwaZulu-Natal High Court, Pietermaritzburg, in relation to the appointment of board members to a statutory body. That Court concluded, however, that the power to suspend and terminate the services of certain board members on the grounds of incapacity, misconduct or neglect entailed administrative rather than executive action (see paras 78-83). Given the difference between this power and the Minister's section 8(c) power, it is not necessary to examine the correctness of the High Court's decision in *Sokhela*.

[49] Second, and relatedly, the exercise by the Minister of her section 8(c) power is not a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state, which is the ordinary remit of administrative law.[73] Rather, it operates at a different level, for the section is a constitutive part of the Minister's power to supervise high-level public office-bearers in the performance of their official duties. She does so by means of the corporate relationship that she has with the Board members. They are the directors she has selected, in accordance with her policy dictates, to manage the Corporation – and thereby determine defence procurement policy.

[50] Third, under the Armscor Act the Minister need only demonstrate good cause in order to justify the termination of the services of a Board member. She does not have to satisfy a list of jurisdictional requirements before she can take the decision, or need to demonstrate that a particular ground such as incapacity or misconduct exists. The Minister thus has a level of discretion in determining when directors should be removed, which points to the fact that her power under section 8(c) is executive in nature.[74] The 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.

[73] See, for example, *Grey's Marine* above n 37 at para 24.

[74] See *Ed-U-College* above n 34 at para 21.

[51] For these reasons, I am persuaded that the impugned decisions are not subject to review under PAJA. Because section 8(c) of the Armscor Act is an adjunct of the Minister's power to make defence policy, and thus more closely related to the formulation of policy than its application, the decision to terminate the services of Board members amounts to the performance of an executive function in terms of section 85(2)(e) of the Constitution, rather than the implementation of national legislation in terms of section 85(2)(a).

Compliance with the requirement of good cause

[52] The Minister submits that Armscor's failure to ensure that the SANDF was adequately equipped was a dereliction of its cardinal duty and was sufficient reason for her to have lost all trust in the Corporation's leadership. Armscor's failures under the leadership of General Motau and Ms Mokoena precipitated the breakdown in their relationship with the Minister and constituted the necessary good cause for the termination of their services in terms of section 8(c) of the Armscor Act. Accordingly, so the Minister argues, she acted lawfully.

[53] General Motau and Ms Mokoena contend that "the Minister's decision to dismiss them on all grounds stipulated in her letters of 8 August 2013 was arbitrary". Armscor agrees with this submission. The respondents assert that the Minister's decision does not withstand scrutiny because she cannot show that any of the Corporation's failures are solely or directly attributable to their leadership.

[54] Good cause may be defined as a substantial or "legally sufficient reason" for a choice made or action taken.[75] Assessing whether there is good cause for a decision is a factual determination dependent upon the particular circumstances of the case at hand.[76] It goes without saying that what constitutes good cause must be understood in the context of the Armscor Act as a whole, with a particular focus on the objectives and functions of Armscor and the important role played by the members of the Board.

[55] As set out above, Armscor is the SANDF's armament and technology procurement agency.[77] Its objectives, as prescribed by the Armscor Act, are to meet the defence matériel, technology and research requirements of the Department effectively, efficiently and economically.[78] In order to meet these objectives the Corporation must, inter alia, acquire and dispose of defence matériel as required by the Department;[79] manage the technology projects required by the Department;[80] establish tender, contract-management and programme-management systems in relation to the acquisition of defence matériel and defence technology;[81] "support and

[75] Garner (ed) *Black's Law Dictionary* 8 ed (Thomson West, St Paul 2004) at 235.

[76] See, for example, *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) (*Union of Refugee Women*) at para 86.

[77] See [3] above.

[78] Section 3(1) of the Armscor Act reads as follows:

> "The objectives of the Corporation are to meet—
>
> (a) the defence matériel requirements of the Department effectively, efficiently and economically; and
>
> (b) the defence technology, research, development, analysis, test and evaluation requirements of the Department effectively, efficiently and economically."

[79] Section 4(2)(a) and (f) of the Armscor Act.

[80] Id section 4(2)(b).

[81] Id section 4(2)(c) and (e).

maintain such strategic and essential defence industrial capabilities, resources and technologies as may be identified by the Department";[82] "manage facilities identified as strategic by the Department in a service level agreement";[83] and "maintain such special capabilities and facilities as are regarded by the Corporation not to be commercially viable, but which may be required by the Department for security or strategic reasons."[84] What is immediately apparent from this excursus is that Armscor does not interact with the Department as it might with any other player in the defence industry or a commercial third party. Rather, it procures at the instance of the Department and exists primarily to serve the military's defence matériel needs. The Department is in the driving seat. With this in mind, I am satisfied that the Minister advanced ample and cogent reasons to disclose good cause as required by section 8(c) of the Armscor Act.[85]

[56] First, in terms of section 5(1)(a) of the Armscor Act, the Corporation is obliged to enter into a service level agreement with the Department. The purpose of this service level agreement is to ensure that Armscor fulfils its core functions in an efficient and effective manner.[86] The service level agreement must "specify

[82] Id section 4(2)(h).

[83] Id section 4(2)(l).

[84] Id section 4(2)(m).

[85] As I believe that the reasons cited by the Minister in her correspondence to General Motau and Ms Mokoena were sufficient to demonstrate good cause, I do not consider it necessary to deal with the further reasons cited by the Minister for her decision in her papers in this Court and the High Court. In any event, I have reservations about whether it would be permissible for her to rely on these reasons as they were not relied on or disclosed when she took her decision (see in this regard Cachalia JA's judgment in *National Lotteries Board and Others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) at paras 27-8).

[86] Section 5(1)(a) of the Armscor Act read with section 3.

measurable objectives and milestones";[87] "specify a system to monitor the delivery of service";[88] "provide for the maintenance of [Armscor's] capabilities over the long term";[89] and "provide for the terms and conditions applicable to the service to be rendered by [Armscor]".[90] Section 5(2) expressly imposes the obligation to conclude a service level agreement on the Board and the Department's accounting officer.

[57] A service level agreement was only concluded in the closing months of the 2012/13 financial year. At the time General Motau and Ms Mokoena approached the High Court, a service level agreement had still not been concluded for the 2013/14 financial year. As the service level agreement is the means by which Armscor is able to supply the Department with defence matériel, the Corporation was unable for large parts of a two-year period to discharge its statutory mandate. And it would seem that the only reason for the ongoing delays was the Board's insistence that it be paid a ten per cent service commission, notwithstanding the fact that this was unaffordable for the Department and that the Corporation was funded by the National Treasury through budgetary transfers from the Department.[91] Such intransigence in the face of the SANDF's ongoing procurement needs justifiably concerned the Minister.

[87] Id section 5(2)(c).

[88] Id section 5(2)(d).

[89] Id section 5(2)(e).

[90] Id section 5(2)(f).

[91] Section 5(2)(g) of the Armscor Act provides that the service level agreement must "set out the rate at which [Armscor] may charge for its services." This is, however, not something which the Corporation is compelled to charge. The Armscor Act also provides for a number of funding mechanisms through which the Corporation may be funded. These include, inter alia, the appropriation of funds from Parliament and revenue derived from its investments (section 15 of the Armscor Act). It would thus be consistent with the statutory framework for Armscor to be funded solely by appropriation from Parliament and investment income rather than by way of a service charge.

[58] Second, the Board failed to complete a number of procurement projects efficiently and timeously. The Department prioritised the replacement of its parachute system and sought Armscor's assistance in this regard in 2010. Yet when General Motau and Ms Mokoena approached the High Court, a supplier had still not been engaged. The SANDF needed to replace its "absolute camping capability", and the necessary documentation was placed before the Board. However, at three separate meetings during 2011 and 2012 the Board failed, without reason, to consider the procurement proposal. Further delays were incurred when the Corporation decided on a "new approach" to the procurement of the camping equipment. Ultimately, the SANDF's operational requirements could not be met as a result of the 36-month delay occasioned by the Board's conduct.

[59] When the Department decided to acquire protection technology for the South African Air Force, the approval of the Board was required to undertake the contracting process with the preferred bidder. This approval was sought in November 2011, yet at the time of the hearing in the High Court it had neither been granted nor refused. From the record before us, it seems that to date, no decision has been made by the Board. These examples indicate Armscor's material and continuing failure to discharge its statutory mandate: the acquisition of defence matériel at the instance of the Department. Millions of Rand allocated to the Department were left wastefully unspent. Evidently Armscor was not operating in an effective, efficient or economic manner.

[60] From the above, it is perspicuous that Armscor was not discharging its statutorily prescribed mandate. The delays in question amounted to a failure to procure much-needed equipment in accordance with the Department's needs.

[61] The Board is empowered to manage the affairs of Armscor.[92] It controls the decisions made and the actions taken by the Corporation. It follows that Armscor's widespread and systemic failures outlined above are attributable to the Board, which must account and ultimately take responsibility for its conduct. I am also compelled to point out that the non-executive members of the Board (General Motau and Ms Mokoena included) are highly skilled specialists who were appointed on account of their knowledge and experience, with a view to ensure that Armscor's affairs are properly and effectively managed.[93] As seasoned professionals in their field, they had to show diligence and professionalism. They are remunerated from the funds of Armscor[94] and are expected not only to act in the interests of the Corporation but also to ensure that the affairs of the Board are in order. There is no adequate explanation

[92] Section 6 of the Armscor Act, entitled "Corporation managed by Board of Directors", reads:

> "(1) The affairs of the Corporation are managed and controlled by a Board of Directors consisting of—
>
> (a) nine non-executive members;
>
> (b) two executive members, namely a Chief Executive Officer and a Chief Financial Officer.
>
> (2) The Board is the accounting authority for the Corporation as contemplated in section 49(2)(a) of the Public Finance Management Act."

[93] Section 7(1) and (2) of the Armscor Act, set out in [4] above.

[94] Section 7(6) of the Armscor Act reads:

> "A non-executive member of the Board must be paid out of the funds of the Corporation such remuneration for his or her services as the Minister, after consultation with the Minister of Finance, may determine."

for the unsatisfactory state of affairs at Armscor. The Minister therefore had good cause to take action.

[62] But did she have good cause to single out General Motau and Ms Mokoena for removal? The respondents say no. Relying on the collective responsibility of the Board for the management of Armscor's affairs, they contend that the Minister acted unfairly in differentiating between the leadership of the Board, on the one hand, and the remaining members of the Board, on the other.

[63] I am constrained to disagree. First, as the directors appointed to lead the Board in the discharge of its duties, General Motau and Ms Mokoena must bear a special responsibility for its failures. They voluntarily acceded to the Minister's decision to appoint them as the leadership of the Board and must therefore take responsibility for its successes and failures. This conclusion seems inherent in the notion of leadership, and therefore axiomatic.

[64] During the High Court proceedings, the Minister sought to justify her conduct in part by reference to Armscor's failure to conclude a service level agreement with the Department. Despite admitting the crucial importance of this agreement, General Motau and Ms Mokoena's only response was that they had no knowledge of the ten per cent service charge. The Minister also drew attention to the delays and failures regarding the various procurement projects, and the consequent under-spending of millions of Rand by the Department. In response, General Motau

and Ms Mokoena denied any knowledge of the details regarding these projects and refused to respond to the information contained in Mr Visser's affidavit on the basis that his report was "not disclosed in its entirety." There was – and remains – no denial of the delays, no explanation for the procurement failures, no justification for their ignorance of critical procurement projects and no attempt to show why they were not culpable for Armscor's dereliction of its statutory duty.

[65] This is not in any way undone by whatever statements the Minister made to the Board at a meeting following the dismissal of General Motau and Ms Mokoena, some of which may have been unclear and confusing.[95] Although her comment concerning Ms Mokoena[96] was ill-advised, it does not, without more, demonstrate that she acted with an ulterior motive. It must be recalled that at the same meeting the Minister reiterated the serious and sufficient reasons given in her letters to General Motau and Ms Mokoena for their dismissal. The statements, though unfortunate, do not disturb the conclusion that the Minister demonstrated good cause in exercising her section 8(c) power.

[66] Second, the Minister's response as to why she dismissed only General Motau and Ms Mokoena was resoundingly sound and logical. Had she dismissed the entire Board, she would have left Armscor, which has crucial obligations to fulfil, disabled and completely rudderless. The less invasive approach was to dismiss only the

[95] See [15] above.

[96] Her comment was to the effect that the failure to remove her would have created an expectation that she would be made Chairperson on General Motau's removal.

leadership of the Board, and to leave the Corporation with the necessary institutional knowledge to continue functioning. As the Minister explained to the Board on 14 August 2013, by allowing the directors other than General Motau and Ms Mokoena to retain their positions, she was attempting to ensure that Armscor had "the capacity, the know-how and the willingness . . . [to] bring solutions to urgent matters affecting [the SANDF] and the [defence] industry."

[67] The Minister's choice not to dismiss the day-to-day management structure of Armscor (particularly the CEO and the CFO) can also not be impugned. It is the Board, headed by the Chairperson and the Deputy Chairperson, which has the principal obligation to manage and control Armscor.[97] Board approval was also required before key decisions could be made around the conclusion of the service level agreement and critical procurement projects.

[68] In conclusion, the Minister was not prompted to act by one or two poor managerial decisions, but by the continued failings of the Armscor Board under the leadership of General Motau and Ms Mokoena. Given this, the facts do not admit of any other conclusion but that the Minister had good cause to terminate their services.

Rationality

[69] General Motau and Ms Mokoena also contend that the Minister's decision falls to be set aside on the basis that it was "not rationally connected to the purpose she

[97] Sections 6(1) and 7(2) of the Armscor Act.

sought to achieve." I take the view that the Minister not only showed the necessary good cause required to dismiss General Motau and Ms Mokoena, but that her decision was also rational. The principle of legality requires that every exercise of public power, including every executive act, be rational.[98] For an exercise of public power to meet this standard, it must be rationally related to the purpose for which the power was given.[99] It is also well-established that the test for rationality is objective[100] and is distinct from that of reasonableness.[101]

[70] In the circumstances of this case, we are not required to determine whether the Minister's decision was the best decision she could have made, or whether she could have made a different decision. Rather, we are concerned with whether the Minister responded rationally to the indications of widespread dysfunction in Armscor, and whether her response was rationally connected to her executive oversight function.

[71] A rational link therefore exists between the need to address the failures of Armscor and the termination of the services of General Motau and Ms Mokoena: with

[98] See in this regard *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at para 27 and *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at para 85.

[99] *Pharmaceutical Manufacturers* id at para 85.

[100] On the importance of objective rather than subjective rationality in the context of assessing statutory standards, see *Democratic Alliance* above n 98 at paras 14-26.

[101] Review for reasonableness is about testing "the decision itself", whereas review for rationality is about testing whether there is a sufficient connection between the means chosen and the objective sought to be achieved – rationality is not about whether other means could have been used. Rationality review, as an evaluation of whether the "minimum threshold" for the exercise of public power has been met, involves judicial restraint. See in this regard *Democratic Alliance* above n 98 at paras 29-32 and 42-3, relying on *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*).

them at the helm, the Corporation was not operating in an efficient or effective manner and was not properly fulfilling its statutorily prescribed mandate. Section 8(c) was properly used by the Minister, in the exercise of her executive oversight, to abate the problems that had set in at Armscor. Given this, I believe that the Minister's decision was rational.

Procedural constraints on the exercise of the Minister's section 8(c) power

[72] General Motau and Ms Mokoena contend that, should this Court find against them on the question whether the Minister's decision constituted administrative action, we should nevertheless conclude that the Minister had to comply with section 71(1) and (2) of the Companies Act[102] when she exercised her power in terms of section 8(c) of the Armscor Act. It is not disputed by any of the parties that the Minister did not comply with those provisions. The Minister's answer is that she was not required to comply with them.

[73] Section 71 reads, in relevant part:

> "(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)—

[102] 71 of 2008.

> (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."

Section 71(1) and (2) is the mechanism under the Companies Act through which shareholders may dismiss a director whom they have elected. Importantly, section 71(2) requires that a shareholder must give a director notice and a chance to make representations before a resolution is adopted to dismiss him or her.

[74] In my view section 8(c) of the Armscor Act must be read together with section 71(1) and (2) of the Companies Act.[103] First, it is not disputed that Armscor falls within the definition of a "state-owned company" in terms of the Companies Act:[104] as required, it is listed in Schedule 2 of the Public Finance Management Act[105] as a "Major Public Entity" and it is registered under the Companies Act. Furthermore, section 9 of the Companies Act deals specifically with

[103] This is reiterated by section 5(4) of the Companies Act, which deals with the situation where there is "inconsistency between any provision of this Act and a provision of any other national legislation". In the event of such inconsistency, section 5(4)(a) provides that "the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second".

[104] That definition reads as follows:

> "[A]n enterprise that is registered in terms of this Act as a company, and either—
>
> (a) is listed as a public entity in Schedule 2 or 3 of the [Public Finance Management Act]; or
>
> (b) is owned by a municipality, as contemplated in the [Local Government: Municipal Systems Act], and is otherwise similar to an enterprise referred to in paragraph (a)".

[105] 1 of 1999.

the statute's application to the affairs of state-owned companies.[106] The effect of that provision is that state-owned companies are, for all intents and purposes, to be treated as public companies, unless a Cabinet member has procured an exemption (in whole or in part) from the obligation to comply with the Companies Act. It was conceded by counsel for the Minister during the hearing that there is nothing before us to indicate that she has applied for an exemption. All indications point to Armscor's affairs being subject to that statute.

[75] Second, the Minister is, for the purpose of section 71(1) and (2), the shareholder of Armscor.[107] The Minister appoints the Chairperson and the Deputy Chairperson of

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[106] The section, entitled "Modified application with respect to state-owned companies", reads as follows:

> "(1) Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3).
>
> (2) The member of the Cabinet responsible for—
>
> (a) state-owned companies may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies, any class of state-owned companies, or to one or more particular state-owned company; or
>
> (b) local government matters may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies owned by a municipality, any class of such enterprises, or to one or more particular such enterprises,
>
> on the grounds that those provisions overlap or duplicate an applicable regulatory scheme established in terms of any other national legislation.
>
> (3) The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (2)—
>
> (a) only to the extent that the relevant alternative regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and
>
> (b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act."

[107] Section 57(1) defines "shareholder" for the purposes of section 71 as including "a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached." The Minister is thus the shareholder of Armscor as she "exercises ownership control over the Corporation on behalf of the State" (section 2(2)(b) of the Armscor Act).

the Board and is thus empowered through those provisions to terminate their services. She is thus required to comply with the prescripts of the section in dismissing them.

[76] Third, on my reading, section 8(c) of the Armscor Act and section 71(1) and (2) of the Companies Act are perfectly compatible: the former provides the substantive criterion, and the latter the process, by which Board members may be dismissed. Section 71(1) and (2) does not put any substantive constraint on the exercise of the Minister's dismissal power. Of course, it would be a different matter if the section obliged the Minister to dismiss a director for some other substantive reason (for example, ineligibility, incapacitation or negligence), notwithstanding the fact that she had good cause under the Armscor Act.[108] But it makes no such provision. Put simply, section 71 is the procedure by which the Minister exercises her section 8(c) power. I see nothing undesirable or unduly constraining in that.

[77] The Armscor Act is not designed, and does not purport, to regulate each aspect of Armscor's governance and corporate affairs. It seems clear, at least generally, that both the Armscor Act and the Companies Act apply – and must have been intended to apply – concurrently. Were that not the case, the Corporation would be operating without any statutory guidance over a wide range of areas.

[108] For example, section 71(3), which relates to the dismissal of a director by the board, requires the board to determine that the director in question is ineligible or disqualified; incapacitated; or negligent or derelict in the performance of his or her functions.

[78] Fourth, the Minister's reliance on *Sasol v Lambert*[109] at the hearing as authority for the proposition that section 8(c) operates to the exclusion of section 71(1) and (2) is misplaced. In that case the Supreme Court of Appeal restated the *generalia specialibus non derogant* maxim: general words and rules do not derogate from special ones.[110] However, this maxim is only of application where a reading of the general statute could alter the meaning of the specific statute.[111] As explained above, that possibility does not arise here, for section 8(c) of the Armscor Act regulates the substantive basis upon which the Minister may terminate the services of a director and section 71(1) and (2) regulates the process the Minister must follow. And it must be noted that *Sasol v Lambert* emphasised that statutes, where possible, "must be read together".[112]

[79] It would not lead to an absurdity to hold that the Minister, as sole shareholder for these purposes, was obliged to comply with section 71(1) and (2) in the circumstances of this case. For the purpose of those provisions is not only to ensure that a majority of shareholders assent to a decision to dismiss a director, but also to ensure that those whose interests may materially be affected by the decisions taken are given an opportunity to put forward relevant information, and to ensure that the decision-makers are appropriately informed before taking a serious decision.

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

[110] Id at para 17.

[111] Id and the authority cited there.

[112] Id at para 15, quoting from *Kent NO v South African Railways and Another* 1946 AD 398 at 405. See generally paras 16-7.

[80] The Minister took no steps required by the Companies Act when she exercised her section 8(c) power. She therefore failed to observe the prescribed procedure, and acted unlawfully, when she sought to terminate General Motau and Ms Mokoena's membership of the Board without first affording them a reasonable opportunity to make representations.

[81] Were it not for the operation of the Companies Act, would there be an obligation on the Minister to dismiss directors in a procedurally fair manner? This Court's decision in *Masetlha*, which was extensively relied on by the Minister in her submissions, has been interpreted to exclude the requirement of procedural fairness in the review of executive action as a stand-alone requirement under the principle of legality.[113] *Masetlha* does not stand for this unequivocal proposition, however. The decision was limited to the specific context of that case and the power under consideration: the distinguishing feature which rendered the observance of procedural fairness inapposite in that case was "the special legal relationship that obtains between the President as head of the National Executive, on the one hand, and the Director-General of an intelligence agency, on the other".[114] The sensitive nature of this special relationship, lying as it did in the heartland of "the effective pursuit of national security",[115] meant that Mr Masetlha, the spymaster-in-chief, could continue

[113] See, for example, Hoexter above n 37 at 418; Murcott "Procedural Fairness as a Component of Legality: Is a Reconciliation between *Albutt* and *Masetlha* Possible?" (2013) 130 *SALJ* 260 at 271; and Price "The Evolution of the Rule of Law" (2013) 130 *SALJ* 649 at 654-5.

[114] *Masetlha* above n 50 at para 75.

[115] Id at para 77.

to occupy his position only as long as he enjoyed the trust of the President, his principal.[116] Moreover, the power to appoint and dismiss in *Masetlha* was "conferred specially upon the President for the effective business of government and . . . for the effective pursuit of national security."[117]

[82] This Court has also subsequently acknowledged in *Albutt*[118] that procedural fairness obligations may attach independently of a statutory obligation in virtue of the principle of legality. In that case, the President was required, as a matter of rationality, to allow some form of participation by interested persons when issuing pardons to prisoners under a special dispensation.[119]

[83] However, whether the principle of legality or some other principle in this case required the Minister to act in a procedurally fair manner, does not, in the light of the applicability of the Companies Act, need to be decided here. It suffices to note that our law has a long tradition – which was endorsed by this Court in *Mohamed* – of strongly entrenching *audi alteram partem* ("hear the other side"),[120] which attains particular force when prejudicial allegations are levelled against an individual. And it

[116] Id at para 86.

[117] Id at para 77.

[118] *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC).

[119] Id at paras 61 and 68-72.

[120] *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC). Ackermann J stated at para 37, relying on the Appellate Division's decision in *R v Ngwevela* 1954 (1) SA 123 (A) at 131H and the other cases referred to in fn 34 of that judgment, that "[i]t is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the Legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it."

is for this reason that dismissal from service has been recognised as a decision that attracts the requirements of procedural fairness.[121]

Relief

[84] The Minister acted rationally and for good cause in terminating the services of General Motau and Ms Mokoena. However, she failed to follow proper procedure in terms of section 71(1) and (2) of the Companies Act. It follows that the Minister acted unlawfully in that regard. Does that mean that the High Court's order – setting aside the Minister's decision and confirming General Motau and Ms Mokoena as Board members – should be upheld?

[85] To grant appropriate relief, we must determine what is fair and just in the circumstances of a particular case.[122] The various interests that might be affected by the remedy should be weighed up. This should at least be guided by the objective to address the wrong occasioned by the infringement; deter future violations; make an order which can be complied with; and which is fair to all those who might be affected

[121] See, for example, *Administrator, Transvaal and Others v Zenzile and Others* [1990] ZASCA 108; 1991 (1) SA 21 (A) at 37A-G and 39A. See also *Administrator, Natal and Another v Sibiya and Another* [1992] ZASCA 115; 1992 (4) SA 532 (A) at 539B-C.

[122] Section 172(1) of the Constitution reads as follows:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

See also *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 42.

by the relief.[123] It also goes without saying that the nature of the infringement will provide guidance as to the appropriate relief.[124] And the right to be heard has value both instrumental and intrinsic.[125] One cannot excuse an unfair process because it led to the right result.[126]

[86] So the setting aside of the Minister's decision and the reinstatement of the aggrieved parties or an award of compensation would usually follow from a finding that a dismissal was procedurally defective and did not comply with the relevant legislative prescripts. But the very exceptional circumstances of this case mean that it would not be just and equitable for this Court to award such remedies here. A declaration is sufficient to address the flaws in the Minister's conduct, and to draw her attention to the importance of complying with the Companies Act and adopting a fair process in making such decisions. Limiting the relief to a declaration would, at the same time, vindicate the Minister's efforts to address the dereliction of duty by General Motau and Ms Mokoena.

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[123] *Hoffmann* id at para 45. See also *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 96.

[124] *Hoffmann* above n 122 at para 45.

[125] In *John v Rees* [1970] Ch 345 at 402 Megarry J observed:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. . . . Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

[126] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) at paras 23-4 and 26.

[87] First, the Minister, on a number of occasions, had expressed her dissatisfaction with their conduct.[127] The Minister convened three meetings with the Board to address various governance issues. None of these was attended by General Motau whilst Ms Mokoena failed to attend the last of the meetings.[128] And General Motau's response to the Minister's letter in which she registered her disapproval of his non-attendance was insouciant, reminding her that Board members had other jobs and obligations. So General Motau and Ms Mokoena were certainly on notice of the Minister's dissatisfaction and her wish to reconstitute the Board.

[88] Second, General Motau and Ms Mokoena's terms of office came to an end in April 2014. The Court cannot reinstate them.

[89] Finally, despite the procedural defects of her decision, the Minister had substantively good, and indeed compelling, reasons for terminating the membership of General Motau and Ms Mokoena. As set out above, she had demonstrable good cause within the meaning of that term in the Armscor Act: the Corporation had, with General Motau and Ms Mokoena as its leadership, failed to discharge its mandate.[129] In the proceedings before this Court the high-water mark of General Motau and

[127] I have in mind the Minister's letter of 19 February 2013 to General Motau, wherein she threatened dismissal over their repeated attempts to set the remuneration levels of Board members. Section 7(6) of the Armscor Act reserves this for ministerial determination.

[128] See [7] above.

[129] See [52]-[68] above for the discussion on good cause.

Ms Mokoena's defence seems to be their ignorance of Armscor's parlous affairs, which is no defence at all.

[90] It is evident that the relationship between the Minister, on the one hand, and General Motau and Ms Mokoena, on the other, has disintegrated irreparably. The order of the High Court reinstating General Motau and Ms Mokoena must therefore be set aside.

Costs

[91] General Motau and Ms Mokoena were represented by counsel appointed by this Court, who acted on their behalf pro bono. Their attorneys acted on the same basis. Although they were partly successful, this makes it unnecessary to grant a costs order in their favour. I therefore make no order as to costs in this Court.

[92] Armscor approached the Court out of concern for the rights of Board members. This Court's finding that the Minister was required to comply with the procedure for the dismissal of directors in the Companies Act in dismissing General Motau and Ms Mokoena is some vindication of Armscor's position. However, given that the Corporation is itself an organ of state, no order as to costs is justified.[130]

[130] See *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 94. See generally M du Plessis et al *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 135.

[93] The order of the High Court with regard to costs cannot stand, however. There was no justification for the costs order on an attorney-and-own client scale made against the Minister.[131] The reasons relied on by the High Court disclose no basis for a punitive and exceptional costs order.[132] I therefore replace this order with an order for costs in favour of General Motau and Ms Mokoena on a party-party scale. Armscor was not involved in the High Court proceedings, and thus no costs order need be made in its favour insofar as those proceedings are concerned.

Order

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

1. Condonation for the late filing of the written submissions of both General Motau and Ms Mokoena, and of the Armaments Corporation of South Africa (SOC) Limited (Armscor), is granted.
2. The appeal is upheld to the extent set out below.
3. The order of the High Court is set aside and replaced with the following:

   "(a) It is declared that the Minister acted unlawfully insofar as she terminated the services of General Motau and Ms Mokoena on the Armscor Board without following the procedure set out in section 71(1) and (2) of the Companies Act.

[131] See para 81.6 of the High Court judgment above n 1.

[132] See [21] above. The High Court reasoned that the Minister's failure to observe the requirements of procedural fairness in making her decision to terminate the services of General Motau and Ms Mokoena was unreasonable. Even if this were the case – which the High Court failed to demonstrate sufficiently – it is not clear that it would justify the exceptional costs order the Court granted. The High Court's other reasons – that the Minister did not deal with General Motau's letter on 12 July 2013 which "displayed [his] respect" for her and the Minister's "utterances" in her meeting with the Board succeeding her decision on 14 August 2013 – similarly provide no exceptional basis to mulct the Minister with a punitive costs order.

(b) The Minister's decision to terminate the services of General Motau and Ms Mokoena on the Armscor Board is not set aside.

(c) The Minister is ordered to pay the costs incurred by General Motau and Ms Mokoena in the High Court."

4. There is no order as to costs in this Court.

JAFTA J (Madlanga J and Zondo J concurring):

[95] I have read the judgment prepared by my Colleague Khampepe J (main judgment). But I do not agree with the outcome proposed and the reasons supporting it. In my view, the narrow question raised in this matter is whether the Minister's termination of the first and second respondents' membership of the Armscor Board violated their procedural fairness rights. If it did, then the High Court was right to set the termination aside.

[96] The factual background is set out in detail in the main judgment and it is not necessary to repeat it here, save to mention the facts essential to a proper understanding of this judgment. The first and second respondents were Chairperson and Deputy Chairperson of the Armscor Board. Their membership was terminated[133] without any pre-decision hearing by the Minister on 8 August 2013. The respondents were notified of the Minister's decision in letters of the same date.

[133] Although section 8(c), in terms of which the Minister acted, speaks of termination of services, it is clear from its text that it deals with the termination of membership and not employment.

[97] The main reason for the termination was that the Minister was unhappy with the Board's performances of its functions. In the letter, the Minister listed a number of instances in respect of which the Board had failed to perform to her expectations. The Board's primary function is to procure equipment and other matériel for the South African National Defence Force. The Minister was concerned that the Board's inaction, under the leadership of the respondents, was prejudicial to the Defence Force and had put its members at risk. Their non-performance was, in the opinion of the Minister, sufficient cause to terminate the respondents' membership.

[98] Discontent with the Minister's decision, the respondents took it on review to the High Court. Apart from disputing the non-performance relied on by the Minister, the respondents contended that the decision was procedurally unfair. In opposing the review, the Minister argued that her decision did not constitute administrative action and therefore was not subject to the procedural fairness requirements in PAJA. This is how the need to classify the decision arose.

[99] It is common cause that the respondents were not afforded a hearing before the Minister terminated their membership. What is in dispute instead is whether the respondents were entitled to a hearing before the decision was taken. If so, whether the right to be heard was located in section 33 of the Constitution,[134] as given effect to by PAJA.[135]

[134] Section 33(1) of the Constitution provides:

[100] The High Court was persuaded that the impugned decision amounted to administrative action and set it aside because of, among other grounds, the fact that it was procedurally unfair. The unfairness arose from the fact that the respondents were denied a pre-decision hearing.

[101] Although the main judgment agrees that the respondents were entitled to a pre-decision hearing, it, however, locates their right in section 71 of the Companies Act. This finding is prompted by the conclusion that the Minister's decision constitutes executive action. I disagree.

[102] The main judgment relies on three considerations for the conclusion that the Minister's decision was executive action. The first is that the power exercised by the Minister "is an adjunct of her power to formulate defence policy".[136] The second is that the Minister did not exercise "a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state".[137] The third is that, in order to terminate membership of the Board, "the Minister need only demonstrate good cause".[138]

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[135] Section 3(1) of PAJA reads:

> "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

[136] Main judgment above at [47].

[137] Id at [49].

[138] Id at [50].

[103] Before examining each of these considerations, it is necessary to outline the process followed in determining whether a particular decision constitutes administrative or executive action. First, there is no standard established or test laid down for this enquiry. The determination is made on a case-by-case basis.[139] It is a difficult enquiry and, as the main judgment observes, caution must be exercised when determining whether an act is executive and not administrative. This is so because, if it is executive, it cannot be subjected to the review scrutiny in section 33 of the Constitution and PAJA. This means that those who are adversely affected by an executive act cannot invoke any of the administrative justice rights conferred by section 33 to challenge the validity of the executive act.

[104] This is because section 33 and PAJA do not apply to executive acts. PAJA defines an administrative act as a decision taken by an organ of state, when exercising a public power in terms of the Constitution or performing a public function in terms of legislation. The decision must also have direct external effect. More importantly, for present purposes, the decision must not arise from the exercise of the executive powers contained in certain sections of the Constitution, as listed in PAJA. Notably, in those exclusions, the power in section 85(2)(a) is left out.[140]

[139] *SARFU* above n 28 at para 143.

[140] See the definition of administrative action in PAJA.

[105] Therefore, as I see it, for any decision to be reviewed as an administrative act, it must constitute an administrative act as defined in PAJA. That act does not include executive acts expressly excluded by the definition section in PAJA. In respect of the National Executive, to which the Minister belongs, the executive powers and functions excluded from the scope of administrative action are those in sections 79(1) and (4); 84(2), leaving out (e) and (j); 85(2), excluding (a); 91; 92(3); 93; 97; 98; 99; and 100 of the Constitution.[141]

[106] By leaving out the powers in section 84(2)(e) and (j) from the list of exclusions, PAJA suggests that appointments made by the President in terms of the Constitution, when not acting in his capacity as head of the National Executive, constitute administrative decisions and so is his or her decision to pardon offenders and remit penalties. The same applies to decisions taken in terms of section 85(2)(a).[142] In terms of PAJA, read with section 85(2)(a) of the Constitution, implementation of national legislation, like the Armscor Act, amounts to administrative action unless the Constitution or an Act of Parliament provides otherwise. Therefore, ordinarily, the implementation of legislation constitutes administrative action, except where there is a clear indication that it does not.

[141] The various sections of the Constitution mentioned here are all listed in the exclusions to the definition of administrative action in PAJA.

[142] Section 85(2)(a) reads:

> "The President exercises the executive authority, together with the other members of Cabinet, by—
>
> (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise".

[107] It cannot be gainsaid that what we are concerned with here is the implementation of the Armscor Act. To be precise, we are dealing with the exercise of power by the Minister in terms of which the respondents' membership of the Board was terminated. The Minister does not derive this power from the Constitution. Instead, it is a power conferred on her by section 8(c) of the Armscor Act. The section provides:

> "A member of the Board must vacate office if—
>
> . . .
>
> (c) his or her services are terminated by the Minister on good cause shown."

[108] The exercise of the power to terminate membership of the Board is subject to one condition. The Minister may terminate the membership of any Board member if the Minister has a good cause to do so. Put differently, good cause triggers and justifies the exercise of that power by the Minister. In exercising the power, the Minister implements the Armscor Act and her decision would, ordinarily, amount to administrative action unless the Armscor Act indicates otherwise.

[109] In *Metcash Trading*,[143] this Court confirmed that the exercise of a statutory power constitutes implementation of legislation and that such action is administrative action, contemplated in section 33 of the Constitution. There it was stated:

> "The Commissioner, in exercising the power under section 36, is clearly implementing legislation and as such the exercise of the section 36 power constitutes

[143] *Metcash Trading Limited v Commissioner for the South African Revenue Service and Another* [2000] ZACC 21; 2001 (1) SA 1109 (CC); 2001 (1) BCLR 1 (CC) (*Metcash Trading*).

> administrative action and falls within the administrative justice clause of the Constitution. I cannot agree with Snyders J to the extent that she considered the exercise of the discretion conferred upon the Commissioner in section 36 of the Act not to be reviewable. The Act gives the Commissioner the discretion to suspend an obligation to pay. It contemplates, therefore that notwithstanding the 'pay now, argue later' rule, there will be circumstances in which it would be just for the Commissioner to suspend the obligation to make payment of the tax pending the determination of the appeal. What those circumstances are will depend on the facts of each particular case. The Commissioner must, however, be able to justify his decision as being rational. The action must also constitute 'just administrative action' as required by section 33 of the Constitution and be in compliance with any legislation governing the review of administrative action."[144]

[110] The question that arises is whether the Armscor Act provides clearly that the implementation of legislation here does not amount to administrative action. The Armscor Act is a short statute, comprising five chapters and 24 sections. Chapter one is devoted to the establishment of the Armaments Corporation of South Africa (SOC) Limited (Corporation) and also sets out its objectives, powers and functions. Chapter two deals with the Board of Directors, including the appointment of directors by the Minister, powers and functions of the Board, as well as their removal from office. Section 8, in terms of which the Minister terminated the respondents' membership, is located in this chapter.

[111] Chapter three, which is one of the shorter chapters, deals with the financial and audit affairs of the Corporation. The shortest chapter is chapter four. It consists of two sections only, one of which empowers the Minister to make regulations. This

[144] Id at para 42.

chapter also empowers the Board to delegate any of its powers to its officials. Chapter five contains miscellaneous provisions on safeguarding records and the property of the Corporation, including intellectual property, formation of subsidiaries to the Corporation and the repeal of laws.

[112] A reading of the entire Armscor Act shows that none of its provisions explicitly provides that its implementation does not constitute administrative action. What needs to be determined is whether, by implication, the Act provides that its implementation amounts to executive action. This enquiry requires us to examine the entire Act for factors indicating that the exercise of the power in section 8(c) constitutes an executive act.

[113] The difficulty in making a determination here normally arises if there is some overlap in executive powers giving rise to administrative action and those which do not, for example, the power in terms of which legislation is implemented and the power in terms of which policy is formulated. Thus, in *SARFU*, this Court remarked:

> "Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power

> constitutes administrative action for the purposes of section 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of section 33. These will need to be drawn carefully in the light of the provisions of the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."[145] (Footnotes omitted.)

[114] Ordinarily the formulation of policy in broad terms does not amount to administrative action. This is because the power to develop and implement national policy in section 85(2)(b) of the Constitution is one of the exclusions in the definition section of PAJA. The exercise of that executive power is not an administrative act. However, the emphasis is usually placed on the formulation part of the power and not on implementation. Once a policy has been formulated and translated into legislation, its implementation would ordinarily constitute an administrative act.

[115] Engaged in the determination of whether the exercise of public power amounted to an administrative or executive action, our courts have drawn a bright line between formulation of policy, on the one hand, and, on the other, its implementation. In *Ed-U-College*, this Court drew the distinction in these terms:

> "It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. *The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing*

[145] *SARFU* above n 28 at para 143.

> *legislation. The formulation of policy in the exercise of such powers may often constitute administrative action*."[146] (Emphasis added.)

[116] The same approach was adopted by the Supreme Court of Appeal in *Grey's Marine Hout Bay*:

> "There will be few administrative acts that are devoid of underlying policy – indeed, administrative action is most often the implementation of policy that has been given legal effect – but the execution of policy is not equivalent to its formulation. The decision in the present case was not one of policy formulation but of execution."[147]

[117] If the exercise of power results in the formulation of policy, this is a strong factor which supports the view that the act arising from that exercise is an executive one. But this is not always a decisive factor, as this Court observed in *Ed-U-College*.[148] In that case, this Court was confronted with the question whether the adoption of a subsidy formula by the MEC and the allocation of subsidies in terms of that formula constituted administrative action or formulation of policy. There, like here, the power exercised was contained in an Act of Parliament. This Court held that the exercise of the power involved formulation of policy in the narrow sense but, despite that, the Court reached the conclusion that the exercise of power constituted administrative action.

[146] *Ed-U-College* above n 34 at para 18.

[147] *Grey's Marine Hout Bay* above n 37 at para 27.

[148] Above n 34 at para 18.

[118] In *Ed-U-College*, the Court explained the distinction between wide and narrow policy formulation thus:

> "In the present case, section 48(2) of the Schools Act empowers the MEC to grant subsidies to independent schools from money allocated for that purpose by the Legislature. Clearly, therefore, unless money is allocated by the Legislature for this purpose, no subsidy may be granted. The principle of subsidy allocation to independent schools is determined in the first instance by the Legislature. Once it has allocated money for independent schools, the MEC is then empowered to determine the manner of how it is to be spent. Although there are a range of ways in which this power can be exercised, it must always be exercised within the constraints of the budget set by the Legislature. Furthermore, it is not a power which the Legislature would be suited to exercise. The determination of which schools should be afforded subsidies and the allocation of such subsidies are primarily administrative tasks. The determination of the precise criteria or formulae for the grant of subsidies does contain an aspect of policy formulation but it is policy formulation in a narrow rather than a broad sense. *The decision apparently constitutes a broad policy decision because it purports to determine how the allocated budget is to be distributed and not the amount to be given to each school. However, on closer scrutiny it is in fact not so broad because the MEC determines not only the formula but also in effect the specific allocations to each school*. This case may be close to the borderline. *However, I am persuaded that the source of the power, being the Legislature, the constraints upon its exercise and its scope point to the conclusion that the exercise of the section 48(2) power constitutes administrative action, not the formulation of policy in the broad sense as suggested by the applicants*."[149] (Emphasis added.)

[119] It is now convenient to examine section 8(c) of the Armscor Act, to determine whether it confers power for formulating policy or implementing the Act. As mentioned earlier, the power in the section is for the termination of Board membership. When exercising it, the Minister does not formulate any policy. Nor

[149] *Ed-U-College* above n 34 at para 21.

does she set out to collect information which may help her to formulate policy. But she does so for a proper implementation of the Armscor Act. The good cause that triggers the exercise of the power must be something done by a Board member that is not in line with the objects of the Armscor Act or the Corporation itself.

[120] On the approach adopted by the Court in *Ed-U-College* and having noted that the source of the power is the Armscor Act, the question is whether the scope of and constraints for the exercise of the section 8(c) power shed some light on whether its exercise amounts to administrative action. The scope of the power is limited to terminating membership of the Board. The constraint for its exercise is the presence of good cause to terminate that membership. Just like in *Ed-U-College*, these factors show that the exercise of the power constitutes administrative action, and not the formulation of the defence policy. Moreover, here unlike in *Ed-U-College*, we are not dealing with a borderline case. It is not a case of formulation of policy, even in the narrow sense.

[121] However, the main judgment holds that "the Minister's section 8(c) power is an adjunct of her power to formulate defence policy". For this finding, reliance is placed on *SARFU*. I disagree. First, the termination of the Board's membership is not supplementary to the Minister's power, if she has the power to formulate defence policy. The position here is different from *SARFU* where the establishment of a commission was taken to be a mechanism in terms of which information could be collected and advice given. These could help the President to formulate policy. It

was in this context that in *SARFU*, this Court said the commission itself was an adjunct to the policy formulation function. The Court stated:

> "A commission of inquiry is an adjunct to the policy formation responsibility of the President. It is a mechanism whereby he or she can obtain information and advice. When the President appointed the commission of inquiry into rugby he was not implementing legislation; he was exercising an original constitutional power vested in him alone. Neither the subject matter, nor the exercise of that power was administrative in character. The appointment of the commission did not, therefore, constitute administrative action within the meaning of section 33. It should, however, be emphasised again, that this conclusion relates to the appointment of the commission of inquiry only. The conduct of the commission, particularly one endowed with powers of compulsion, is a different matter."[150]

[122] It is apparent from this statement that the Court was influenced by two considerations in concluding that the appointment of the commission of inquiry did not constitute administrative action. The first consideration was that the commission would facilitate the procurement of information and advice which could help the President in performing the function of formulating policy. The second consideration was that, when appointing the commission, the President was not implementing legislation but was exercising an original constitutional power vested in him as head of state and not as head of the Executive. The Court distinguished between implementation of legislation and the performance of functions which are essentially political.

[123] The present is not such a case.

[150] *SARFU* above n 28 at para 147.

[124] The second consideration relied on in the main judgment is that "the exercise by the Minister of her section 8(c) power is not a low-level bureaucratic power which merely involves the application of policy in the discharge of the daily functions of the state". It is asserted that the section operates at a different level and empowers the Minister to perform her oversight responsibilities and supervise "high-level public office-bearers in the performance of their official duties". As I read it, there is an inconsistency in this consideration. On the one hand, it says that the exercise of the power does not involve the implementation of policy in the daily functions of the state, and on the other, it says that the section empowers the Minister to supervise public office-bearers in the performance of their duties.

[125] But the inconsistency aside, the level at which the Minister operates is not material to the enquiry because even the President has responsibilities that are administrative and others that are executive. As was observed in *SARFU*, some responsibilities of the President and Ministers may amount to administrative action and others not. In *SARFU* the Court proclaimed:

> "As we have seen, one of the constitutional responsibilities of the President and Cabinet Members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute 'administrative action' within the meaning of section 33. Cabinet Members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of section 33. It follows that some acts of

> members of the Executive, in both the national and provincial spheres of government will constitute 'administrative action' as contemplated by section 33, but not all acts by such members will do so."[151] (Footnote omitted.)

[126] The last consideration on which the main judgment relies is that the Minister has a discretion to terminate membership of any Board member on the basis of a good cause. In my view, the vesting of a discretion in the Minister does not indicate that the function is executive rather than administrative. Indeed, the conferment of a discretion is the hallmark of most administrative functions. In *Dawood*,[152] this Court affirmed the importance of discretionary powers in administrative decisions. There it was said:

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here."[153] (Footnote omitted.)

[127] I conclude that the Minister's termination of the respondents' membership of the Board constituted administrative action envisaged in section 33 of the Constitution. Consequently, her decision is reviewable under PAJA. Since the

[151] *SARFU* above n 28 at para 142.

[152] *Dawood* above n 54.

[153] Id at para 53.

respondents were not given a hearing before that decision was taken, it was procedurally unfair and the High Court was right to set it aside.

[128] In the view I take of the matter, it is not necessary to determine whether section 71 of the Companies Act finds application in this matter. It is also unnecessary to decide whether the termination of the respondents' membership was based on a good cause.

[129] For all these reasons, I would dismiss the appeal.

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