REPORTABLE

CASE NO.12266/08

IN THE HIGH COURT OF SOUTH AFRICA
THE KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG

In the matter between

MBUYISELWA PATRICK SOKHELA	First Applicant
APPOLONARIS PHILANI SHANGASE	Second Applicant
THULANI GOODLORD NKOSI	Third Applicant
ALAN LAX	Fourth Applicant
OBED SHABANGU	Fifth Applicant

and

THE MEC FOR AGRICULTURE AND ENVIRONMENTAL AFFAIRS (KWAZULU-NATAL)	First Respondent
THE MEC FOR FINANCE (KWAZULU-NATAL)	Second Respondent
MS BUSI MNGANGA	Third Respondent
ROSHAN MORAR	Fourth Respondent
COMFORT NGIDI	Fifth Respondent

J U D G M E N T

Delivered: 19 June 2009

WALLIS J.

[1] Conservation is of great importance in the Province of KwaZulu-Natal. The day-to-day responsibility for conservation matters lies with the KwaZulu-Natal Nature Conservation Service established in terms of s 20(1) of the KwaZulu-Natal Nature Conservation Management Act 9 of 1997 (KZN). The Conservation Service is now called Ezemvelo KwaZulu-Natal Wildlife ("Ezemvelo"). According to the founding affidavit of Dr Sokhela, which is not in this respect disputed by the first respondent ("the MEC"), this is apparently the trading name of the conservation service although it appears to have assumed a more official role as it is the name referred to in Schedule 3 to the Public Finance Management Act 1 of 1999 ("the PFMA"). Ezemvelo is in turn accountable to the KwaZulu-Natal Conservation Board for the execution of its functions, powers and duties.[1]

[2] The KwaZulu-Natal Conservation Board ("the board") is established in terms of s 4 of the Act and is the successor to the Natal Parks Board. It is a requirement[2] that it consist of no less than nine and no more than fourteen members appointed by the MEC having responsibility for protection and conservation of the environment and nature conservation. At all times relevant to these proceedings that was the MEC for Agriculture and Environmental Affairs.

[3] The applicants were all duly appointed by the MEC as members of the board, with Dr Sokhela being appointed as its Chair.[3] They were

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1 S 20(2) of the Act.

2 S 4(6) of the Act.

3 When these proceedings commenced there were five applicants, who were also the only five people who had been appointed as members of the Board. One of them (the fourth

the only members and so the board was not fully and properly constituted in terms of the Act. However, as we are concerned with the position of the applicants as members of the board and not with any question of the validity of their actions when acting as a board whilst it was not properly constituted, this does not appear to be material and counsel were agreed that it can be disregarded. In fairness to the parties it should perhaps be recorded that the applicants had raised with the MEC the need to make further appointments and bring the board up to strength and Mr Mthimkulu, who was at the material time the incumbent of the office of MEC, gave evidence that he was much concerned over the need to make further appointments to the board.

[4] The relevant primary functions of the board are to direct the management of nature conservation in KwaZulu-Natal and to ensure the proper, efficient and effective management of Ezemvelo.[4] It is afforded substantial powers for these purposes. It is not itself listed as a Provincial Public Entity for the purposes of the PFMA, although Ezemvelo is, but the MEC contends that the board is by virtue of s 49(2)(a) of the PFMA the accounting authority for Ezemvelo. The applicants dispute this and contend that the Chief Executive Officer of Ezemvelo, a post held at the time in an acting capacity, is the accounting authority by virtue of s 49(2(b) of the PFMA. Although foreshadowed in the affidavits no argument was addressed to me on this topic nor was any evidence led on who in practice performed the

applicant) subsequently resolved his differences with the MEC and is no longer participating in these proceedings. However he was a participant along with the other applicants in all the relevant events and for convenience I will continue to refer to the board and its members as including him and to the applicants also as including him, save where in the context of these proceedings it is apparent that he is no longer a participant.

4 Ss 5(1)(a)(i) and (b) of the Act.

functions of the accounting authority for Ezemvelo. In my view it is not necessary to resolve this issue, which poses some difficulty in determining what kind of board is referred to in s 49(2)(a) of the PFMA, and I refrain from doing so.

[5] The issue in the present case arises out of the MEC suspending all the members of the board from their duties on the 18 September 2008. It is not disputed that he had the power to do this in terms of s 12 of the Act, but the members of the board contend that in two respects he did not exercise that power lawfully. Firstly they contend that properly construed s 12 imposes certain constraints on the MEC's powers of suspension by defining the circumstances in which a suspension can occur and the purposes of such suspension. Invoking the constitutional principle of legality[5] they contend that those circumstances were not present and the purpose of the suspension was not a permissible purpose. Secondly they contend that before they could be lawfully suspended the MEC was obliged to afford them an opportunity to make representations to him as to why they should not be suspended and he failed to do so. On both grounds they claim that their suspension was invalid.

[6] I interpose at this point to say that apart from suspending the applicants from their position as members of the board the MEC simultaneously and purporting to act in terms of the provisions of s 49(3) of the PFMA appointed the third, fourth and fifth respondents as an interim accounting authority of Ezemvelo. He did so on the

[5] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC), para 58.

basis of his contention that the board was the accounting authority for Ezemvelo and as the members of the board had been suspended it was necessary to put an interim accounting authority in place to discharge that function. Like the suspensions of the applicants this decision was challenged. The basis of the challenge was two-fold, namely that the suspension of the board members was unlawful and hence the basis for the appointment of an interim accounting authority was lacking, and, in any event, that the Acting Chief Executive Officer of Ezemvelo is in fact the accounting authority for the purposes of the PFMA and cannot be replaced by an interim accounting authority. Nothing, however, turns on this issue. It was common cause between counsel that if the suspension of the applicants falls to be set aside then the appointment of the interim accounting authority must likewise be set aside. (I should mention that the third, fourth and fifth respondents who were the appointees have played no part in these proceedings choosing instead to abide the decision of the court.) If, however, the suspension of the applicants is not set aside the applicants have no further interest and no *locus standi* to pursue their challenge to the appointment of the interim accounting authority. It was also accepted in argument by Mr Pammenter SC, who appeared for the applicants, that if the suspension of the board members was not set aside it would be undesirable to leave a vacuum in place in overseeing the affairs of Ezemvelo. In the result the outcome of the claim to this relief depends upon the outcome of the claim to have the suspension of the members of the board set aside.

[7] The applicants initially instituted these proceedings as an urgent application on the 23 September 2008, five days after their suspension, seeking the issue of a rule *nisi* and interim relief. The application was opposed and after answering and replying affidavits had been filed came before McLaren J, who referred certain issues for the hearing of oral evidence. These issues revolved around a meeting held between the MEC and four members of the board[6] on 11 September 2008. The MEC contends that this meeting constituted a hearing at which the members of the board were afforded the opportunity to make representations to him as to why they should not be suspended. He accordingly contended that any obligations owed by him to the members of the board under the *audi alteram partem* rule were discharged. As the events at the meeting were not common cause and certain issues were not fully explored on the papers McLaren J referred the following questions for the hearing of oral evidence, namely:-

'(a) Who arranged for the meeting to be held on 11 September 2008?

(b) Were the applicants advised what the purpose of the meeting would be?

(c) What was the purpose of the meeting?

(d) Was the issue of the applicants' suspension discussed at the meeting?

(e) Whether the applicants made any oral or written representations to the first respondent in regard to their envisaged suspension?'

[8] In the result I heard evidence from Mr Shangase, Mr Nkosi and Dr Sokhela, respectively the second, third and first applicants, on behalf of the applicants and on behalf of the first respondent from Mr Nene, who is the head of ministry in the Department of Agriculture and

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6 The fifth respondent was unable to attend the meeting.

Environmental Affairs (KwaZulu-Natal), and Mr Mthimkulu, who at the relevant time held the office of MEC for Agriculture and Environmental Affairs in KwaZulu-Natal. I will deal with this evidence at a later stage.

[9] The statutory framework within which the decision to suspend the board members fell to be taken is provided by s 12 of the Act, which in turn must be read with section 11 dealing with the circumstances in which the MEC may terminate a person's appointment as a member of the board. These sections read as follows:-

'**11. Termination of Employment**

(1) The Minister may terminate a person's appointment as a member on one or more of the following grounds:

(a) Infirmity of mind or body which prevents him or her from the proper discharge of the duties of his or her office;

(b) Conduct which brings or could bring the activities of the Board into disrepute;

(c) Failure, refusal or neglect to carry out the duties and functions of a member to the best of his or her ability; or

(d) Failure to attend three consecutive meetings of the Board without the consent of the chairperson.

(2) Whenever the Minister terminates the appointment of a member in terms of sub-section (1), such termination and the grounds therefore must be reported within fourteen days to Parliament or, if Parliament is not sitting, to the Speaker and the chairperson of the Portfolio Committee.

12. Suspension of a Member

The Minister may suspend a member from the execution of his or her duties whilst the Minister is investigating and considering allegations which, if proved to

be correct or substantially correct, could result in the member's appointment being terminated in terms of section 11.'[7]

[10] Before dealing with the legal contentions of the parties it is desirable to set out the background leading up to the suspension of the members of the board. A convenient starting point is the audit of the board for 2006-2007. That audit was conducted by the auditor-general[8] and resulted in a qualified report. On grounds set out in the report it concluded that the financial statements did not in all material respects fairly present the financial position of the board as at 31 March 2007 or its financial performance and cash flows for the year then ended. This qualified audit led the MEC initially to appoint a consultancy to provide a report on the situation and thereafter to appoint a firm of auditors to conduct a forensic investigation into the affairs of Ezemvelo.

[11] The forensic investigation resulted in a report being finalised in May 2008. It identified the following matters as being the subject of its investigation:

(a) Identify any irregular credit card transactions and the persons responsible for these transactions.

(b) Investigate, using an appropriate sample, procurement transactions inclusive of the tender, quotation and urgent and

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7 The reference in the sections to "the Minister" is a reference to the MEC and in this judgment I will use the constitutionally correct description, which is MEC. In addition the reference to "Parliament" is a reference to the Provincial Legislature of the Province of KwaZulu-Natal. Again I will use the constitutionally correct description.

8 The report by the board in the financial statements is signed by Dr Sokhela and says that "the organisation is a Schedule 3(c) Entity in terms of the PFMA" and that the board is the accounting authority. This, along with other references in the documents to the board being the accounting authority is inconsistent with the applicants' contentions and illustrates why it is undesirable for the court to enter upon these issues when it is unnecessary to do so.

emergency procurement processes. This also relates to the projects section of Ezemvelo.

(c) Investigate the appointment of professional consultants, contractors and statutory compliance in respect of the building industry and verify the contract deliverables.

(d) Verify the qualifications of senior management and a sample of other personnel.

(e) Investigate a sample of recent appointments and confirm compliance with recruitment and employment policies including the failure to disclose close family and other relationships.

(f) Investigate the payroll expenditure, in particular the verification of employee attendance and other records.

(g) Investigate the validity of payments to alleged temporary staff and contract labour.

(h) Investigate the allocation and occupation of company-owned and leased properties and confirm compliance with income tax legislation relating to fringe benefits.

(i) Investigate corporate governance within Ezemvelo, including compliance with relevant legislation, relationships with other organisations, management structure and systems and other governance issues as directed by the Superintendent-General.

(j) Investigate the completeness of revenue generated and banked and identify the reasons for existing weaknesses in controls of revenue management.

Other than the general issue of corporate governance none of these matters outwardly appears to relate to the activities of board members.

[12] The forensic report made a number of recommendations including that certain employees be prosecuted and that others should be

subjected to disciplinary action. Many recommendations dealt with internal administrative matters and the improvement of systems and control and oversight procedures. All of these were matters that would fall to be implemented through the managerial staff of Ezemvelo from the CEO down. The only recommendations that had any direct bearing on the members of the board were the following in paragraph 7.4 of the executive summary under the general heading of 'Supply Chain Management':-

'We recommended that EKZNW consider the following, which would enhance the control environment:

- The Board Members that failed to disclose their business interests as required be given the opportunity to submit their written explanations for the non-disclosure. These submissions should be addressed to the MEC stating the reason/s why the businesses were not declared as required;

- The MEC for KZNDAE should consider whether he wants to retain those individuals who did not comply with critical business processes that are fundamental to the Corporate Governance at EKZNW as members of the Board;
- …

- Ensure that the EKZNW records relating to the declaration of interests by employees and Board members is updated to reflect all interests held;

- …

- In those instances where payment has been made to the businesses of the Board Members and the procurement regulations have not been complied with, the expenditure is deemed irregular and should thus be reported and addressed at the appropriate level.'

[13] These broad recommendations were fleshed out in a little more detail in the relevant chapter of the report. In regard to Dr Sokhela it was said that he failed to declare his interests in other organisations. A similar complaint was made in relation to the fifth applicant. In regard to the second, third and fourth applicants it was alleged, in addition to a failure to

declare other interests, that they or entities in which they had an interest had done work for the board or Ezemvelo without following proper procurement procedures. In addition there was also some criticism of the level of their charges. Other than a single comment that as "custodians responsible for enforcing Corporate Governance" they should ensure that they lead by example and that their actions should be beyond reproach, the report does not appear to attribute any of the many other problems it identified to any failings on the part of the board members.

[14] The production of the forensic report prompted the MEC to write to the board on 4 July 2008 enclosing a copy of the executive summary to the report and saying the following:

> '1. As you are aware, I caused a forensic investigation to be undertaken by Deloitte and Touche during the latter part of 2007 and 2008 into possible non-compliance and possible irregularities within the various functionalities of the KwaZulu-Natal Nature Conservation Service in consultation with the KwaZulu-Natal Provincial Treasury.
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> 2. I enclose under cover of this letter a copy of the Executive Summary of the finding and recommendations contained in the individual reports relating to the investigations performed in respect of the various functionalities within the Department. Although the Executive Summary should be read in conjunction with the findings and the resultant recommendations, the reports are not at this stage included under cover of this letter.
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> 3. Should you require a copy of the complete reports such will be made available to you.
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> 4. The Executive Summary deals with the findings and the resultant recommendations in relation to the following areas of concern:-
>
> 4.1 The misappropriation of funds through the fraudulent usage of corporate cards and the failure to comply with policies and procedures relating to payments for labour; failure to adhere to EKZNW's corporate card policies and procedure; the inappropriate use of corporate cards and the circumvention of controls;
>
> 4.2 The failure to comply with the Supply Chain Management Procedures and Policies including cover quoting; failure to ensure proper sourcing of

suppliers; failure to supervise activities of staff members within the Supply Chain Management; failure to ensure proper disclosure of interests in the operations of bidders; the irregular payment to entities which were irregularly awarded work; failure to properly supervise the opening and recording of tenders;

4.3 The commission of criminal conduct and disciplinary misconduct in respect of the technical services;

4.4 The failure to comply with the Recruitment and Selection Policy within the human resources component;

4.5 The occupation of company owned and leased accommodation contrary to policy;

4.6 Disciplinary infractions in respect of revenue collection;

4.7 Disciplinary infractions at the project section;

4.8 Criminal conduct as well as disciplinary infractions with regard to the procurement from the NRB supplier group.

5. The report also details instances where Board members failed to disclose their business interests and in other instances where Board members performed services for the Ezemvelo KwaZulu-Natal Wildlife without complying with the Supply Chain Management Procedures and Policies.

6. In terms of Section 49 of the Public Finance Management Act 1 of 1999 the Board is the accounting authority for the Ezemvelo KwaZulu-Natal Wildlife.

7. My *prima facie* view is that the accounting authority has failed to exercise the duty of utmost care to ensure reasonable protection of the assets and records of the Ezemvelo KwaZulu-Natal Wildlife; has failed to act with fidelity, integrity and in the best interest of the Ezemvelo KwaZulu-Natal Wildlife in managing the financial affairs thereof and has acted in a way that is inconsistent with the responsibilities assigned to an accounting authority in terms of the Act.

8. It is my intention to exercise ownership control over the Ezemvelo KwaZulu-Natal Wildlife as envisaged by the Public Finance Management Act and in that regard it is my intention to request the entire Board to tender their resignations.

9. In order to ensure that you are heard before I make any firm decision you are requested to peruse the forensic review and make such submissions as you are entitled to make to me.

10. I intend calling a meeting of the Board members and to invite Deloitte and Touche to present the report at such a meeting.

11 My office will contact you in due course to advise you of the date, the time and the venue for the meeting which I have proposed herein.'

[15] On 6 July 2008 the MEC met with the board's chair, Dr Sokhela, and presented the report to him. No details of that presentation appear from the papers before me and it was not the subject of any of the oral evidence. It appears from the correspondence that two further letters were sent by the MEC to the board on 18 July 2008 and 25 July 2008 respectively. However copies of these letters do not form part of the papers. On 28 July 2008 Dr Sokhela responded to the MEC in general terms dealing with what he described as the operational issues raised by the forensic report and specifically in regard to the situation in respect of board members' outside business interests, explaining that in terms of the relevant legislation the only disclosure required was in respect of relationships and transactions between board members and Ezemvelo and where entities in which board members had interests were involved in actual or potential dealings with Ezemvelo or the board or were engaged in matters being investigated, considered or voted on by the board or any matter before the accounting authority.

[16] This letter by the chair was accompanied by detailed letters from each member of the board dealing with their interests in other entities and where applicable their commercial dealings with the board and Ezemvelo. An examination of these letters is instructive. The third applicant refers to nine companies or close corporations in which he has an interest or is a director. According to him none do business with the board or Ezemvelo, with one possible exception where he is the nominee of the board as a

director of a section 21 company. Two of the companies are section 21 companies and two are said to be dormant. The second applicant's response is to similar effect. He is engaged in two entities – a consultancy and a legal firm – that have done work for Ezemvelo and he says that his interest in those entities has been disclosed and that he played no role in allocating work to these entities. He is a director together with the third applicant of a section 21 company where the board nominated him to that position and was presumably well-aware of it.

[17] The first and fifth applicants' response was that their involvement in external entities related to entities that do not do business with the board or Ezemvelo and involved no conflict of interest. The fourth applicant said likewise, pointing out that in two instances identified in the report he had been deployed by the board to the entities in question and in one that the close corporation in question owned private immovable property that manifestly had nothing to do with the activities of the board or Ezemvelo. He says that he received agreed remuneration for being the board's representative on the boards of three retirement funds of Ezemvelo. He also explained the basis on which he and the two other attorneys on the board (the second and fifth applicants) performed legal work involving a review of the Act on instructions from the then head of department of the Department of Agriculture and Environmental Affairs and the then CEO of Ezemvelo. This work was undertaken in terms of a project proposal and budget submitted to those officials.

[18] It is not necessary to assess the adequacy of these responses although on their face they go at least some way towards providing a substantial answer to the specific criticisms levelled at the board members in the report. What

is more important is that at no stage prior to 18 September 2008 did the MEC or his staff respond to them in any way, whether by seeking further information or explanation or by refuting any of their contents, including the legal contentions made by the board members as to the scope of the duty of disclosure resting on them. Their contention was that the auditors who had prepared the forensic report had adopted a fundamentally erroneous legal view of the scope and extent of the duty of disclosure.

[19] On 11 August 2008 Dr Sokhela wrote to the MEC referring to the board's response and asking permission to release the report to the members of the audit committee and the members of the executive of Ezemvelo. The letter also sought the MEC's input on certain matters and invited him to attend the board meeting on 29 August 2008 and a meeting of the audit committee on 8 September 2008. At this stage there was apparently no portent of what was to come and the documents and evidence suggest that the board was going about its business and trying to address the issues raised by the forensic report.

[20] A conversation between Dr Sokhela and the MEC is reflected in a letter from the former to the latter on 25 August 2008. Apparently the MEC had raised certain issues in a letter of 19 August 2008, which like some other correspondence at this time is not part of the papers. The board's response was to urge the MEC to attend an urgent meeting with the board if possible on 25 August itself. The board proposed eight issues for discussion including supplementing its own membership; a strategy to deal with the allegations in the forensic report; plans relating to privatisation of Ezemvelo and issues relating to an investigation into certain actions of the

CEO and an evaluation of the executive director's performance. There is nothing to suggest in this that the position of the board members themselves was in any way being reviewed or was regarded by them as being under threat.

[21] The key event that brought about a change in the situation was that the board members were urgently summoned to a meeting of the Finance and Economic Development Portfolio Committee of the Provincial Legislature, which meeting was attended also by the members of the Public Accounts Standing Committee and the Agriculture and Environmental Affairs Portfolio Committee. This meeting took place on 9 September 2008. The board members were present during some of the discussions regarding Ezemvelo but when the discussion turned to that portion of the forensic report dealing with their position they were asked to leave the room. They waited for a while in the corridor and were then taken to a room where they could continue to wait. Somewhere between an hour and an hour and a half later the MEC emerged from the meeting and told them it was unnecessary for them to wait any longer and that they could go.

[22] That afternoon the MEC sent a letter to Dr Sokhela. It read as follows:

'**RECOMMENDATIONS FROM THE MEETING OF THE JOINT FINANCE AND ECONOMIC DEVELOPMENT PORTFOLIO COMMITTEE**

This letter serves to inform you of the recommendations made by the above-mentioned portfolio committees at the meeting held on 09 September 2008.

Following a briefing by the Head of Provincial Treasury on the review of the forensic audit report on Ezemvelo KZN Wildlife the committee recommends:

1. That the MEC for Agriculture and Environmental Affairs implements the approval by Provincial Treasury to appoint another functionary as the Accounting

Authority for the Board of Ezemvelo in terms of Section 49(3) of the Public Finance Management Act.

2. That the current board members be suspended pending further investigations being done in terms of the forensic report.

3. That the MEC reports to the Finance Portfolio Committee on progress with regard to these matters by 09 October 2008.

I therefore, as MEC responsible for Ezemvelo KZN Wildlife, need to apply my mind on this recommendation and revert to you as soon as possible on my decision."

[23] Receipt of that letter caused Dr Sokhela to convene an urgent meeting of the members of the board on 10 September 2008. In the course of that meeting a letter was drafted to the MEC and I will set out the terms of that letter in due course. At present I simply note that in paragraph 4 of the letter Dr Sokhela said:

'… I urge the Honourable MEC to urgently meet with the Members of the Board and myself to address all of these matters, prior to the Honourable MEC applying his mind to the matters referred to in his letter under reply.'

Both Mr Nene and the MEC suggested in their evidence that on the evening of 9 September 2008 a meeting had been arranged for 11 September 2008 between the MEC and the members of the board at the request of Dr Sokhela. Had that been the case I cannot think that a letter drafted by the members of the board (including three attorneys) in the early evening of the following day would have contained a request in the terms quoted above as opposed to recording that the MEC had agreed to hold a meeting with the board members on 11 September 2009. It seems to me more probable therefore that the meeting was organised in the course of telephone discussions between Dr Sokhela and Mr Nene on the one hand and Mr Nene and Mr Mthimkulu on the other, in the course of the evening of 10 September 2008 after this letter had been prepared.

[24] It is overwhelmingly probable that the impetus for the meeting was the receipt by the board of the MEC's letter of 9 September 2008 embodying the recommendation by the joint portfolio committees. Clearly this had come as something of a bolt from the blue and it aroused the ire of the members of the board who felt very strongly that the decision had been reached by the joint portfolio committees without their having been given any opportunity to address the concerns leading to that recommendation or even being aware in any detail of what they were. The portfolio committees had not told them of their concerns and, whilst the board members would probably have thought that they had their roots in the forensic report, they had been given no opportunity of clarifying the issues raised by that report or even of putting before the committees the material that they had placed before the MEC by way of the letters of 25 July 2008. This lead to a muted suggestion in the evidence of the second applicant that the purpose of convening the meeting on 11 September 2008 was unclear to the members of the board, in part, as he said, because he was not aware of the circumstances in which the meeting had been arranged. However, against the background outlined above I accept that the reason why the meeting of 11 September 2008 was arranged was that the board asked for such a meeting after the receipt by its chair of the MEC's letter of 9 September 2008 containing the recommendations by the joint portfolio committees. The meeting was called to deal with the recommendations of the portfolio committees.

[25] It will be necessary to return to deal in some detail with what transpired at this meeting. For present purposes it suffices to say that all those

who gave evidence were at one in saying that the MEC made it clear that he had not reached a decision on the question of suspending the board members. However, a week later on 18 September 2008, he wrote to Dr Sokhela in the following terms:

'Re: **SUSPENSION OF EZEMVELO KZNWILDLIFE BOARD MEMBERS**

Following our meeting of the 11th September 2008 where we discussed recommendation of the Portfolio Committee.

Provincial Treasury have since approved that we invoke section 49(3) and 18(2(g) of the PMFA (attached is a copy of the letter from Treasury). I have therefore applied my mind and taken a decision to give the Board an opportunity to clear itself on the allegations.

I have decided to appoint a 3 member team to be an interim Accounting Authority during this process while these matters are dealt with.

I want to emphasize that the stepping aside of the Board does in no way mean the guiltiness of the Board Members.

Please attached the statement that I will be presenting to the media this afternoon."

[26] The media statement was headed 'Suspension of the KZN Nature Conservation Board' It briefly dealt with the background to the commissioning of the forensic report and said:

'The forensic report findings were released and are damning. Unfortunately the report also fingered the Board Members."

It goes on to recite the resolution taken by the Portfolio Committees on 9 September 2008 and continued:

'I therefore on the same day wrote a letter to Board Chairman apprising him of this recommendation by the Legislature to which I am accountable. On the 11th of September 2008 I met the Members of the Board and had a lengthy discussion on the forensic findings which also implicate the Board. I fully agreed with the Board Members that they must be given the opportunity to state their side of the story. I undertook to apply my mind on the recommendation of the Legislature.

I have since seen it prudent to afford the Board Members the opportunity to respond to the findings of the Forensic Report. Surely it will be difficult for these Members to do this while at the same time they are performing the task of being

an Accounting Authority of EKZNW. I have therefore acceded to the recommendation of the Legislature by allowing the Board Members to step aside while the findings of the forensic are further dealt with.

I must however emphasize that this **does not** mean that the Members of the Board are guilty, but this suspension affords them the opportunity to clear themselves in line with the principle of *audi alteram partem* (to hear their side of the story)."

[27] These proceedings to set aside the suspension of the board members were instituted five days later.

These proceedings were launched five days later challenging the suspension of the Board members.

[28] The first ground of the challenge to the suspensions is based on the proposition that the MEC's power to suspend a board member is circumscribed by the Act and that the purpose of affording the MEC the power to suspend board members is to facilitate an investigation into allegations made against them. On that basis it is contended that before there can be a lawful suspension there must be allegations made against the board member or members concerned that if proved to be at least substantially true would entitle the MEC to dismiss that member in terms of s 11 of the Act. It is then contended that in order for the suspension to be valid the MEC must wish to investigate those allegations and the suspension of the member concerned must serve to facilitate that investigation.

[29] On the basis of that approach to the interpretation of ss 11 and 12 of the Act the applicants argue that it was clear from the letter of suspension and the media statement quoted above:

> '… that the reason for the first respondent deciding to suspend us, was to give us the opportunity of clearing ourselves of the allegations made against us in the forensic report.'

It is said that this is not a ground upon which the first respondent can suspend board members.

[30] In my view this contention involves an unduly restrictive construction of s 12 of the Act. The power there vested in the MEC is a power to suspend a member while the MEC is investigating and considering allegations against that member. Suspension is permissible whilst the MEC is investigating allegations made against a board member and also when he is considering those allegations in the light of any investigations that he has undertaken or caused to be undertaken. The power of suspension exists throughout this process. It is not confined to a situation where there is an investigation underway because it expressly includes the period of consideration by the MEC of the implications if the allegations prove to be correct. In my view suspension is permissible not only in cases where there is a need for investigation and consideration but also in a case where consideration only is called for. Cases may well arise where there is nothing to investigate because the facts of the matter are perfectly clear, but the MEC may still wish to take time to consider those facts but thinks it appropriate in the meantime for the member to be suspended. Take a situation where a board member is offered and publicly accepts an award from a commercial entity known to aspire to conduct commercial

mining activities in a conservation area. Those activities are strongly opposed by conservationists and environmentalists and the award raises a storm of protest. The fact of the award and its presentation to the board member concerned are in the public domain and require no investigation. However, rather than act in haste the MEC may well wish to consider whether the acceptance of the award was indeed something that could bring the activities of the board into disrepute, as contemplated in s 11(1)(b) of the Act. To take some time to consider the issue would not be inappropriate but one can easily see that the MEC could think it appropriate to suspend the member concerned from the execution of his or her duties in the meantime.

[31] It follows that I am also unable to accept the contention that a suspension is only permissible if it would facilitate the process of investigation. As I have pointed out the power to suspend is not dependent upon the MEC needing to conduct an investigation. Where there is an investigation there is no need to tie the suspension to the fact of investigation and to require that it have as its purpose the facilitation of the investigation. An investigation may be underway but could be undertaken irrespective of whether the board member remained in office or had been suspended. Nonetheless there might well be circumstances in which the MEC regarded suspension of the member concerned as being in the interests of the operations of the board and Ezemvelo and in the public interest. For example, it might be perfectly feasible for a forensic audit team to investigate very serious allegations of financial irregularity involving a Board member without any let or hindrance from the fact that the board member was still attending to his or her duties. After all the members of the board are not working on a

daily basis at the offices of Ezemvelo nor are they involved in the day-to-day operations of Ezemvelo. Their function is to direct the management of nature conservation in KwaZulu-Natal and to ensure the proper, efficient and effective management of Ezemvelo. It is however the officials of Ezemvelo who are responsible for the conduct of its affairs not the board members. Nonetheless if allegations of financial impropriety against a board member are the subject of an investigation it is obviously desirable that the MEC should consider whether that member should be suspended from his or her duties whilst the investigation is underway.

[32] A suspension in those circumstances is commonplace both in the public arena and in private and commercial organisations both in South Africa and overseas[9]. As I write this judgment two members of the ruling Labour Party in the United Kingdom have been suspended from membership of that party in consequence of allegations that they claimed as expenses payments in respect of mortgages that had already been discharged[10]. Manifestly the substantive purpose of that suspension is not to enable the Labour Party to investigate the situation nor is it necessary to facilitate the internal workings of party disciplinary processes. The purpose of the suspensions is to proclaim to the electorate that the party will not tolerate such conduct even if it was inadvertent, fell within the applicable rules and did not involve any criminal offence. No good reason has been advanced to me why the power of suspension in section 12 of the Act cannot be exercised for similar public interest purposes, provided the allegations being

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[9] Lord Denning MR in *Lewis v Heffer &others* [1978] 3 All ER 354 (CA) said that: 'The suspension in such a case is merely done by way of good administration.'

[10] Both have announced that they will stand down at the next election.

investigated or considered are such that they may lead to the termination of the member's appointment as a member of the board under section 11 of the Act.

[33] The applicants' contention based upon a narrow and restrictive interpretation of s 12 of the Act cannot succeed. It was not contended that on a broader interpretation of the section the suspension of the board members in this instance was impermissible. Nor in my view could it have been. The MEC had commissioned a comprehensive investigation of the affairs of Ezemvelo by a well-known firm of forensic auditors. Whilst their report had largely been directed at activities by officials of Ezemvelo they had also been critical of members of the board in regard to the matters described above. The Board members had furnished explanations in respect of those matters and the MEC was entitled to consider them. He was also entitled to consider the overall implications of the deficiencies identified initially by the auditor-general and subsequently by the consultancy report and the forensic report, in relation to the operations of Ezemvelo. These were matters of concern to him as evidenced by paragraph 7 of his letter to the board of 4 July 2008 and these matters had not yet been addressed by the board members. It cannot be said, nor was it said, that a consideration of those matters could not have led him to believe that the board member should be removed for reasons set out in section 11(1) of the Act. In his affidavit he claims that he was considering all these issues. The MEC does say, albeit somewhat elliptically, that he considered a wider range of matters than merely the issue of non-disclosure of other commercial interests including the board's oversight

of the operations of Ezemvelo. He specifically refers in his affidavit to the fact that the forensic report:

> '… confirmed that the Ezemvelo KwaZulu-Natal Wildlife and the Board were riddled with numerous cases of mismanagement, fraud, theft and corrupt practices. Many of these are currently the subject of police action and/or disciplinary action. In many other instances civil recovery processes have been recommended. The report concluded without a shred of doubt that the Board was not managing its affairs in accordance with acceptable standards'.

Again it is unnecessary to decide whether these strongly held views by the MEC were justified by the terms of the report. What they illustrate is that he claims that he took into account a broad range of factors in deciding that the suspension of the Board members was justified whilst matters were further investigated and resolved and that claim has not been challenged. On the broader interpretation of section 12 of the Act that approach cannot be faulted and, as I have already noted, the applicants did not seek to do so.

[34] That conclusion required the court to focus upon the second basis for the applicants' attack on the decision to suspend them, namely that they were not properly apprised of the charges against them and not afforded an opportunity to make representations to the MEC why he should not suspend them. The response by the MEC is that by way of the meeting held on 11 September 2008 and a letter handed to him at that meeting the applicants' entitlement to make representations was fully satisfied. He does, however, contend that there was in law no obligation on him to afford to the applicants such rights of procedural fairness. It is appropriate to deal first with the factual contention that a proper opportunity to make representations was given to the applicants as an

affirmative answer to that would obviate the need to undertake the second enquiry.

[35] In the course of argument the events at the meeting of the 11 September crystallised and became common cause between counsel.[11] That limits the need for me to engage in a lengthy analysis of the evidence of all of the witnesses. It is, however, appropriate for me to make some comment in regard to general issues of credibility. In my view all of the witnesses were striving as best they could to recall the events at that meeting. They were hampered by the fact that the proceedings were not recorded and no one saw fit to take a minute or note of what transpired. There was an understandable tendency in those circumstances for the witnesses to try to emphasize those matters that they perceived to be favourable to their side of the case. Thus the three applicants who gave evidence all stressed the fact that the MEC assured them that he had not taken a decision on their suspension but was applying his mind to the recommendation of the joint portfolio committees and would revert. In amplifying upon that statement they tended to favour a construction that the purpose of the MEC reverting to them was to give them an opportunity to be heard on the question of suspension. On the other hand, Mr Nene and Mr Mthimkulu sought to stress the fact that in the course of discussion the question of suspension was to some extent at least dealt with and to build upon this in order to convey that this meeting was the occasion for the Board members to make such representations as they wished on the question of their suspension. In my view there is an element of understandable reconstruction and

[11] I put eleven factual propositions to Mr Pammenter in the course of his address and he accepted all of them and added four more. Mr Mbenenge accepted all fifteen and added nine of his own, which were in turn accepted as correct by Mr Pammenter in reply. Those propositions form the basis for the summary of the facts in the judgment.

perhaps exaggeration in both stances. To that extent the witnesses tended to cast their evidence in terms that favoured their own case. Beyond that, however, I do not think that any witness sought actively to mislead me or was deliberately not telling the truth. I stress in this regard that by the end of the evidence and the argument there was a large measure of agreement between counsel as to what had transpired.

[36] The factual matters on which counsel were agreed and which are plainly supported by the evidence were the following. The starting point for these events was the joint meeting of the portfolio committees to which the board members were summoned. They were however excluded from that meeting when their situation was discussed and were given no opportunity to have any input in the recommendations of the portfolio committees. When they received the MEC's letter dated 9 September 2008 Dr Sokhela spoke to Mr Nene telephonically and arranged the meeting that took place on 11 September. For the reasons I have given I think it probable that these arrangements were only made on the evening of 10 September after the board members had met and formulated a written response to the MEC's letter.

[37] The meeting on 11 September was attended by the MEC, Mr Nene and Mr Ngidi, from the side of the Department, and four of the five board members, the fifth applicant being unable to attend. The meeting lasted for between one and one and a half hours. The board members specifically asked the MEC whether he had decided to suspend them and were told that he had not but that he was applying his mind to the recommendation by the portfolio committees and would revert to them.

He does not say that he told them expressly that he was considering suspending them, merely that he was considering the recommendation by the portfolio committees. Nor did he at any stage during the meeting tell them that this was their opportunity to make representations to him concerning a possible suspension or that he was considering suspending them in order to enable them to clear their names. They were not asked about the effect that such a suspension would have on them and they did not during the meeting point out that such a suspension might have the effect of blackening their names in the public eye by condemning them in the court of public opinion. In the course of the meeting the board members voiced very strong objections to the way in which the portfolio committees had treated them. They felt that they had been unfairly excluded when matters concerning them were discussed. They had not had the opportunity to find out on what grounds the portfolio committees recommended their suspension or to justify their actions, correct misapprehensions and misunderstandings on the part of the portfolio committees and generally to demonstrate why they should not be suspended. They said that it would be unfair to suspend them on the basis of this recommendation.

[38] During the course of the meeting the board members handed to the MEC the letter they had prepared the previous evening. The terms of that letter, which is relied on by the MEC, are of some importance and are set out below:

'Dear Honourable MEC

RECOMMENDATIONS FROM THE MEETING OF THE JOINT FINANCE AND ECONOMIC DEVELOPMENT PORTFOLIO COMMITTEE HELD ON 9 SEPTEMBER 2008.

I acknowledge the receipt of your letter dated 9 September 2008, and note the contents thereof.

Following consultation with the Board Members, I wish to comment as follows:

1 The recommendations made by the Joint Committee are with respect improper and unprocedural for *inter alia*, the following reasons:

(a) The Board had been invited to attend an in camera meeting to discuss the Forensic Report of Ezemvelo KZNWildlife. At the meeting, notwithstanding that prior notification that one Board Member would be late and despite acceptance of this by the Chairperson of the Finance and Economic Development Portfolio Committee, the said Board Member was not permitted to enter the meeting on his arrival.

(b) The Board Members present were requested to excuse themselves from the meeting during the discussions on items in the Forensic Report involving Board Members. Board Members were informed that they would be called back at a later stage to participate in the further discussions. Board Members believed that on their return they would be afforded an opportunity to respond to any matters arising out of the discussion in their absence.

(c) At a later stage, the Board Members attending the meeting stood outside in the passage for approximately 30 minutes and were later shown to a room to await being called back to the meeting. After approximately one hour, the Honourable MEC requested the Board Members to leave and informed them that he would communicate the outcome of the meeting to them at a later stage.

(d) At 17.00, I received the Honourable MEC's faxed letter under reply, and I was shocked by the recommendations made by the Joint Committee, and the Honourable MEC's intention to apply his mind to the said recommendations.

(e) I wish to emphasise that at no stage was the Board informed or made aware that the purpose of the meeting was to arrive at recommendations of this nature.

(f) The Board has had no opportunity to raise its concerns or to put its views forward on the forensic report as well as the first and second recommendations.

(g) With regard to the first recommendation, which provides that the MEC for Agriculture and Environmental Affairs implements the approval by Provincial Treasury to appoint another functionary as the Accounting Authority for the Board of Ezemvelo in terms of Section 49(3) of the Public Finance Management Act, I remind the Honourable MEC that Treasury has never consulted the Board with regard to this proposed action. I refer the Honourable MEC to my letter dated 20 November 2007, to which the Board has received no reply to date. I also remind the Honourable MEC of his statement made to the Joint SCOPA and Finance Committee meeting in Parliament on 19 August 2008 that Section 49(3) of the PFMA had never been invoked, contrary to popular perception at that time.

The Board contends that prior to any resort to the application of this section, both Provincial Treasury and the Honourable MEC's office are required to afford the Board a reasonable opportunity to make representations in response to the stated grounds upon which such action might be based i.e. what are the 'exceptional circumstances' that might justify such an action? No such opportunity has been afforded to the Board nor have substantive grounds been given to justify such action.

(h) With regard to the second recommendation, which provides that the current Board Members be suspended pending further investigations being done in terms of the forensic report, I remind the Honourable MEC that the individual Board Members provided a detailed explanation in the allegations made in respect in the Forensic Audit Report. I also confirm that the Honourable MEC has not responded to these detailed explanations of Board Members. The Honourable MEC has not responded to the preliminary response of the Board to the Forensic Audit Report and suggested actions dated 28 July 2008. I request the Honourable MEC to provide grounds upon which he intends to investigate and suspend individual Board Members, as provided for in the KZN Nature Conservation Management Act, 9 of 1997.

(i) With regard to the Forensic Report, I would like to advise the Honourable MEC that the Board Members are concerned that the Forensic Report was not released to the Board until 9 July 2008, and the Board was given very short notice to respond to the Honourable MEC. To date, the Honourable MEC has not responded to the Board's response to the Forensic Report, and also has not obtained permission to release the Forensic Report to the KZN Nature Conservation Service, established in terms of Section 20 of the KZN Nature Conservation Management Act, 1997, as amended, to enable them to respond to the operational issues raised in the report.

2. The Board has repeatedly requested an opportunity to meet with the Honourable MEC in order to discuss these and other important matters in a spirit of co-operative governance as required of organs of state, as per my correspondence dated 25 August 2008 and other previous correspondence. I note with extreme disappointment that to date, except in those cases where you wished to meet with the Board to discuss specific aspects of the Board's activities, no other opportunities have been afforded the Board to address such matters and to discharge its legislative mandate.

3. I find it disappointing that a Committee of Parliament and the Honourable MEC can proceed to arrive at recommendations without following the basic rules of natural and administrative justice as provided for in our Constitution and other legislation.

4. In the light of the above, and the potential prejudice and injustice to the Board, the Board Members in their individual capacities, the KwaZulu-Natal Nature Conservation Service, and the people of KwaZulu-Natal, I urge the Honourable MEC to urgently meet with the Members of the Board and myself to address all of these matters, prior to the Honourable MEC applying his mind to the matters referred to in his letter under reply.

5. Should the Honourable MEC fail to meet with the Board Members and myself and proceed to apply his mind as indicated without having done so, the Board will have no alternative but to regretfully seek legal recourse and the Board reserves its rights accordingly.

I look forward to the Honourable MEC's response.'

[39] The MEC did not read this letter or give any consideration to its contents at the meeting. One significant aspect of the letter is that in paragraph l(h) the MEC was specifically requested to provide grounds upon which he intended to investigate and suspend individual board members. There is no suggestion that during the course of the meeting he linked any specific grounds of concern on his part to a possible suspension of the board members.[12] He also did not tell the board members that this was their opportunity to make representations in regard to a possible suspension and it is difficult to see how he could have done so without formulating the grounds upon which he was contemplating acting. Nor were they told in advance of the meeting that this was their opportunity to make representations about their possible suspension.[13]

[40] What then was said at the meeting that was pertinent to the question of suspension? Mr Mbenenge formulated six factual propositions in this regard which Mr Pammenter accepted. They were that the board members complained that the procedure adopted by the portfolio committees was unfair. They said that the portfolio committees had no

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12 He was asked in cross-examination: "So would it be correct to say then that you couldn't tell them the grounds on which you were considering suspending them, because you hadn't even had the opportunity to apply your mind to the matter at that stage?" and answered "Correct". (Transcript 212, line 25 to 213, line 3.)

13 Transcript 207, line 13-19.

power to recommend their suspension because they did not report to any of the portfolio committees but to the MEC. The MEC explained that he was nonetheless obliged to report to the portfolio committees to whom he owed political accountability. Specifically on the matter of suspension the board members said that they should not be suspended because the matters raised by the forensic report fell within the purview of management rather than within their area of responsibility. They told the MEC that they had commenced with the implementation of the report and would collaborate with him on all matters pertaining to the report. They denied that they had committed any misconduct warranting their suspension.

[41] I do not think that any additional factual findings can properly be distilled from the evidence. The meeting does not appear to have followed any fixed agenda and a range of issues appears to have been discussed in no particular sequence. The board members were plainly upset about their treatment by the portfolio committees and expressed the view that such treatment had been both unfair and unlawful. There was undoubtedly some discussion on the topic of their possible suspension but it was not a focussed discussion in which the MEC identified the matters that were of particular concern to him and asked the board members for their response to those matters or to explain why they would not justify him in suspending them. It is unclear to what extent the issues of non-disclosure of other business interests were considered and there is no suggestion that the MEC identified any aspects of the responses already furnished to him by the board members in that regard on 26 July 2008 that he found inadequate, unsatisfactory or unacceptable.

[42] In conducting this meeting in this fashion the seeds of confusion between the parties were liberally sown. The members of the board were clearly of the view that before any steps could be taken against them they were entitled to a hearing. Indeed the letter of 10 September 2008 appears to claim a right to a hearing both before the portfolio committees and by the MEC. They were reassured by the MEC's statement that he had not yet taken a decision to suspend them and that he would revert to them.[14] It is I think understandable that they may have left the meeting under the belief that if the MEC came to the conclusion that he should implement the recommendation of the portfolio committees he would advise them of that fact, furnish them with the reasons why he had come to that conclusion and afford them an opportunity to deal with those reasons. At worst and taking the MEC's words at face value they would have left knowing that he was deciding what to do about the portfolio committees' recommendation and would revert to them on that. That left matters up in the air. I find as a fact that they did not know and could not in all the circumstances have known that they were being afforded the opportunity to make such representations as they wished to the MEC to persuade him not to suspend them.

[43] That finding is reinforced by the further factual finding accepted by both counsel that prior to this meeting the MEC had taken no legal advice as to his obligations towards the board members in the event that

[14] Mr Mthimkulu's evidence in chief was that whenever one of the board members spoke of the decision by the portfolio committees to suspend them, he corrected them and said that no decision to suspend them had been taken.

he was contemplating their suspension. In other words he did not come to the meeting having been advised that if he wished to suspend the board members he was obliged to give them a hearing and afford them an opportunity to make representations in regard to the matters underlying such proposed suspension. His own approach to the meeting cannot therefore have been that this was the occasion on which representations should be made to him. That appears to be a later construct after the decision had been taken and was challenged on the grounds that no opportunity to make representations had been afforded to the board members.

[44] Assuming for the present that the board members were entitled to an opportunity to make representations to the MEC before the decision to suspend them was taken, can it be said, as claimed by the MEC in his answering affidavit that such an opportunity was afforded them by way of the meeting on 11 September 2008 and by way of the contents of the letter from the board dated 10 September 2008 that was handed to the MEC at the meeting? In his affidavit the MEC submits that these constitute "a complete answer to the *audi* argument".

[45] It emerges from the evidence summarised above that both at the meeting on 11 September 2008 and in their letter of 10 September 2008, which incorporated their earlier responses to the forensic report dated 26 July 2008, the members of the board drew to the attention of the MEC matters that were pertinent to the question whether they should be suspended from their duties. In that sense they undoubtedly did make some representations to the MEC concerning their

suspension. However to a considerable extent they did so in a vacuum. They had been apprised of the contents of the forensic report, which identified as the potential grounds for their suspension the non-disclosure of their interests in various entities. They had responded to that in some detail on 26 July 2008 and incorporated that response in their further letter of 10 September 2008. No one had suggested to them that these responses were inadequate or insufficient and if so in what respects. It is noteworthy that in the letter of 10 September 2008 they pointed out that they had given a detailed explanation in regard to the allegations made in the forensic report and this had not attracted any response from the MEC. Anything they said at the meeting of 10 September on this topic cannot therefore have taken the matter further inasmuch as they were not aware of the true nature of the MEC's concerns. Nor did the MEC in his evidence seek to explain precisely what those concerns were in relation to the non-disclosure issue so that the court is left with the situation where questions had been raised about the board members' conduct by the authors of the forensic report and they had each given an explanation before the meeting. Their explanations had not been challenged and they could not have known that they were regarded as inadequate, assuming that to have been the MEC's view.

[46] Apart from the non-disclosure issues the forensic report had identified a substantial array of problems in the operations of Ezemvelo. None of these were laid directly at the door of members of the board. Insofar as the existence of those problems underlay the decision by the MEC the board members were largely in the dark over that fact. They had been asked in the letter of 4 July 2008 to respond generally to the forensic

report and had done so in their own response to the MEC dated 28 July 2008. They had asked the MEC for input before finalising that response but none had been forthcoming. The board members had drawn a distinction between the questions raised specifically in relation to them and the other aspects of the report that involved the CEO, the executive management of Ezemvelo and various staff members. There is no evidence that in the course of the meeting on 11 September 2008 they were told that the MEC had a substantial concern about their performance of their oversight function and that this was a factor he would take into account in considering the issue of suspension.

[47] A major difficulty in dealing with this portion of the case is that nowhere in his affidavit or in his evidence, did the MEC state with any clarity the reasons for his decision to suspend the board members. He said that the audit report for 2006/2007 was a damning report and amongst the worst of the annual reports to be given against an entity.[15] He incorrectly stated that the auditor-general had expressed the opinion that a sum of R24 million of revenue to the board could not be properly accounted for.[16] What the auditor-general in fact said was that the procedures were insufficient to satisfy him that all cash sales relating to admissions to Ezemvelo's reserves were properly recorded. That is a far cry from saying that the R24 million actually reflected as cash sales was not properly accounted for. The point being made by the auditor-general was that the figure could be higher not that R24 million had gone astray.

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15 Answering affidavit, para 47.
16 Para 48.

[48] In his answering affidavit the MEC then turned to deal with the forensic report. He says that:

> 'The report concluded without a shred of doubt that the Board was not managing its affairs in accordance with acceptable standards.'[17]

It is not clear whether this is an inference that the MEC drew from the forensic report. What is clear is that in the portions of the report that have been annexed to the affidavits no such statement by the forensic auditors is to be found. I mention this because in both the letter of suspension and the accompanying media statement the MEC said that he was affording the members of the board an opportunity to clear themselves of the allegations against them, without specifying what those allegations were. If they were those in this or the previous paragraph and they had been squarely presented to the members of the board they could have addressed whatever misconceptions underpinned them. However, as these issues were not identified to the members of the board and they were not asked to respond to them it is hardly surprising that they did not deal with them prior to their suspension or at the meeting on 11 September.

[49] In his answering affidavit the MEC then turned to deal with the chapter of the forensic report dealing with supply chain management irregularities. I have already described these and quoted the relevant portions dealing with the applicants. They relate to the issues of non-disclosure and doing work for the board and Ezemvelo. The MEC says that this chapter of the report 'condemned all of the applicants of serious irregularities'. He then annexes a portion of the report as annexure G and refers to the non-disclosure of business interests, the

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17 Answering affidavit, para 52.

performance of work for the board and Ezemvelo and the payment of remuneration. The document that is annexed as constituting this chapter of the forensic report is extremely cryptic as it merely identifies a number of people including the board members, their functions and lists some forty-five annexures. Whilst the table of contents indicates that it is at least fifty-eight pages long, only six pages are annexed to the application papers. However the MEC does summarise the gist of the allegations against the applicants in his affidavit. This summary deals only with the non-disclosure issue and not any issue concerning the quality of their performance of the oversight function. The individual responses to the non-disclosure allegations were annexed to the letter of 10 September 2008, having first been sent to the MEC on about 28 July 2008. That was in accordance with the recommendations in the forensic report that the board members be given an opportunity to submit their written explanations for the non-disclosure of other business interests.[18] The MEC had not responded to these explanations nor does the evidence show that they were dealt with at the meeting on 11 September 2008 or that it was suggested to the applications that the explanations were in some way inadequate. The MEC mentions these responses in his affidavit[19] but does not otherwise deal with them.

[50] In dealing with the issue of suspension the MEC's affidavit concludes as follows:

'75.

It is thus clear that I can confirm that I indeed applied my mind to the question of whether or not to suspend the applicants in view of the allegations which have been made against them by the forensic report, including though not limited to, the issue of the conflict of interest – about which they had made representations to me.

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18 These recommendations are set out in paragraph 12 of this judgment.

19 Paragraphs 65 and 66.

76.

As is manifest, the allegations relating to the provision of services to the Board and/ or Ezemvelo without following procurement procedures, has nothing to do with the conflict of interest. To my mind it has everything to do with abuse or failure to follow regular procedures in procurement.

77.

I make mention of these matters simply to demonstrate that I gave consideration to a number of issues which have a bearing on the decision I had to make in terms of Section 12 to the Act. Failure to declare interest was certainly not the only consideration.

78.

As I have indicated it was against this background that I had the meeting with the applicants.

79.

At that meeting:-

(a) I advised the applicants that I was seriously considering suspending them in line with the Portfolio Committees' recommendations;

(b) I afforded applicants with an opportunity to make representations in that particular regard. Accordingly such representations were made to me by the applicants;

(c) Annexure "J", a lengthy letter dated 10 September 2008 (with annexures), was handed over to me.

80.

As is plain from annexure "J" the applicants' major complaint tended to address concerns around the validity, propriety or otherwise of the Portfolio Committees' recommendations to me.

81.

It did not address the broader issues of improprieties, irregularities and various other broad issues of mismanagement of the Board's affairs which allegations were subject of my investigation and concern.

82.

Notwithstanding the representations made to me by and on behalf of the applicants:-

(a) I decided that the allegations which had been made against the applicants in the Deloitte & Touche forensic report were serious and warranted an intervention such as was recommended to me by the Portfolio Committees;

(b) I decided to suspend the entire Board with the view to further investigate the matter. I deemed it prudent and in the public interest to conduct such investigations while the applicants are on suspension.'

[51] One qualification to these paragraphs emerged from the oral evidence. It is that the MEC merely conveyed at the meeting that he was considering the portfolio committees' recommendations, which carried with it the implication that the question of suspension was under consideration. He did not, however, say that he specifically told the applicants that he was seriously considering suspending them. Had he done so I have little doubt that the board members would have insisted on being told on what grounds he was considering their suspension consistent with the stance they had adopted in the letter of 10 September 2008 that was handed to the MEC at the meeting. The overall picture that emerges from these paragraphs of the MEC's affidavit and the evidence concerning what transpired at the meeting on 11 September 2008, is that the MEC had not identified with any clarity the matters in the forensic report, other than the alleged non-disclosure of interests, that perturbed him insofar as the members of the board were concerned nor had he identified with any clarity the grounds upon which he might consider suspending the members of the board. In the result these were not pertinently put to the members of the board as grounds upon which their suspension might be justified nor were they

asked specifically to respond to the matters relevant to that decision. As a result of this lack of clarity from the side of the MEC the meeting on 11 September 2008 became an unstructured discussion of issues of concern to the board members, during the course of which they undoubtedly touched upon some of the matters of concern to the MEC, but without any focus on the critical issue of what the board members had to say about their possible suspension and the reasons therefor.

[52] Whilst there was some discussion at the meeting on 11 September 2008 of some issues relevant to the decision to suspend the board members it was not in my view a hearing on that issue or a reasonable opportunity for the board members to make representations as contemplated in s3(2)(b)(ii) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). As s 3(2)(a) of PAJA makes clear what will constitute a fair administrative procedure depends upon the circumstances of each case. However in general in order to give effect to the right to procedurally fair administrative action the person affected must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations and a clear statement of the administrative action. Ordinarily the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. That is hardly surprising bearing in mind that one of the grounds upon which the decision of an administrator may be set aside is because irrelevant considerations were taken into account or relevant considerations were not considered.[20]

[20] S 6(2)(c)(iii) of PJA. This was a ground of review recognised by the common law. *Jacobs en 'n Ander v Wacks en Andere* 1992 (1) SA 521 (A) at 550 E-551 C.

[53] Where a person has a right to be heard before a decision is taken it is important that whatever the form of the hearing, the subject matter of the hearing or opportunity to make representations is made clear to the affected parties in order that the right to make representations may be effective. The point is illustrated by *Zondi and Others v Administrator Natal and Others.*[21] There striking workers had been given an ultimatum to return to work by a fixed date and invited to make representations to an official stating why they should not be dismissed for participating in an illegal strike. The date given in the ultimatum for the return to work was thereafter extended as was the date upon which they were to make representations. When the workers did not respond to either the ultimatum or the invitation to make representations letters of termination were issued to them but in an attempt to persuade them to return to work a public statement was made by the respondent employer that, provided they returned to work by a particular date, they 'may have their letters terminating their employment withdrawn and in doing so retain their pension and leave benefits'. That deadline was then extended from the Friday to the Monday morning and then again to close of business on the Monday. As a matter of fact all workers who reported for duty before this extended deadline had their letters of dismissal withdrawn. The appellants, however, only received the message about the extension when it was too late to report for work on the Monday and instead reported for duty when work started on the Tuesday. The employer refused to withdraw the notices of termination already served upon them.

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21 1991 (3) SA) 583 (A).

[54] The employer, the provincial administration, accepted that it was obliged to give the workers a hearing before dismissing them. It contended that it had discharged this obligation by inviting them to make representations when the original ultimatum was given. However the appeal court held that the termination of their employment did not flow solely from their participation in the original illegal strike and non-compliance with the original ultimatum, but from that together with their failure to return to work before the extended deadline at close of business on the Monday. It accordingly held that the dismissed workers lost their employment partly because of their initial participation in the strike and partly because they failed to return to work by the stipulated deadline. As far as the latter factor was concerned the workers adversely affected by it did not have an opportunity of explaining why they failed to comply with the deadline. The failure by the employer to give them an opportunity to explain why they had not returned to work before the deadline, when conceivably they could have advanced reasons that would have exonerated them from any blame in not doing so, invalidated the dismissals.

[55] That case illustrates the point that in order for a hearing or an opportunity to make representations to be effective it is necessary that the hearing must concern the matters giving rise to the decision and the opportunity to make representations must relate to those matters. If the occasion identified as the opportunity to make representations is a meeting, but the participants are unaware that it is intended to serve the purpose of enabling representations to be made and the ultimate decision-maker does not disclose the concerns that might lead him or

her to take an adverse decision, it seems to me that no opportunity to make representations has been given.

[56] In reaching that conclusion I am mindful of the judgment in *Administrator Transvaal and Others v Theletsane and Others*[22], which also involved the dismissal of striking employees in the public sector and a complaint that they were not afforded any hearing before dismissal. In that case, the majority of the court held that as the only issue raised in the application papers was the failure to give workers any hearing at all, it was not permissible to decide the case on the basis that the hearing was not a proper hearing concerning the matter of their dismissal. However a careful perusal of the judgment shows that the reason for the majority taking this view was that the respondent had been brought to court to meet a case that no hearing at all had been held and, in view of the ambiguity in the affidavits filed on his behalf, it would not be safe or proper to consider the case on the basis that a hearing was held but it was insufficient or related to the wrong issue. In the present instance the MEC specifically responded to the case that no opportunity to make representations had been given about the suspension of the board members by identifying the meeting of 11 September 2008 as the occasion upon which such representations could be made and the events at that meeting have been fully canvassed in the course of oral evidence. In those circumstances there can be no reason for the court not to consider whether that meeting, as explained in the evidence of the witnesses, indeed constituted an opportunity for the board members to make representations to the MEC concerning their possible suspension and the reasons for it.

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22 1991 (2) SA 192 (A).

[57] I have also had regard in relation to this aspect of the matter to the decision of the Constitutional Court in *Masetlha v President of the Republic of South Africa and Another*.[23] There the majority of the court held that the applicant's dismissal did not attract procedural justice but concluded that even had it done so he had had ample occasion to respond to the allegations made against him, because he had at least two meetings with the minister concerned at which he was called upon to provide an explanation for the particular events and his role in it. He had submitted a written report and participated in and made submissions regarding an investigation process set up by the minister. Thereafter he had been furnished with a copy of the report and had been advised of the adverse recommendations made against him.[24] In my view, however, the opportunity afforded to the board members was considerably less than that afforded to Mr Masetlha. Accordingly I think the approach by Ngcobo J is applicable in this situation, where he said:

'[203] Compliance with a duty to act fairly required the President to convey to the applicant that he was of the view that the relationship of trust between him and the applicant had broken down irreparably and that for that reason he was contemplating altering the applicant's term of office so as to terminate the appointment earlier. The applicant should have been given an opportunity to comment on these matters…

[204] The applicant should have been consulted not only on the question whether the relationship of trust had broken down but also on the terms and conditions that would apply to the termination of the contract. The fact that the applicant may have had little or nothing to urge in his own defence is a factor alien to the enquiry

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23 2008 (1) SA 566 (CC).

24 See para 83 in the judgment of Moseneke DCJ.

whether he is entitled to a prior hearing. It cannot be an answer therefore to suggest that a fair hearing could not have made a difference to the result'.[25]

[58] To sum up therefore, in my view, the meeting of 11 September 2008 did not constitute a sufficient opportunity for the board members to make representations to the MEC concerning their possible suspension and the reasons therefor, so as to satisfy any requirement that they be given a hearing before their suspension was effected. There was no notice that this was the purpose of the meeting and such notice is necessary in order for the persons affected to appreciate the significance of the meeting.[26] Whilst issues relevant to the question of suspension were undoubtedly discussed at the meeting the MEC did not identify the grounds upon which he was contemplating suspending the members and accordingly the members of the board were not aware of the gist or substance of the case they had to meet.[27] Insofar as the MEC did not find the explanations already furnished to him by the board members in regard to issues of conflict of interest or the forensic report generally satisfactory he should have identified the nature of his dissatisfaction to enable them to try and dispel his concerns. If the MEC was minded to reject their explanations he should at least have informed them of why he was so minded and afforded them the opportunity to overcome his doubts.[28] The consequence of these deficiencies is that the applicants were not afforded an opportunity before the decision to suspend them

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25 At p 629 F-I.

26 *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) 589 (CC), para 112.

27 *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 232 C-D; *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA), para 42; *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works and Others* 2008 (1) SA 438 (SCA), para 12.

28 The position is similar to that of a board or functionary that rejects evidence on the basis of its own knowledge or the views of other parties of which an applicant is not aware. *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 289, 295 and 313.

was made to make representations to the MEC why they should not be suspended. The MEC pinned his colours to the mast of the proposition that the meeting of 11 September 2008 served that purpose, but in my view it did not. The mere fact that some things were said at that meeting that had a bearing on the question of suspension does not convert it into a proper opportunity to make representations on that issue. Provided therefore the applicants were entitled to have a hearing and an opportunity to makes such representations before they were suspended they are entitled to relief. It is to that issue that I now turn.

[59] The applicants contend that they were entitled to make representations to the MEC prior to their suspension on the basis that the suspension constitutes administrative action as defined in s 1 of PAJA and therefore attracted the constitutionally guaranteed right to procedural fairness that included a reasonable opportunity to make representations to the decision-maker prior to the decision being made and implemented. The respondents contend that neither the appointment of members to a statutory board such as this, nor the suspension or termination of those appointments, constitute administrative action in terms of PAJA and hence there was no entitlement on the part of the applicants to claim a right to make representations. They were entitled to a decision constrained by the constitutional principles of rationality and legality, but no more.

[60] The lineaments of the enquiry that must now be undertaken are fairly clearly established. The question whether action taken by a public

official or authority is administrative is central to the enquiry.[29] The focus of the enquiry is primarily upon the nature of the power being exercised rather than the identity of the person or body exercising the power.[30] With the enactment of PAJA the grounds of judicial review of administrative action have been codified and the cause of action for judicial review of administrative action now ordinarily arises from PAJA.[31] That requires a consideration of the action in question against the requirements of the definition of 'administrative action' in PAJA. There are seven requirements namely that there must be (i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone's rights, (vi) which has a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA.[32] As the judgment in *Grey's Marine* makes clear it is a requirement flowing from the definition of 'decision' in PAJA that the decision be one of an administrative nature. In deciding whether a decision is one of an administrative nature the appropriate starting point[33] is to determine whether it would constitute administrative action within the meaning of s 33 of the Constitution.[34] The boundaries between administrative action and other forms of conduct by organs of state will often be difficult to draw and this must be done carefully on a case by case basis having regard to the provisions of the Constitution

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29 *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC), para 26.

30 *President of the Republic of South Africa & Others v South African Rugby Football Union & Others* 2000 (1) SA 1 (CC), ("SARFU"), paras 141 and 143.

31 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004 (4) SA 490 (CC), para 25.

32 *Grey's Marine Hout Bay (Pty) Ltd & Others v Minister of Public Works & Others* 2005 (6) SA 313 (SCA), para 21 cited with approval in *Chirwa v Transnet Ltd & Others* 2008 (4) SA 367 (CC), para 181.

33 *SARFU,* para 143.

34 *Chirwa v Transnet Ltd,* para 139 quoting *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC) para 202 and *Minister of Health & Another NO v New Clicks SA (Pty) Ltd & Others (Treatment Action Campaign & Another as Amici Curiae)* 2006 (2) SA 311 (CC).

and the need for an efficient, equitable and ethical public administration.

[61] The requirement that the decision should be of an administrative nature has been described as 'something of a puzzle'.[35] In my view it serves two important purposes. Firstly it focuses attention on the need for the court to determine whether the particular exercise of public power or performance of a public function under consideration is properly to be classified as administrative action. As the Constitutional Court recognised in *Fedsure,* that task of classification is mandated by the provisions of the Constitution itself. That does not mean that the former classification of administrative powers and functions[36] that was largely discredited and abandoned in our administrative law even before the advent of the Interim Constitution[37] has now been revived. The present situation is that the Constitution draws an ostensibly simple distinction between acts that constitute administrative action and acts that do not and the courts must draw that distinction or essay that process of constitutional classification. The court is required to make a positive decision in each case whether a particular exercise of public power or performance of a public function is of an administrative character. Thus the determination of what constitutes administrative action does not occur by default on the basis that if it does not fit some other juristic pigeonhole it is administrative action. There needs to be a positive finding that particular conduct is administrative action in order

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35 Hoexter, *Administrative Law in South Africa*, 190. See also de Ville, *Judicial Review of Administrative Action in South Africa*, 40 and Currie and de Waal, *The Bill of Rights Handbook*, 5th Ed 654-656.

36 As to which see Baxter, *Administrative Law*, 344 -348

37 Largely as a result of the judgments in *Administrator, Transvaal & Others v Traub & Others* 1989 (4) SA 731 (A) and *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 10J-11A.

for the power of judicial review under PAJA to be engaged. That approach ties in closely with the second purpose which is to make it clear that the mere fact that an exercise of public power or the performance of a public function does not fall within one of the exclusions in sub-paragraphs (aa) to (ii) of the definition of 'administrative action' does not necessarily mean that the exercise of public power or performance of a public function in question constitutes administrative action. It precludes the determination of what constitutes administrative action from becoming a mechanical exercise in which the court merely asks itself whether a public power is being exercised or a public function is being performed and then considers whether it falls within one or other of the exceptions. The inclusion of the requirement that the decision be of an administrative nature demands that a detailed analysis be undertaken of the nature of the public power or public function in question to determine its true character. This serves in turn to demonstrate that the exceptions contained in the definition of administrative action are not a closed list nor are cases falling outside those exceptions to be looked at on the basis that if they are not *eiusdem generis* with the exceptions they are automatically to be treated as constituting administrative action. There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose.

[62] Before engaging in that analysis it is best to clear away those elements that are not in dispute. It is not disputed that in suspending the members of the board the MEC was acting in terms of legislation. It is also not suggested that the suspension falls within any of the exceptions

enumerated in the definition of administrative action. That left four matters namely whether the decision to suspend constituted administrative action in the sense dealt with above; whether it involved the exercise of a public power or the performance of a public function; whether it adversely affected the rights of the board members and whether it had a direct, external legal effect. In the heads of argument submitted on behalf of the MEC it was accepted that he was an organ of State, but that acceptance is inconsistent with the denial that he exercised a public power or performed a public function in the light of the definition of an 'organ of State' in s 239 of the Constitution. That definition provides that any functionary exercising a public power or performing a public function in terms of any legislation is an organ of State. Accordingly a finding that a public power is being exercised or a public function performed is central to the identification of a functionary as an organ of State. As a concession of law this is not binding on the first respondent and it is preferable to decide the matter unencumbered by that concession.

[63] In my view the MEC was clearly exercising a public power in terms of an empowering provision when he suspended the board members. The purpose for which such a suspension is permissible under s 12 of the Act is to enable the MEC to investigate or consider conduct that may lead to the termination of the board member's appointment in terms of s 11 of the Act. If one examines the different sub-sections of s 11 they reveal that the circumstances in which a member of the board can be removed from office can be broadly summarised as being circumstances where the person concerned is either unable to perform their duties (sub-sect (a)); is guilty of conduct that hampers the proper

performance by the board of its functions (sub-sect (b)); or has been indolent and neglectful in the performance of his or her duties (sub-sects (c) and (d)). The MEC is given the power to terminate a board member's appointment in any of those circumstances because the MEC is the person who bears political responsibility for the functioning of the board and Ezemvelo. Such political responsibility is not simply a responsibility to those who sit in the Provincial Legislature, but is a broader responsibility to the public in the province of KwaZulu-Natal to ensure the proper functioning of the board in terms of the Act. There is nothing private or personal about the exercise of the power of termination in terms of s 11 and there is likewise nothing private or personal about the exercise of the power of suspension under s 12. Both powers are given to the MEC in the interests of the proper conduct of the affairs of the board and Ezemvelo. In my view therefore their exercise is plainly the exercise of a public power and in exercising those powers the MEC is an organ of State as defined in s 239 of the Constitution.

[64] The next question is whether the suspension of the board members adversely affects their rights. The contention on behalf of the MEC is that the only right of which the board members are deprived as a result of their suspension is their right to receive a negligible honorarium consequent upon their attendance at meetings of the board. In my view that is too narrow a construction of the concept of rights that may be adversely affected by the exercise of the public powers of suspension. Of far greater importance is that when the power is exercised the public perception will inevitably be that the members of the board have been or may have been guilty of some or other form of misconduct that

renders them no longer fit to serve in that capacity. The detrimental effect of such a suspension on the standing, reputation and dignity of the members of the board is apparent. In the present case that is made evident by the terms of the media release published by the MEC at the time of the suspension. In it he said that the forensic report was damning and that it pointed a finger at the members of the board. Their suspension was explained on the basis that it would afford them the opportunity to 'clear their names'. The protestation that this did not mean that they were guilty of any misconduct can hardly have ameliorated the adverse impact of the suspension on the standing, reputation and dignity of the board members. As Mr Nkosi [38] said the impact of the suspension was that people would ask him whether he had yet accounted for the R24 million.

[65] Under our Constitution the right to human dignity is one that is inherent in each person and each person has the right to have their dignity respected and protected.[39] In my view the impact that the suspension has on that particular right is such that one must conclude that the decision to suspend a person from their office as a member of the board under the Act adversely affects that right. There is also an adverse effect in the loss of such benefits as accrue to a board member, which consists not only of the honoraria for attending meetings, which I accept are relatively nominal, but also the enjoyment of other benefits, such as the use of Ezemvelo's facilities, that would be valued by board members in return for the public service they perform as such. Their suspension as board members not only impacts upon their reputation, standing and dignity but it also deprives them of these benefits. That is

38 Transcript, p 142.
39 S 10 of the Constitution.

sufficient in my view to say that the decision to suspend them adversely affects their rights.

[66] The next requirement for the suspension to constitute administrative action is that it should have direct, external, legal effect. That is an expression that has given some difficulty as appears from the discussion in *Grey's Marine*[40] and the academic writers.[41] Whatever difficulties may arise in a different context, in my view they do not arise in the present case. The suspension directly affects the board members. It is external to the MEC, who is the decision-maker, and its legal effect is to impact upon the rights of the board members in the manner already discussed as well as preventing them from performing their lawful functions as board members in the future. The effect on the board members of the decision is in my view direct, external and legal in nature. That makes it a clearer case than *Grey's Marine* where a decision was held to have direct, external legal effect where it affected the rights of a person who benefitted from the administrative action rather than those challenging the administrative action. Whilst, speaking for myself, I would have thought that the concept of 'direct, external, legal effect' related to the impact of the decision on the person seeking to challenge it by way of judicial review, that is neither here nor there in this case where it is plain that the decision impacted on the rights of the board members themselves. I therefore hold that this requirement is satisfied.

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40 Para 23

41 Hoexter, pp 207-209; de Ville, 54-58; Currie & de Waal, 662-663.

[67] That leaves only the question whether the decision by the MEC is a decision of an administrative nature. There is little in the existing case law to act as a guide in the consideration of this issue. Decisions that the setting of a rate by a local authority;[42] the establishment of a commission of enquiry;[43] a summary sentencing procedure;[44] the proclamation of a date of commencement for an Act of Parliament;[45] the issue of a search warrant;[46] the cancellation of a commercial contract[47] or the endorsement of an agreement between mini-bus taxi associations that added nothing to the terms of the agreement[48] do not constitute administrative action are relatively unhelpful because their contextual setting is so different from the present case. At most they provide examples of the type of analysis that our highest courts have undertaken in endeavouring to address this issue. What emerges from the cases is that decisions falling in the realm of the formulation of policy or those described under the Constitution as the executive functions of government[49], whether at the national or provincial level[50], fall outside this sphere of administrative action. However the implementation of policy, even though it involves the relevant functionary in making decisions of substantial importance, such as the determination of the formula under which subsidies provided for in the

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42 *Fedsure, supra.*

43 *SARFU, supra.*

44 *Nel v le Roux NO & Others* 1996 (3) SA 562 (CC).

45 *Pharmaceutical Manufacturers' Association of SA and another :In re Ex parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC).

46 *Thint (Pty) Ltd v National Director of Public Prosecutions & Others; Zuma & Ano v National Director of Public Prosecutions & Others* 2009 (1) SA 1 (CC) paras [89] and [90].

47 *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC & Others* 2001 (3) SA 1013 (SCA).

48 *Mzamba Taxi Owners' Association v Bizana Taxi Association & Others* 2006 (2) SA 154 (SCA).

49 I use this expression compendiously to include not only the executive functions specified in the Constitution itself but the actions of high political office-bearers in the upper tier of decision-making in government..

50 Ss 85 and 125 of the Constitution.

budget are to be paid[51] or possibly the making of regulations that enable the policy to be put into effect[52] may constitute administrative action despite the policy component involved.

[68] There are two cases that at first sight deal with situations that are analogous to the present one. The one involves the suspension and termination of the employment of the head of the National Intelligence Agency.[53] The other dealt with the question whether the dismissal of an employee by an organ of State constitutes administrative action.[54] Both cases involved the termination of the services of a person functioning within either the public administration or an organ of State. In both cases the claimant contended that the termination of their services constituted administrative action and challenged the termination on that basis. In both cases the Constitutional Court held that the termination did not constitute administrative action. On the face of it there is therefore a potential parallel between the termination of the services of Mr Masetlha and Ms Chirwa and the suspension, with a possible termination looming, of the appointment of the board members. It is therefore necessary to examine the reasoning of the Constitutional Court in each of those cases.

[69] In *Chirwa* all the members of the Constitutional Court held that the termination of the applicant's employment contract did not constitute

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51 *Permanent Secretary, Department of Education and Welfare, Eastern Cape, & Another v Ed-U-College (PE)(Section 21) Inc* 2001 (2) SA 1 (CC) para 21.

52 *Minister of Health v New Clicks SA (Pty) Ltd* 2006 (2) SA 311 (CC) paras 128 and 467.

53 *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC).

54 *Chirwa v Transnet* 2008 (4) SA 367 (CC).

administrative action but for different reasons. The majority concurred in a judgment by Ngcobo J in which he said the following:

'[142] The subject matter of the power involved here is the termination of a contract of employment for poor work performance. The source of the power is the employment contract between the applicant and Transnet. The nature of the power involved here is therefore contractual. The fact that Transnet is a creature of statute does not detract from the fact that in terminating the applicant's contract of employment, it was exercising its contractual power. It does not involve the implementation of legislation which constitutes administrative action. The conduct of Transnet in terminating the employment contract does not in my view constitute administration. It is more concerned with labour and employment relations. The mere fact that Transnet is an organ of State which exercises public power does not transform its conduct in terminating the applicant's employment contract into administrative action. Section 33 is not concerned with every act of administration performed by an organ of State. It follows therefore that the conduct of Transnet did not constitute administrative action under s 33.'

Ngcobo J found support for this conclusion in the fact that under the Constitution administrative action and labour and employment relations are subjected to different forms of regulation, review and enforcement. Furthermore he held that there is nothing in the language of s 23 of the Constitution that guarantees to everyone the right to fair labour practices to indicate that public sector employees are to be regulated differently from employees in the private sector. Whilst in the pre-Constitutional dispensation our courts had held[55] that the dismissal of public sector employees is subject to administrative law, in view of the advent of the Constitution and the revision of our labour laws to give effect to the fundamental right to fair labour practices conferred by s 23(1) of the Constitution Ngcobo J said that it is no longer necessary to treat public sector employees differently and to confer upon them the additional protection of administrative law.[56]

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55 In a line of cases leading up to and following upon *Administrator, Transvaal & Others v Zenzile & Others* 1991 (1) SA 21 (A).

56 Paras 143 to 148.

[70] That brief synopsis of the reasoning in the majority judgment in *Chirwa* demonstrates in my view that its superficial similarity to the present case goes no further than skin deep. There are two substantial points of difference between that case and the present situation. The first and obvious one is that we are not dealing with an employment relationship. The second, which follows closely upon it, is that, unlike Ms Chirwa, the board members cannot have resort to any other constitutionally protected rights in order to protect their interests and ensure that they are fairly treated. In the absence of either the contractual component or the protection afforded by the Labour Relations Act[57] their situation is different and the reasoning of the Constitutional Court cannot be applied to them.

[71] Turning to *Masetlha*, the applicant was the head of the National Intelligence Agency (the NIA). In order to secure the termination of his appointment the President unilaterally amended the term thereof so that it expired almost immediately a little more than twenty-one months before it was originally due to expire. That decision was challenged on various grounds including that it constituted unfair administrative action. The majority judgment by Moseneke DCJ held that, notwithstanding the existence of a statutory framework for appointments to the NIA, the appointment of the head of the NIA was effected under s 209(2) of the Constitution. It held that the power of appointment necessarily implied a power of dismissal and when acting under s 209(2) the President was exercising the executive authority vested in him by s 85(1) of the Constitution as he was performing an executive function provided for in the Constitution itself.[58] As such his

[57] Act 66 of 1995.
[58] S 85(2)(e) of the Constitution.

actions fell within the exclusion contained in sub-section (aa) of the definition of administration action in PAJA. That makes the case clearly distinguishable from the present one, as neither the appointment nor the suspension or termination of the appointment of the members of the board constitutes an exercise of the executive authority of a province in terms of s 125(2)(g) of the Constitution. Again, whilst there is a superficial similarity between the circumstances in *Masetlha's* case and the situation I am considering there are fundamental differences that distinguish the two. Accordingly the reasoning that led the Constitutional Court in *Chirwa* and *Masetlha* to hold that the termination of the applicants' positions did not involve administrative action cannot be translated directly to the present situation.

[72] In *SARFU* the Constitutional Court drew a distinction between the role of government, and particularly the executive, in formulating policy and its role in the implementation of legislation. The latter it regarded as an administrative responsibility that will 'ordinarily' constitute administrative action. However, that general proposition must be subjected to close scrutiny in a practical situation. Much will depend upon the nature of the legislation. Thus, for example, the provisions of the Criminal Procedure Act[59] are in daily operation in our criminal courts, but there is little in that Act that could be said to be administrative action, whether by officials of the Department of Justice or by those who staff the criminal courts. The principal responsibility of government in regard to that Act was to bring it into force in the first

[59] 51 of 1977.

place – which was not administrative action[60] - and to consider the need from time to time for the Act to be amended and updated to meet new circumstances.

[73] Similarly there are statutes such as the Labour Relations Act and the Companies Act[61] that merely require the executive to put in place the structures of the Act such as the Registrar of Companies, the Registrar of Labour Relations or the CCMA. It is those functionaries and institutions that then take responsibility for the implementation of the legislation and in doing so their actions may well constitute administrative action. Thus the conduct of CCMA arbitrations constitutes administrative action[62], but its establishment and the appointment of commissioners may not. Other legislation involves the establishment of advisory and regulatory bodies such as the Financial Services Board[63] or ICASA.[64] The function of the executive in relation to bodies such as these involves putting in place the structures provided for in the legislation, but beyond exercising political oversight over such bodies, which may include the receipt of reports from those bodies, it has little to do with the day-to-day implementation of the legislation. The bodies established under the statutes, rather than the executive, undertake the day-to-day administrative activity under statutes of that type.

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60 *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC) para 79.

61 61 of 1973 as amended and about to be replaced by the Companies Act 2009.

62 *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* 2008 (2) SA 24 (CC).

63 Financial Services Board Act 97 of 1990.

64 Independent Communications Authority of South Africa Act 13 of 2000.

[74] These examples suggest that the implementation of legislation may take different forms only some of which will constitute administrative action and be subject to judicial review under PAJA. Where one is concerned with the establishment of statutory bodies and the function of ensuring that they can perform their statutory obligations it seems to me that generally speaking one is not in the realm of administrative action as contemplated in PAJA. The steps taken by government to appoint appropriate persons to undertake the various functions required by legislation stand at one remove from and are logically prior to the ordinary activities involved in the application and implementation of that legislation.

[75] I realise that in some, but not all, of the examples mentioned above the appointment of functionaries and members of boards may well result in or take the form of the conclusion of contracts of employment and that this introduces both contractual and labour-related considerations into the equation. However I mention them as illustrative of a broader proposition that merely because something falls under the general rubric of implementing legislation does not mean that it constitutes administrative action. My particular focus is on the question of the appointment of people, whether under contracts of employment, or as members of boards such as the board in the present case, to perform the functions for which the relevant legislation provides. The appointment of the board under the Act in the present case involves a process of nomination and public consideration of nominees with statutorily prescribed qualifications in regard to the board's composition. There are many other such boards established under legislation in this country. In general terms their purpose is to involve members of the community,

especially those having special expertise, in performing supervisory or oversight functions in regard to certain public activities. The activities in point in the present case are those of Ezemvelo relating to the promotion of conservation in KwaZulu-Natal, which include the important public functions of managing reserves and resorts dedicated to conservation activities and the environment. The provincial legislature has deemed it appropriate that members of the public selected in terms of s 4 of the Act and bringing to bear a broad range of expertise in the area of conservation and the environment will exercise oversight over the activities of Ezemvelo. In accepting such appointments board members are performing a public service, the point having been well-made that the small honoraria paid to them and other benefits that accrue from their membership of the board, are not commercially related to the earning powers of the individuals concerned.

[76] The role of this process and the part the MEC plays in it is to ensure that the membership of the board is appropriately qualified to perform its functions. The broad policy direction of conservation activities in KwaZulu-Natal must be determined by the Provincial Legislature and the MEC. No doubt in selecting the members of the board the MEC will bear in mind those policy aims and seek to choose people who share that vision and are capable of implementing that broad policy. In that sense, whilst the appointment of members of the board does not have the same constitutional significance as did the appointment of the head of NIA, it shares some of the characteristics of that appointment. The persons appointed must be such that the MEC, who ultimately bears political and therefore public responsibility for their activities,

accepts that they are appropriate people to perform their function and capable of implementing the policies of his department in relation to conservation matters. There is much to be said for the contention by Mr Mbenenge that the appointment of people who will oversee the implementation of policy is closely linked to the determination of the policy itself and as such the function of appointing them is not administrative in character, but is closely linked to the policy function of government. Bearing in mind that such boards are commonplace in modern society I am hesitant to accept that the process of appointment is administrative action and subject to judicial review.

[77] The question is whether the same holds true for suspension and dismissal. Mr Mbenenge's submission was that the two go hand-in-hand. He pointed out that in *Masetlha* the Constitutional Court held that the power of appointment necessarily encompassed a power of dismissal, without the need for that power to be conferred expressly. Accordingly, he submitted, the fact that the questions of suspension and dismissal are specifically dealt with in the Act is neither here nor there. They simply serve to regulate and define a power that would otherwise necessarily have vested in the MEC.

[78] There is force in these submissions but one cannot escape the fact that the provincial legislature has seen fit in the Act to circumscribe the powers of suspension and dismissal of the MEC. This is not a case such as *Masetlha* where one is dealing with a person heading up an organisation fundamental to the security of the State and filling a post recognised by the Constitution. In those circumstances it is

understandable that the President's power to terminate the appointment of the incumbent may be relatively unfettered, save by the principle of legality and the requirement of rationality, so that where there is a loss of confidence in the incumbent their appointment can be terminated. Important though conservation and the environment are it cannot be suggested that the members of the board stand on the same footing and this has been recognised by the legislature in setting out the basis upon which board members can have their appointments terminated. They are, broadly speaking, incapacity, misconduct or neglect of their duties. A loss of faith in the members of the board by the MEC is not a ground for terminating their appointment unless it arises from one of those three. As a suspension serves the purpose of enabling the MEC to investigate and consider whether to terminate the appointment of a board member it is likewise not open to the MEC to suspend a board member because of a loss of faith in their abilities or even a breakdown in the relationship between the MEC and the board, unless the MEC can point to one or other of the matters set out in s 11 of the Act.

[79] If one examines the power of dismissal and the constraints imposed upon it by s 11 it deals with questions of capacity and conduct on the part of the board members. The decision to terminate a board member's appointment is taken where they are no longer able to perform their function or where they have neglected to perform their function or where they have performed their functions or acted in a way that may be prejudicial to the board and Ezemvelo. In other words the legislation provides that they may only be dismissed for cause. This is quintessentially a matter that requires investigation and consideration where the individual concerned may be expected to have their own

perspective and be able to bring facts to the attention of the decision-maker and arguments under consideration that may materially influence a decision under s 11. A consideration of these issues is similar to the enquiry that an employer makes into the conduct, performance or capacity of an employee. It is also similar to the type of enquiry that under our common law private bodies, such as the Jockey Club[65] and churches[66] have long been held obliged to conduct in relation to the discipline of those subject to their control. It has been held that under our common law even prior to our present constitutional dispensation proceedings of a disciplinary character were required to be procedurally fair, whether or not they amounted to administrative action and whether or not an organ of State was involved.[67]

[80] The type of power being exercised under s 11 is therefore one that in a variety of fields attracts the ordinary obligations of administrative justice and in particular the duty to observe the *audi alteram partem* maxim. The context in which the power may be exercised is that it arises in consequence of the MEC's responsibility for the affairs of Ezemvelo. Unlike the decision to appoint board members in the first instance it has no policy overtones. It is directed solely at the ongoing proper functioning of the board. As that is part of the public administration its character is primarily administrative and directed at ensuring that the board and Ezemvelo function properly in the public interest. Accordingly the power is to be exercised in the context of the administration of the board and Ezemvelo. That context and the nature

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65 *Marlin v Durban Turf Club & others* 1942 AD 122*; Turner v Jockey Club of South Africa* 1974 (3) SA 633 (A)

66 *Theron en andere v Ring van Wellington van die N G Sendingkerk in Suid-Afrika en andere* 1976 (2) SA 1 (A)

67 *Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee & others* 2002 (5) SA 449 (SCA) at 462A-B.

of the power itself point in the direction of its exercise constituting administrative action subject to judicial scrutiny under PAJA.

[81] In considering the nature of the power it is also legitimate to consider the impact of its exercise. That impact falls directly and personally on the individual board members. It affects their rights in the manner already discussed in this judgment and operates to their detriment. The classic pre-constitutional statement of the ambit of the power of judicial review was that of Corbett CJ in *Traub's* case[68] where he said:

> 'The maxim [*audi alteram partem*] expresses a principle of natural justice which is part of our law. The classic formulations of the principle state that, when a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken (or in some instances thereafter …), unless the statute expressly or by implication indicates the contrary.'

In giving the majority judgment in *Masetlha* Moseneke DCJ described this as a 'seminal passage' and went on to say that:

> '[75] It is so that the *audi* principle, or the right to be heard, which is derived from tenets of natural justice, is part of the common law. It is inspired by the notion that people should be afforded a chance to participate in the decision that will affect them and more importantly an opportunity to influence the result of the decision. It was recognised in *Zenzile* that the power to dismiss must ordinarily be constrained by the requirement of procedural fairness, which incorporates the right to be heard ahead of an adverse decision.'

The situation confronting the court in this case is different from those in *Traub* and *Zenzile* in that it does not involve an employment relationship and is also different from that in *Masetlha* in that it does not involve an appointment in the performance of an executive function derived from the Constitution to an office recognised by the Constitution. The position of the applicants falls somewhere between

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[68] At 748 G.

those two poles. In my view, however, it is closer to the employment situation than to the rather special circumstances of *Masetlha*.

[82] In our pre-constitutional jurisprudence Milne JA built upon the foundation laid in *Traub's* case to draw a distinction between statutory powers which, when exercised, affect equally members of the community at large and those which, whilst possibly also having a general impact, are calculated to cause particular prejudice to an individual or particular group of individuals.[69] In the latter case a right to be heard would ordinarily arise. This line of approach also favours the contentions of the applicants. Whilst I am not aware of any case decided prior to 1994 and dealing with a situation such as the present I think that an application of the law as it had then developed would have resulted in the applicants being entitled to a hearing before their appointments as board members could be terminated. Can it be said that in giving a constitutional right to just administrative action that would no longer be the case? I am aware of concerns in the academic writing that the effect of the definition of administrative action in PAJA has been to narrow the scope for judicial review of exercises of public power. In my view, however, such a construction of the concept of administrative action would be inconsistent with the constitutional purpose of entrenching a right to just administrative action. It would also be inconsistent with the principles of transparency and accountability that underlie our public administration.[70] The Constitutional Court has said that the concept of administrative action in PAJA must be construed in accordance with the constitutional guarantee in s 33 of the Constitution and that the principles of our

69 *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A) at 12E-G.
70 S 195(1)(f) and (g) of the Constitution.

common law have been 'subsumed' under that provision of the Constitution and 'inform the content' of our administrative law[71]. Before the Constitution our administrative law tended to be fragmented and to some degree dependent upon a process of classification that was increasingly seen to be artificial and outmoded. Some progress had been made in decisions of the then Appellate Division towards a more coherent framework for administrative law generally and the exercise of the power of judicial review in particular.[72] In my view the intention of the Constitution was to draw together the disparate threads of our administrative law and the circumstances in which the power of judicial review was available under the umbrella of a single broad concept of administrative action. In accordance with the generous construction to be afforded constitutionally guaranteed rights[73], conduct that attracted the power of judicial review under our previous dispensation will ordinarily be regarded as constituting administrative action under the present constitutional dispensation. There will of course be exceptions arising from differences in the structure of government and the status of differing levels of government, as highlighted by the *Fedsure* decision, but in general it seems to me that where the power of judicial review was available under our previous dispensation the courts will be slow to construe that conduct as falling outside the ambit of administrative action under the Constitution and PAJA.

[83] For those reasons it seems to me that the exercise of the power to terminate the appointment of a board member under s 11 of the Act will

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71 *Pharmaceutical Manufacturers Association of SA & Another: In re Ex Parte President of the Republic of South Africa & Others* 2000 (2) SA 674 (CC), paras 33 and 45.

72 This flowed particularly from the judgments in *Traub, South African Roads Board v Johannesburg City Council* and *Hira v Booysen* 1992 (4) SA 69 (A).

73 *S v Zuma & Others* 1995 (2) SA 642 (CC), paras 14 and 15.

constitute administrative action. Is the position any different in regard to the suspension of a board member under s 12 of the Act? In my view the answer is that it is not. The question whether suspension, as opposed to dismissal attracted the requirements of natural justice and an obligation to comply with the *audi alteram partem* principle was comprehensively considered by Howie J in *Muller & Others v Chairman, Ministers' Council, House of Representatives & Others*[74] where the learned judge held, for reasons that I find entirely persuasive, that there is no reason in principle to distinguish between a suspension and a dismissal. The correctness of that decision has not subsequently been challenged and it appears to reflect current received wisdom in the field of employment[75]. It follows that in my view the suspension of the applicants by the MEC did constitute administrative action in terms of PAJA and attracted the obligations of procedural fairness laid down in PAJA. As set out above in my judgment the MEC did not comply with those obligations before suspending the applicants. Accordingly their suspension was invalid and the applicants are entitled to the relief that they claim in these proceedings.

[84] I accordingly make an order in the following terms:-

(a) That the decision of the first respondent to suspend the first, second, third and fifth applicants as members of the KwaZulu-Natal Nature Conservation Board is reviewed and set aside.

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74 1992 (2) SA 508 (C).

75 *Mogothle v Premier of the North West Province and another* (2009) 4 BLLR 331 (LC), paras 31-39. It also accords with the views in relation to office bearers preferred in H W R Wade and C F Forsyth *Administrative Law*, 9 ed, 542-544, concluding at the latter point with the following statement: 'In the case of offices, membership, status, and so forth … it would seem right to protect the officer or member against wrongful deprivation of every kind and to accord him the procedural rights without which deprivation is not fair and lawful. Whether he is removable for cause or at pleasure should make no difference."

(b) The appointment of the third, fourth and fifth respondents as an 'Interim Accounting Authority' of Ezemvelo KZN Wildlife is hereby reviewed and set aside.

(c) The first respondent is to pay the applicants' costs of this application.

DATES OF HEARING	15, 16, 17 APRIL 2009, 4, 5 MAY 2009
DATE OF JUDGMENT	19 JUNE 2009
APPLICANTS' COUNSEL	MR C.J. PAMMENTER S C
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