



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 1274/2022

In the matter between:

MINISTER OF WATER AND SANITATION

Applicant

And

BUHLE TONISE

First Respondent

ZAMA XALISA

Second Respondent

MXOLISI JOE SIKHOSANA

Third Respondent

TABISA WANA

Fourth Respondent

NKOSAZANA NOMAXHOSA JONGILANGA

Fifth Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

Beshe J

[1] On the 24 May 2023 I rendered a judgment setting aside a decision by The Minister of Water and Sanitation to dissolve the Amatola Water Board and terminate the appointment of applicants in the matter to the Amatola Water Board.

[2] The Minister is now seeking to leave to appeal against the said judgment.

[3] Leave to appeal is sought on the basis that I erred in law, based on what the Constitutional Court found in *Minister of Defence and Military Veterans v Motau and Others*,¹ by characterising the Minister's decision to remove board members as constituting an administrative decision. This, contrary to what was held in the Motau matter, *supra*, that the decision to remove board members constitutes an executive decision. Further that by ordering the re-instatement of the board members I did not have regard to the fact that the interim board was still in place. It was submitted that ordering the re-instatement of the Amatola Board will result in there being two parallel board for the same Water Board. My judgment is furthermore impugned on the basis that despite holding that the Minister's impugned decision amounted to an administrative action, but that no case had been made that it was reviewable under PAJA, I still went ahead and reviewed it.

[4] The Minister's decision was reviewed in terms of the Common Law, in particular the principle of legality which requires that every exercise of public power must be rational.

[5] In my view, the complaint that I failed to follow the decision in the Motau matter is misplaced. This in view of the fact that even in the Motau² matter the Constitutional Court, which was dealing with a specific piece of legislation, the Armsco Act, held that the fact that power is sourced on legislation is not in itself determinative of whether power exercised in respect of thereof is executive in nature. Earlier at paragraph [36] of the judgment, it was held that:

"[36] It is the function rather than the functionary that is important in assessing the nature of the action in question. 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

¹ 2014 (5) SA 69 CC.

² Motau *supra* at paragraph [36].

made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula.”

[6] Be that as it may, I am unable to say that there are no reasonable prospects of appellate court finding that the Minister’ decision is this regard constituted executive action.³

[7] To the extent that I may have erred by not setting aside the Minister’s decision to appoint an Interim Board thereby offending the principle enunciated in the matter of Oudekraal Estates (Pty) Ltd v City of Cape Town and Others⁴, there once again I am unable to say there are no reasonable prospects of the Minister succeeding on this point. Even though I was of the view that such an order would have been superfluous in the light of the order I made that applicants in the matter (now respondents) be re-instated as members of the Amatola Board. This also in view of the fact that the term of the Interim Board was for five months, which period had already expired.

[8] In the Oudekraal matter it was held that until such time that an invalid administrative action is set aside by a court in proceedings for judicial review, it exists in fact and has legal consequences.⁵

[9] For these reasons, the Minister is granted leave to appeal to the Full Bench of this division.

Costs to be costs in the appeal.

**N G BESHE
JUDGE OF THE HIGH COURT**

³ Section 17 (1) (a) of the Superior Court Act 10 of 2013.

⁴ 2004 (6) SA 222 SCA.

⁵ Oudekraal *supra* at 242 (a)-(c).

APPEARANCES

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Date Heard : 18 July 2023

Date Reserved : 18 July 2023

Date Delivered : 12 September 2023