(Western Cape Division, Cape Town)

Reportable

Case No: 3473/2022

In the matter between:

PETER BECKER **Applicant**

vs

MINISTER OF MINERAL RESOURCES & ENERGY **First Respondent**

NATIONAL NUCLEAR REGULATOR **Second Respondent**

CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE NATIONAL NUCLEAR REGULATOR **Third Respondent**

JUDGMENT DELIVERED 19 JANUARY 2023

MANTAME J

A Introduction

[1] This is an application for judicial review of a decision by the first respondent ("*the Minister*") to discharge the applicant ("*Mr Becker*") as a director of the third respondent ("*the Board*") for misconduct in terms of section 9(1)(c) of the National Nuclear Regulation Act 47 of 1999 ("*the Act*"). Mr Becker was discharged from his position pursuant to some utterances or statements he made and were recorded in an article

published in the online magazine *'Energize'* on 30 June 2021 and some further reasons that were put forward by the Minister. Mr Becker does not dispute such statements, but contends that if due regard is heard to his statements, there were no grounds to sustain a conclusion of misconduct, and that the Minister's decision is vitiated by various irregularities, bad faith and an ulterior purpose, and is accordingly unconstitutional, unlawful and invalid.

[2] The first, second and third respondents opposed this application on the basis that Mr Becker's statements and actions evidenced that he had allowed himself to be caught in a conflict of interest. This, on its own constitutes misconduct which justified a discharge from his directorship in terms of section 9(1)(c) of the Act by the Minister.

B Factual Background

[3] On 10 June 2021, the Minister appointed Mr Becker as a non-executive director of the Board of the second respondent *("the Regulator*") in terms of section 8(4)(a)(iii) of the Act. Essentially, Mr Becker represented communities who may be affected by nuclear activities on the Board. His appointment emanated from his nomination to this position by a number of civil society organisations including the Koeberg Alert Alliance ("*the KAA*"), the Southern African Faith Communities Environmental Institute, and the Pelindaba Working Group. Mr Becker was the spokesperson of the KAA before his appointment to the Board and remained as such after his appointment as a director of the Board. The KAA is an informal group of approximately 1080 individuals who are concerned about the safety of the continued use of nuclear power in South Africa and has called for a review of such use. The KAA made its views known that it is concerned about the safety of the nuclear activities at Koeberg Power Station ("*Koeberg*") and is

opposed to the further building of reactors at Koeberg, and is further concerned about Koeberg's lifespan being extended on its expiry in 2024. As a spokesperson for the KAA, Mr Becker held these views when he was appointed by the Minister.

[4] Mr Becker stated that, at the time of his appointment, his position concerning nuclear safety at Koeberg were known by the Minister and were not hidden. Prior to his appointment, he delivered his *curriculum vitae* to the Regulator which clearly reflected his personal views on the desirability of nuclear activities. Likewise, in his letter of nomination, the KAA described itself as 'a group of community members in South Africa concerned about nuclear power and in particular Koeberg Nuclear Power Station just outside of Cape Town.'

[5] Days after his appointment, Mr Becker was said to have made these contentious remarks and was quoted in an article published in the online magazine *Energize* on 30 June 2021. The article is titled *'Thyspunt nuclear hearings distract from Koeberg problems,'* and it is undisputed that he stated as follows:

(a) "It is disappointing to see money and time being spent on pursuing nuclear power for the Thyspunt site after the government had stated that there was no money to fund a new nuclear build."

(b) "The existing Koeberg plant is more of a concern, where Reactor 1 was down since January due to an increasing leak rate of a steam generator within the containment building. The plant manager Velaphi Ntuli was then suspended on 4 June 2021 and two (2) weeks later Reactor 1 was running again. Was the leak actually fixed in that short period or did the new acting plant manager override Ntuli's concerns? We call for transparency and that Ntuli be allowed to speak publicly about his decision not to restart the reactor."

(c) "We should be worrying about the safety of the existing plant at Koeberg, especially as it approaches the end of its design lifetime."

(d) "There are several issues that need to be addressed before the Koeberg plant can be considered safe by modern standards, and that will come with a significant cost. Much like, an old car, there comes a time when it is just not worth repairing it to the point where it is as safe as a new car. It was unwise to spend money refurbishing the plant before finding out what would have to be done to obtain a licence to extend its life. We are probably going to have load shedding for the next two (2) or three (3) years. It will only make the situation worse to repeatedly shut down Koeberg for refurbishing work over that time. Eskom has said the refurbishing of Koeberg to allow the life extension would cost R20 billion. Based on other large Eskom projects, this is likely to double or even triple."

[6] In this article, Mr Becker said he was quoted as the spokesperson of the KAA. He did not purport to represent the Board. On 5 July 2021, he concluded an individual performance agreement ("*IPA*"). He was thereafter inducted as a member of the Board on 8 July 2021. According to Mr Becker, the article was published before he had performed any duties as a director of the Board, and before he received any information or documents from the Regulator in relation to his performance of those functions.

[7] On 15 July 2021, the Technical Committee of the Board held its meeting online. After the conclusion of the meeting, Mr Becker requested two (2) documents, related to the presentation of Ms Louisa Mphete *("Ms Mphete")* on a report back on the most recent emergency drill conducted by the Regulator at Koeberg and which described two (2) instances of non-compliance observed during the drill. According to Mr Becker this request was in response to the information received during his induction from the Chairperson of the Board, Dr Thapelo Motshudi *("Dr Motshudi")* that they could request

information from any staff member of the Regulator at any time if it was necessary to fulfil their oversight duties.

[8] On 19 July 2021, Mr Becker communicated with Mr Gino Moonsamy ("*Mr Moonsamy*"), the Regulator's Communications and Stakeholder Relations Manager and informed him that he would be "hosting a meeting of civil organisations in his (my) capacity as rep (*sic*) on the Board. The goal is to collect the top concerns/questions relating to nuclear safety across organisations". He enquired further what appropriate channels are available for civil society to raise concerns around nuclear safety.

[9] On 22 July 2021, he convened a two-hour virtual meeting with civil society organisations and did not do so as a representative of the Board, and did not purport to do so as a representative of the Board. Indeed, various issues were raised around nuclear safety. He noted and collated them so as to provide to the Regulator as he promised in his email exchanges with Mr Moonsamy of the Regulator. At the end of this meeting, Mr Becker sent an email to Mr Moonsamy that indicated various issues that emerged from the meeting, in particular, concerning the process and sequence by which authorisations are granted. In response to this email, it appears that there was a confusion between Mr Moonsamy and Dr Bismark Mzubanzi Tyobeka ("*Dr Tyobeka*") the CEO of the Regulator. Dr Tyobeka was of the opinion that he met civil society organisation as a representative of the Board. Mr Becker said, he certainly did not do so. However, it appears that one of the reasons for his discharge was that he allegedly represented the Board without authority to do so. This, Mr Becker said, is not true.

[10] Similarly, on 27 July 2021, Mr Becker sent an email to the Chairperson of the Board, with the subject heading “Request for guidance – incremental decisions.” In this email, Mr Becker raised the same concerns that he had addressed in his *“Energize”* article regarding the inappropriateness of allowing Eskom to spend money on “incremental steps” at Koeberg (including a major project to replace steam generators). The Minister stated that this was in anticipation of an application to extend its life span after July 2024. The Minister’s concern was that Mr Becker plainly indicated that this consideration of economic viability, or desirability should shape the way the Board dealt with applications regarding Koeberg. It was stated by Mr Becker that it is untenable that his request for information could be construed as misconduct. Mr Becker referred to an issue which came up at a meeting of the Technical Committee of the Board concerning “steps that are being approved at Koeberg relating to the steam generator replacement process and other aspects of LTO (“*Long Term Operation*”).” He questioned the current licence for Koeberg that was expiring in 2024, and the replacement of steam generators in 2022 that is not economically viable if the life of the plant is not extended after July 2024. His concern was whether the Regulator was “at risk of in effect giving tacit approval for LTO by approving all these processes so close to the end of the current licence”.

[11] Mr Becker stated that his queries regarding the Long Term Operation at Koeberg and the potential extension of its operations and licence were made internally to the Chairperson and other members of the Board. His conduct was in no way inconsistent with his duties and functions as a member of the Board. At no stage did he bring the Board into disrepute.

[12] As a result thereof, on the Regulator's first Board meeting of 29 July 2021, a portion of the meeting was dedicated to the conduct of Mr Becker. The Board felt that Mr Becker conflated his activist work, and his function on the Board; he might have breached various provisions of the Act, which would constitute an offence; he found himself in a self-created conflict between his functions for the KAA, and that which he did as a member of the Board; this conduct might require an independent legal opinion to inform the Board on the way forward and might also necessitate the referral of the matter to the Minister. It is on this background that the Board resolved to obtain an independent legal opinion on this matter. MacRobert Attorneys was subsequently instructed by the Board to give an opinion in respect of Mr Becker's conduct.

[13] A day after the Board meeting, that is, 30 July 2021, Mr Becker sent an email to the Chairperson of the Board in which he advised that his meeting of 22 July 2021 had been held virtually and was attended by a group of over thirty-five (35) activists from organisations concerned with issues of radiation and nuclear safety. Mr Becker had been asked to relay their concerns regarding access to the Board's meetings and applications for nuclear authorisations, and to request that public participation process started sooner. These participants, it was recorded, they sought a suspension or termination of the National Nuclear Regulator's process in considering an application from Eskom to approve a site for the proposed new nuclear power station at Thyspunt in the Eastern Cape (known as a Nuclear Installation Site Licence or NISL).

[14] On 18 August 2021 Mr Moonsamy received an email from a reporter, Francesca Villette querying whether Eskom has as yet submitted a safety case for the extension of the lifespan of Koeberg.

[15] On 6 October 2021, the Board received a legal opinion from MacRobert Attorneys *("MacRobert's opinion")*, which amongst others, recommended the discharge of Mr Becker from the Board. Pursuant to this opinion on 7 October 2021, the Chairperson of the Board addressed a letter to the Minister requesting that he acts based on this opinion. On 14 October 2021, the Minister received a correspondence from Mr Becker which placed on record his disagreement with MacRobert's opinion and the purported facts upon which it was based. On 29 October 2021 a meeting of the Board was held to discuss this opinion. The Board decided to wait for the Minister's response on this opinion. It agreed to afford Mr Becker an opportunity to respond in writing to the allegations against him.

[16] In turn, Mr Becker procured his own legal opinion and was transmitted to the Minister on 17 January 2022 which substantively differed with MacRobert's opinion. On 18 January 2022, the Minister addressed a letter to Mr Becker's attorneys advising that, as the allegations levelled against him are of a serious nature, and his continued presence on the Board may prejudice its efficient functioning, the Minister considered it prudent to suspend Mr Becker with immediate effect, pending a final decision in terms of Section 9(1) of the Act. Mr Becker was afforded an opportunity to furnish written representations as to why he should not be discharged from office as a director of the Board. On the same day, Mr Becker states that a sub-committee of the Board held a meeting which began at 09h00. Even though the Minister suspended him on that day, at 14h00 when he received the letter of suspension, he was already excluded from accessing Board documents, and precluded from receiving meeting invitations and Board packs.

[17] It was then that he launched an urgent application to this Court seeking an order (i) declaring that the suspension decision was *ultra vires* the Minister's powers in the Act and therefore unlawful; (ii) that while the Minister has the statutory powers to appoint directors to the Board (Section 8(4)(a) of the Act) and to discharge directors of the Board from office (Section 9(1) of the Act), he has no express power in terms of the Act or otherwise in law to suspend a director. Such power is also not implied by the provisions of the Act or otherwise by the law; (iii) and an order reviewing and setting aside the suspension. This application was settled by the parties on the basis that Mr Becker would provide written representations to the Minister by 11 February 2022; the Minister would by 15 February 2022 decide whether to discharge him; the Board and its committees would not hold any meeting or make any decisions pending the Minister's decision.

[18] On 2 February 2022, after Mr Becker's suspension, he was again quoted on Daily Maverick's online news platform in an article titled *"Koeberg nuclear power plant rejuvenation: Protesters say silence is a killer (first published on 16 December 2021)."* In this article, Mr Becker was quoted as the spokesperson of KAA and he stated that "a safety case study for the extension of the lifespan of Koeberg is not one for a bunch of engineers to decide alone, but rather one that should involve consultation with members of the public … This has a moral component, a society component, an intergenerational ethics component – this is not for a bunch of engineers to decide alone. That is why the community needs to be consulted and the public needs to have their say." According to the Minister, this is nothing short of a clarion call for the Regulator to base its decision on its own assessment of desirability, rather than a safety case.

[19] As agreed, Mr Becker provided written representations to the Minister dated 9 February 2022 under cover of a letter from his attorney dated 10 February 2022. In his representations, Mr Becker pointed out that MacRobert's opinion made allegations against him. The Minister had not indicated the basis on which he was considering discharging him. There are three grounds under Section 9(1) of the Act on which a director may be discharged. The Minister did not indicate which ground was alleged to apply to him, and what factual basis it was alleged to apply. He emphasised that his views and membership of the KAA were known when he was appointed, and did not give rise to an impermissible conflict with the position as a director. Further, having diverse views on the Board enhances its ability to regulate nuclear activities safely. Furthermore, he had never purported to represent the Board when meeting civil society organisations. He has not disclosed confidential information when he was quoted in the meeting. He was merely quoted as a spokesperson for KAA. By making internal inquiries around the conduct and decision-making of the Regulator, he has not caused any disruption. Lastly, he has not made any defamatory statements about the Board or Regulator or the Regulator's employees.

[20] On 15 February 2022, Mr Becker received a correspondence from the Minister in response thereto, conceding that he had not indicated the grounds on which he was contemplating discharging him. The Minister proceeded to state the grounds on which he was considering discharging him. He further provided him with an opportunity to make representations by 18 February 2022 and undertook to make a decision as to his discharge by 23 February 2022.

[21] After an engagement on these timelines with legal representatives of the parties, it was agreed that Mr Becker would actually provide his submissions by 21 February 2022 and the Minister would make his decision by 25 February 2022. Mr Becker having furnished the submissions on 21 February 2022, the Minister discharged him on 25 February 2022 on the basis of misconduct in terms of section 9(1)(c) of the Act. In essence, the Minister discharged him on the basis that he had a conflict of interest which arose from him having expressed critical views concerning the desirability of nuclear energy. Mr Becker pointed out that the Minister's decision is vitiated by multiple material irregularities, irrationality, unreasonableness and unlawfulness.

C Issues

[22] This Court is called upon to decide whether there are valid grounds to sustain a conclusion of misconduct by the Minister, and / or whether the Minister's decision is vitiated by various irregularities, bad faith and an ulterior purpose, and is therefore accordingly unconstitutional, unlawful and invalid.

D The Impugned decision

[23] Mr Becker stated that it is important for this Court to identify precisely what the Minister's reasons were for discharging him on 25 February 2022, and to differentiate them from new matter and reasons on which the respondents now seek to rely on in this application.

(i) Reasons for discharge on the correspondence dated 25 February 2022

[24] In the correspondence of 25 February 2022, the Minister acknowledged that the Regulator is an independent regulator that does not promote or oppose nuclear activities in South Africa and its primary concern is with the safe conduct of nuclear activities in South Africa. The Minister confirmed that Mr Becker's appointment on 10 June 2021 is that of a non-executive director in terms of section 8(4)(a)(iii) of the Act (as a person representing communities which may be affected by nuclear activities). Mr Becker, in accepting such an appointment, entered into a fiduciary relationship with the Regulator and its Board, and accepted the common law obligations to display the utmost good faith towards the Regulator, and in his dealings on its behalf. A position of directorship at a regulatory body such as the Regulator entails serving the public interest. This position places an even higher duty on a director to act independently and with the utmost good faith.

[25] The Minister made reference to various documents that were issued to Mr Becker during his induction and therefore agreed to conduct himself as guided and abide by them. Shortly after his appointment, Mr Becker conducted himself in a manner which was of concern to the Board. The Minister *inter alia* stated that:

25.1 Mr Becker made statements to *'Energize'* magazine. These statements created an impression that a member of the Regulatory Board was against a process run by the Regulator and suggested that the Regulator and the Government had not taken seriously their regulatory and oversight obligations with regard to the Koeberg Nuclear Power Station ("*Koeberg*").

25.2 Mr Becker made communication to the Chairperson of the Regulatory Board suggesting that the Board had made 'incremental decisions' that would disable it

from making an objective decision in relation to the extension of Koeberg lifetime. Further, the Regulatory Board would not be able to bring an unbiased mind to the question of whether the life of Koeberg should be extended, thereby ignoring their fiduciary duties.

25.3 Mr Becker in his engagement with civil society groups, created an impression that he was representing the Board. The Board Charter is clear that the Chairperson is the spokesperson of the Regulatory Board, unless those functions have been delegated to some other individual.

25.4 Mr Becker made public statements to suggest that the Regulator and the Government will not diligently and properly carry out the Constitutional statutory obligations in regard to any decision as to whether to extend the life of Koeberg. These statements were made despite Mr Becker being advised by the Chairperson of the Regulatory Board that any decision related to the extension of the life of Koeberg will only be taken in strict compliance with the Act and once the public and all stakeholders have been consulted.

25.5 Whether Mr Becker was inherently and indirectly conflicted in his role as an anti-nuclear activist and the spokesperson for KAA, and his role or a member of the Board.

[26] The Minister's concern was that while Mr Becker was appointed to the Regulatory Board to represent communities which may be affected by nuclear activities, his conduct should reflect the totality of all communities and not one organisation. Mr Becker confirmed that it is only the KAA that is opposed to any new nuclear plants being established, as well as the extension of the life of Koeberg. If he holds those

views, he could be unable to make an objective decision when presented with objective, scientific evidence in respect of the extension of the life of Koeberg and any decision he would make in that regard will be prejudicial as he has made his views known.

[27] Proper governance in Minister's view entails that every member of the Board, irrespective of their personal views, regardless of their appointment category, should bring an independent mind to bear in an unbiased, fair and even-handed manner when making decisions. The Minister stated that conflict of interest does not only arise from financial conflict or to assets or property but includes personal affiliations, associations and confidential information. The Constitutional rights to freedom of expression and association that Mr Becker has asserted did not prevent him from being disqualified as a director if he was conflicted.

[28] Having said so, the Minister stated that Mr Becker placed himself in a position in which he has a personal interest which conflicts with his duties to the Regulator, he publicly vocalised his opinions on nuclear activity and his opposition to the lifespan extension of Koeberg, which is in conflict with the independent / neutral role and functions of the Regulator. There can be little doubt on how he would vote, were he still to be a member of the Regulatory Board, he was therefore unqualified to make a decision on the Board; Mr Becker's continued involvement, when he was unable to bring an independent mind to bear on decisions in relation to the safe operation and / or extension of Koeberg, because he has already indicated his position, in the Minister's view, amounts to misconduct. Mr Becker hosted meetings with civil society organisations either in his capacity as a member **'on'** or **'of'** the Regulatory Board and gave the impression that he was acting on behalf of the Regulatory Board, with no

authority to do so. He has acted in conflict with his obligations both in law and in contract; and according to the Minister the conflict of interest that existed is material and fundamental as it is impossible for him to avoid or manage the actual conflict as well as the appearance of conflict. It would on the face of it appear that he had no hesitation to make the public aware of his conflict. With those reasons, the Minister was satisfied that Mr Becker has committed misconduct and discharged him from office as director of the Regulatory Board with immediate effect.

(b) Reasons for discharge in the respondent's answering affidavits

[29] Mr Becker stated that it is impermissible for the Minister being a decision-maker in an affidavit opposing review proceedings to supplement or give different reasons for a decision, to those that it provided contemporaneously when the decision was made.[1] The decision-maker is bound by the reasons it provided when making the decision. Reasons provided after the fact (in litigation) amount to a "*moving target*" and "*it is a fundamental principle of administrative law that judicial review of agency action is limited to the ground that the agency invoked when it took the action.*[2] Similarly, the Chairperson of the Regulatory Board was accused of advancing reasons that did not form part of the Minister's decision.

[30] The Minister, it was said, may therefore not assert new reasons and different allegations and accusations to justify his decision. Equally, the Chairperson of the Regulatory Board cannot advance reasons and allegations which did not form the basis of the Minister's decision. There is some irony in the Minister accusing Mr Becker of

[1] National Energy Regulator of South Africa and Another v PG Group (Pty) Limited and Others 2020 (1) SA 450 (CC) at para 39; and Minister of Defence and Military Veterans v Motau and Others 2014 (5) (SA) 69 (CC) at 55 fn 85 and National Lotteries Board and Others v South Africa Education and Environment Project [2011] ZASCA 154; [2012]1 All SA 451 (SCA);2012 (4) SA 504 (SCA) at para 27 - 28

[2] Forum De Monitoria De Orcamento v Chang and Others [2022] 2 All SA 157 (GJ) at para 85, citing Department of Homeland Security v Regents of the University of California 591 US_____ (2020) (slip op)

raising irrelevant matters in his papers, where the shoe is in fact on the other foot. Mr Becker highlighted three (3) different reasons proffered impermissibly by the Minister and the Chairperson of the Regulatory Board.

[31] *First*, in his affidavit, the Minister abandoned the contention that Mr Becker holds certain views concerning the desirability of nuclear energy and therefore automatically disqualified himself from bringing an independent mind as a member of the Board to making decisions concerning the safety of nuclear activities. It was stated that the Minister had to disavow that reason because:

31.1 It is unrealistic to expect persons sitting on the Board not to have any views concerning the desirability of nuclear energy or other activities. Some other members of the Board indeed have positive views about desirability. This reasoning demonstrated an irrationality in the Minister's decision as there is no necessary link between a person's views as to desirability and their views about safety.

31.2 In his answering affidavit the Minister contends that Mr Becker should however be singled out because, Mr Becker had shown "single-minded commitment to promote his own political views that led to the ineluctable conclusion that he could not remain true to his neutral role as a director of the Regulator, as well as his legal and contractual obligations to the Regulator."

31.3 The publicly expressed views of Mr Becker concerning desirability are said to be a "contagion" that would "infect" the Board's decision-making.

31.4 The Minister cannot now abandon a reason which he gave when he made the decision, and which demonstrates the irrationality of his decision, in favour of a new argument. If the reason he initially gave was bad he cannot now abandon or change the reason. It was stated that on his own version at the time, the "bad" reason influenced his decision: "Once the bad reasons played an appreciable or significant role in the outcome, it is … impossible to say that the reasons given provide a rational connection to it … The same applies where it is impossible to distinguish between the reasons that substantially influenced the decision, and those that did not.[3]

[32] *Second*, that Mr Becker's conduct has harmed the Board's reputation. It was said that much of the Chairperson's affidavit attempted to support this proposition.

32.1 Mr Becker stated that before the Minister discharged him he called for submissions and accused Mr Becker of harming the Board's reputation. Mr Becker addressed this accusation in his written representations, and had denied having harmed the Board's reputation.

32.2 From the summary of the official reason for the decision, the Minister did include the harming of the Board's reputation as a reason. He jettisoned this ground clearly because he accepted Mr Becker's submission that there was no reputational damage to the Board. This ground cannot now be resuscitated to justify the decision.

32.3 For the first time in his answering affidavit, the Minister referred to a Daily Maverick article published in December 2021. In the article, Mr Becker is quoted

[3] Rustenburg Platinum Mines (Ltd) (Rustenburg section) v Commission for Conciliation, Mediation and Arbitration 2007 (1) SA 576 (SCA) at para 34 per Cameron JA

to have referred to Eskom employees as “bunch of engineers” and that the decision to extend the lifespan of Koeberg is both a technical one, and a political, economic and social one. It was said that the Minister has clearly misunderstood what Mr Becker said and now seeks to rely on to justify his decision. Mr Becker said, a decision to extend the Koeberg lifespan is self-evidently partly technical and partly policy-based.

32.4 Also reference was made to a KAA statement for which Mr Becker was not responsible. It stated certain facts about how the Regulator received most of its funding from licence applications by Eskom and the Minister draws conclusions therefrom. The Minister, it was said did not put this to Mr Becker before he made the decision. Mr Becker would have an answer if he was invited to provide one.

32.5 The Chairperson of the Board suggested that Mr Becker had reduced the staff morale at the Regulator. This was said to be a conclusory statement. No evidence was produced to show that indeed this occurred. In any event, it cannot be used so belatedly to justify the Minister’s decision.

[33] *Third,* the Chairperson of the Regulator stated that Mr Becker is said to have refused to recuse himself from decisions and discussions concerning the extension of Koeberg’s lifespan. Mr Becker stated that this reason is untenable. If such a decision will only be made in 2024 it is unclear how Mr Becker failed to recuse himself. Not a single example is provided of a meeting where Mr Becker should have recused himself, but did not do so. Nothing was said about other Board members who have positive views about desirability, having to recuse themselves. It was contended that the new reasons were addressed in order to demonstrate that the Minister’s references to new reasons is invalid.

[34] In response thereto, the Minister asserted that the decision to discharge Mr Becker was an exercise of "*administrative action*" subject to review in terms of the grounds in section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"). Alternatively, he suggested that the same grounds apply pursuant to this Court's power to review the Minister's decision based on "*legality review*," in terms of section 1(c) of the Constitution. In *Gijima*,[4] it was stated that the characterisation of the impugned actions cannot be side-stepped. The Court held that it had to determine whether PAJA applied, and only revert to legality review as "*a safety net*" or a measure of last resort when the law allows no other avenues to challenge the unlawful exercise of public power. It cannot be the first port of call or an alternative path to review, when PAJA applies.

[35] Mr Becker's contention was that whether or not a section 9(1) decision to discharge him is an administrative action, the principles of *audi alteram partem* apply to the Minister's decision. In *Motau*, Khampepe J observed that "*our law has a long tradition … of strongly entrenching audi alteram partem ('hear the other side') which attains particular force when prejudicial allegations are levelled against an individual.*"[5] It was pointed out that "*dismissal from service has been recognized as a decision that attracts the requirements of procedural fairness.*"[6]

[36] Mr Becker's submissions were that Ackerman J held in *Mohamed* that:[7]

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[4] State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd (641/2015) [2016] ZASCA 143; [2016] 4 All SA 842 (SCA); 2017(2) SA 63 SCA (30 September 2016) at para 35-38 (The Minister acknowledged that the judgment was partially overturned by the Constitutional Court in 2018 (2) SA 23 (CC), but the principle was not brought into doubt.

[5] Motau at para 83

[6] Motau at para 83, citing Administrator, Transvaal and Others v Zenzile and Others 1991 (1) SA 21(A) at 37A-G and 39A

[7] National Director of Public Prosecutions and Another v Mohamed NO and Others 2003 (4) SA 1 (CC) at para 37

"*as a matter of statutory construction, the audi rule should be enforced unless it is clear that the Legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it*."

[37] It was stressed that the accusations of misconduct by a Minister call for an opportunity to be heard before an adverse decision is made. There is nothing in the Act which contemplates that the *audi* principle should not apply to decisions to discharge directors. The opposite is the case: in light of the purpose of the Act and how closely circumscribed the power is the *audi* principle further constrains the Minister's power to remove directors of an independent body which oversees the conduct of his department.

[38] The Minister disagreed with this contention and stated that Mr Becker's argument regarding procedural fairness in respect of the general public find no application if the Minister's decision is characterised as executive action.[8] His decision to dismiss Mr Becker is clearly an executive act provided for under national legislation as envisaged in section 85(2) of the Constitution. As such, it was argued, it is excluded from the application of PAJA. In *Masetlha,* the President's power under the Constitution and Legislation to appoint and dismiss the Director-General of the National Intelligence Agency, was found to be executive in nature.

[39] In *Motau*, the Minister stated, the Constitutional Court had to similarly characterise a Ministerial decision to dismiss members of Armscor's board of directors.

[8] Masetlha v President of the Republic of South Africa and Another 2008 (1) SA 566 (CC) at para 77; Minister of Home Affairs & Others v Scalabrini Centre and Others 2013 (6) SA 421 (SCA) para 67 and 72

The Court held that whether the Minister's decision amounted to administrative or executive action is important: If it amounts to administrative action, it is subject to a higher level of scrutiny in terms of PAJA. If it is executive action, it is subject to the less exacting constraints imposed by the principle of legality. The Constitutional Court concluded that the Minister's decision was executive and not administrative in nature.

[40] The fact that the Minister, Mr Becker said, failed to call on him to answer violates the *audi alteram partem* principle and renders the decision procedurally irregular, irrational and vitiates it. The Minister sought to resuscitate allegations against which he jettisoned in his official reasons that rendered the procedure to be unfair.

[41] The Minister demonstrably, it was submitted, failed to consider the written representations of Mr Becker in that:

41.1 the Minister ignored Mr Becker's repeated explanation that he had not purported to represent the Board in meeting civil society, but rather had met with them as their representative **on** the Board.

41.2 in his official reasons the Minister failed to engage with or consider Mr Becker's submissions that the Minister: was aware of his views when he was appointed, and never explained how continuing to hold those views after appointment was misconduct. The decision memorandum prepared for the Minister by his Department also failed to engage with these submissions at all.

[42] According to Mr Becker, the *audi* principle does not only require an opportunity to make representations. It also requires the decision-maker to seriously consider and address such representations in the decision.

[43] Notwithstanding, it was argued, the Minister not only failed to give Mr Becker procedural fairness, but also treated the public in a procedurally irregular manner. Section 8(7) of the Act explicitly requires a form of public consultation when certain directors are appointed to the Board, including the director to represent affected communities. The decision to discharge such director, including for alleged misconduct – also requires the Minister to obtain the views of the public and affected communities as to the reasons for such removal. It was said this is for two (2) reasons:

43.1 the decision to remove the only director on the Board who is expressly required to represent communities who may be affected by nuclear activities plainly, materially and adversely affects the rights of the public, or a class of persons (which is included in the definition of "*public*" in PAJA) are materially and adversely affected; namely, communities who may be affected by nuclear activities. Section 4 of PAJA requires the Minister to ensure that his decision was procedurally fair, and provided "*specific mechanisms that are designed to afford large numbers of people a hearing."*[9]

43.2 it is well-established that in order to act in a procedurally rational manner a decision-maker may be required to consult with parties who may be specifically affected by the decision.[10] In other words, some decisions "must include an opportunity where the affected parties are given notice and afforded an opportunity to make representations" concerning the decisions.[11] Mr Becker was nominated by civil society organisations and was appointed to represent affected

[9] Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others 2021 (3) SA 593 (SCA) at para 86
[10] Minister of Home Affairs and Others v Scalabrini Centre (*supra*) at para 68
[11] e.tv (Pty) Limited v Minister of Communications and Digital Technologies and Others 2022 (9) BCLR 1055 (CC) at para 51

> communities. It was therefore incumbent on the Minister to provide an opportunity to members of the public to express their views as to his removal. The Minister's failure to do so renders his decision irrational, as he has no way of knowing what the views are of the constituency Mr Becker was appointed to represent. His constituency's views on whether his actions constituted misconduct, if they did, whether he should not be removed for other reasons.

[44] The Minister contended that procedural fairness in respect of the general public find no application if the Minister's decision is characterised as an executive decision.[12] The Minister, exercised a value judgment in discharging Mr Becker. His value judgment took into account that Mr Becker could not disentangle his views on nuclear energy from his role on the Board and by so doing disqualified himself. In this instance, the Court should show deference – unless the Minister's decision is irrational which in this instance is not the case. The Minister's power to appoint directors of the Regulator is an extension of the State's role to ensure a safety policy in respect of nuclear installation.

[45] The Chairperson of the Regulator and the Regulator supported the Minister's discharge of Mr Becker. It was their contention that not long after his appointment to the Board, Mr Becker embarked upon a conduct which led the Board to believe that he did not comply with his fiduciary obligations as a director of the Regulator. He conducted himself in the public sphere in a manner that damaged the reputation and goodwill of the Regulator, and which indicated that he was potentially conflicted.

[12] Masetlha (supra) at para 77 and Minister of Home Affairs v Scalabrini Centre (supra) at para 67 and 72

[46] The Regulator, in line with its obligations under section 7(1)(g)(iii) of the Act, regarded it necessary to inform the Minister of its concerns regarding Mr Becker's conduct which cast doubt as to his ability to conduct himself as a director of the Regulator according to his contractual and statutory obligations. In their opinion Mr Becker struggled to maintain the objectivity and independence as a director of the Regulator.

[47] After his public statements, the Board queried Mr Becker as to the potential conflict arising from his position on the Board and his position as a KAA member, and invited him to explain how he would manage situations where he had to take a position at civil society that was opposed to that of a Regulator. His response was that he had not made any statements that he was representing the Board. His engagements had been in his capacity as a representative of all civil society on the Regulator. Mr Becker assured the Board that his statements to the media were not based on any confidential information which he had acquired by virtue of his status as a director.

[48] Pursuant to the Board meeting of 29 July 2021, the Board took a view that Mr Becker's statements in the *Energize* article had to be withdrawn as it was an incorrect representation of what the Regulator does and of the decisions it makes. Mr Becker indicated that there might be an opportunity to amend the statement so as to remove the impression that the Regulator was pursuing a pro-nuclear power stance. However, no steps were taken by Mr Becker to that effect.

[49] The Regulator and the Chairperson of the Board highlighted that Mr Becker's evident conflict was apparent from the statement by the KAA which was forwarded to

the Regulator's representative by a member of the press, where the KAA commented on speculation that Eskom had concluded a contract to extend the life of the Koeberg nuclear power plant. KAA's view was that since Eskom required a new licence to be granted by the Regulator to authorise it to operate beyond 2024, and since no public participation had been conducted on the issue, an inference could be drawn that the Regulator was allowing Eskom to ignore due process and to go ahead with its plans as if the extension was a "*done deal*." This, according to KAA called into question the independence of the Regulator. Mr Becker, it was said sought to disassociate himself from these statements. It was further said, he cannot disassociate himself sufficiently to establish an independent view from that expressed by the association for which he is the spokesperson, and is publicly known as such.

[50] KAA it was said, called into question the objectivity and independence of the Regulator and speculated as to the Regulator's preparedness to collude with Eskom with regard to the decision on whether or not to approve the extension of the lifespan of Koeberg, *inter alia*, because it was beholden to Eskom for 75% of its revenue. The Regulator stated that this allegation is profoundly damaging to it and to the members of its Board who are directly implicated in the insinuated conduct. Based on this conduct, the Minister formed a view that Mr Becker's public statements constituted misconduct warranting his discharge as a director.

[51] Mr Becker stated that the Minister's decision is vitiated by the fact that even before he received his written representations, he had already decided to discharge him. When the Minister suspended him on 18 January 2022, he called on Mr Becker to make written representations by 11 February 2022 as to why he should not be

discharged as a director. However, on 3 February 2022, before representations were made or due, the Minister was interviewed on Newsroom Afrika and he stated:

> "*But it is simple, you are an anti-nuclear activist you can't sit on the Board of nuclear, and get all the details of the plans and go and plan a program against that entity. It is not allowed.*"

[52] Mr Becker was therefore of the opinion that the Minister had already prejudged him and decided to remove him. The representations process was a sham. The Minister, in response to this allegation stated that this was merely a "*prima facie view*." He could have been convinced otherwise by his representations, but such contentions were not borne out by the facts.

[53] On 7 May 2022, and after Mr Becker was removed as a director, the Minister made further public comments which confirmed that he had a fixed view with a predetermined outcome and he stated that:

> "*If you resist nuclear and you [are] a board member, I fire you, simple. You can't be in a board of something you're not advocating for.*"

[54] In justifying his utterances, the Minister stated that he did not intend to suggest that members of the Board would be removed for holding personal views on the desirability of nuclear which were different from those of the Government.

[55] The Minister emphasized that his decision to discharge Mr Becker was based on misconduct. Misconduct is not defined in the Act. However, a useful point of reference

was found in the guidelines of the Institute of Directors South Africa relating to "Director's Misconduct" which defines the concept as follows:

> "*Any action by a director that is in breach of his / her role, responsibilities, function, duties or the standard of conduct expected of that director, whether stipulated in terms of legislation, common law or Board and / or company policies, would be considered as misconduct. Whether or not the action was wilful, intentional, or unintentional will merely affect the degree of sanction required for such misconduct in the specific circumstances.*[13]

[56] According to the Institute of Directors South Africa, conflict of interest constitute misconduct. The following are examples of misconduct:

> -Disclosing confidential information (including information relating to boardroom discussions) with authorisations;
>
> -Acting or speaking on behalf of the company with appropriate authorisation.
>
> -Failing to disclose conflict of interest and acting upon such conflict;
>
> -Competing with the business of the company
>
> -Taking any action which would be in breach of a fiduciary duty;
>
> -Violating a law.

[57] The Minister suggested that once a person accepts an appointment as a director, a fiduciary relationship becomes established in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. A decision made under circumstances where a clear conflict of interest can be

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[13] The institute of Directors of South Africa in its publication "Director Misconduct - General guidance note on how to approach director misconduct" dated 20 March 2020 accessed at https://cdn.ymaws.com/www.loDSA_Guidance_for_Boards_-_Director_Misconduct.pdf. The Institute sets out that "Ethical leadership is characterised by integrity, competence, responsibility, accountability, fairness and transparency".

demonstrated is often regarded as void[14] and thus consequently reviewable. The same principles are applicable to a director of the Regulator, which is borne out by several relevant legislative and governance prescripts - which assist in a proper understanding of their expected conduct and the duty to avoid conflicts. As required in his letter of appointment, on 5 July 2021, Mr Becker signed an Individual Performance Agreement, the Board Charter, the Code of Conduct and Ethics and the Media Policy.

[58] The Minister acknowledged that although the Regulator is a juristic person, it is not incorporated in terms of the Companies Act. However, the principles pertaining to directors as contained in the Companies Act and incorporated in Mr Becker's Individual Performance Agreement provides a useful guide. For instance, Section 76 of the Companies Act determines the standards required from directors in the execution of their duties. These provisions embody the common law fiduciary duties but are not an all-encompassing list of all common law fiduciary duties. The King IV Report, which is incorporated in Mr Becker's Individual Performance Agreement sets out the roles and responsibilities of the board and is often used by the courts as the benchmark against what is reasonably expected of a competent director. Once appointed a director accepts the full extent of the duties and responsibilities as imposed. A core element of a director's fiduciary duty is to avoid a conflict of interest.[15] This is a duty not to place themselves in positions in which their personal interest's conflict with the organisation's interest and that includes disclosing fully, facts related to what they may believe may become a conflict. A director, it was stated can thus never place their own interests before the organisations. These sentiments were shared by the Chairperson of the Board.

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[14] Grobbelaar v Grobbelaar 1959 (4) SA 719 (AD) at 724 to 725
[15] Movie Camera Company (Pty) Ltd v Van Wyk and Another [2003] 2 All SA 291 (C)

[59] Mr Becker asserted that the Minister's action was based on "*speculative*" conclusions or false inferences. The Minister disagreed with such contentions and stated that he does not have to wait until Mr Becker actually exercises his power in a manner which displays his bias. The Minister stated that there was an existing and reasonable apprehension of the appearance of bias which is definitive, and not an inferential leap[16] that Mr Becker will display in future.

[60] For instance, the Chairperson of the Board stated that Mr Becker decided to ignore his advice that any decision relating to the extension of the licence of Koeberg will, as required by law, be preceded by a public participation process and that the Regulator and its Board will diligently carry out their legislative and regulatory mandate. Mr Becker owed a fiduciary responsibility to the Regulator from the date of his appointment to the Board. If he had doubts as to the integrity and compliance by the Regulator, he ought to have questioned same at Board level rather than engaging with these issues at media level.

[61] The Chairperson of the Board pointed out that even though nominee directors may in fact be representing the interest of those who nominated them, they are in law obliged to serve the interest of the company to the exclusion of the interests of their nominators.[17] It was contended that since Mr Becker has allowed himself to be involved in a conflict of interest situation, his discharge by the Minister was justifiable.

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[16] Govan v Skidmore 1952 (1) SA 732 (N) at 734 C - D

[17] Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd 1980 (4) SA 156 (W) 163

[62] Mr Becker re-iterated that a fixed view and a predetermined outcome by the Minister are inconsistent with procedural fairness. The value of natural justice is to promote an objective and informed decision. There is no point in making representations if the decision-maker has already made its decision. The affected party will then have to convince the decision-maker that he is wrong.[18] In *Blom,* Corbett CJ noted that a "right to be heard after the event, when a decision has been taken, is not an adequate substitute for a right to be heard before the decision is taken." The Chief Justice pointed out that there is a "natural human inclination to adhere to a decision once taken."[19]

[63] It was therefore submitted that the Minister had an ulterior motive to get rid of a director who may raise challenging questions concerning nuclear energy in South Africa, and in that context concerning the extension of Koeberg's lifespan and other nuclear projects. The Minister conjured up allegations of misconduct where there was none so as to achieve this purpose. The Minister's decision was taken in bad faith, because the complaints do not demonstrate any act of misconduct. The Minister has applied a standard to Mr Becker which he has not applied to other members of the Board. In the circumstances it was said, the Minister's decision is not one which a reasonable decision-maker could reach. This Court should therefore declare the Minister's decision to be unlawful, unconstitutional and invalid, including an order reviewing and setting aside the Minister's decision with costs.

[18] Baxter Administrative Law (1984) at 587
[19] Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A) at 668 D - F

E Discussion

[64] The appointment of Mr Becker to the Board commenced with an invitation to the members of the public to submit nominations for the various positions on the Board. After receipt of the nominations, the Minister appointed a panel that compiled a shortlist from the persons who were so nominated. Mr Becker went through this process and on 10 June 2021 he was appointed by the Minister in terms of section 8(4)(2)(iii) of the Act, to represent communities who may be affected by nuclear activities. Mr Becker was appointed as such after his nomination was supported by civil society organisations, such as the KAA, the South African Faith Communities' Environmental Institute, and the Pelindaba Working Group. This therefore means that he served on the Board not in his personal capacity, but in a representative capacity. The Minister does not deny the fact that he knew Mr Becker's background when he appointed him to the Board. The KAA in particular in which Mr Becker is its spokesperson, has always raised its concern about the safety of the continued use of nuclear power in South Africa and has called for the review of such use. KAA, in particular is also opposed to the further building of reactors at Koeberg and the extension of the Koeberg's lifespan in 2024. This did not come as a surprise after the appointment of Mr Becker to the Board.

[65] Shortly after his appointment came into effect, Mr Becker was quoted in an article published in the online magazine *Energize*. He was quoted as a spokesperson of KAA, stating that it was disappointing to see money and time being spent on pursuing nuclear power for the Thyspunt site after government had stated that there was no money to fund a new nuclear build. This article noted that Mr Becker had recently been appointed to the Board. Mr Becker was further quoted as stating that 'we should be worrying about the safety of the existing plant at Koeberg, especially as it

approaches the end of its design lifetime. He was concerned that there are several issues that need to be addressed before the Koeberg plant can be considered safe by modern standards and that will come with a “significant cost” and “much like an older car, there comes a time where it is just not worth repairing it to the point where it is as safe as a new car, it was unwise to spend money refurbishing the plant before finding out what would have to be done to obtain a licence to extend its life.”

[66] At the time of making these statements, he was only armed with his letter of appointment to the Board that was effective from 10 June 2021. It may be safely assumed that Mr Becker could not have made them on behalf of the Board or for the Board as he was not yet inducted and the induction of the Board members took place on 8 July 2021. Although the signature of the documents took effect from the date of appointment, i.e. 10 June 2021, factually all the new Board members were not appraised on how to conduct themselves on the Board until 8 July 2021. In my opinion, when Mr Becker made those remarks on the *Energize* magazine, he embarked on his civil society activist duties. It was only on 5 July 2021 when Mr Becker formally accepted his appointment and signed an Individual Performance Agreement, and apprised of the Code of Conduct and Ethics, the Regulator’s Media Policy, the Public Finance Management Act 1 of 1999, the Companies Act 71 of 2008 and any other laws applicable to the governance of State owned entities and the duties of a director and that his conduct should adhere to such prescripts. These documents though it was said that they were effective from the date of appointment (10 June 2021), in my view they cannot have a retrospective effect. One cannot be held liable for an information that has not yet come to his/her attention. The effective date should be the date of signature.

[67] On 19 July 2021, Mr Becker forwarded an email to Mr Moonsamy advising him that he would be "hosting a meeting of civil society organisations" in his capacity as representative **on** the Board. The goal was to collect the top concerns / questions relating to nuclear safety across organisations. The purpose of the meeting was to ascertain the views of the civil society and bring those concerns to the Board – since he was the representative of the communities affected by nuclear activities. Clearly, there was nothing untoward with this prior notice to the Regulator as he made his intentions known.

[68] It appears that there was an internal exchange of emails at the Regulator which caused some confusion about Mr Becker's involvement with the communities that he represents on the Board. Although Mr Moonsamy seemed to have plainly understood what Mr Becker meant in his email and supported the engagement with civil society, a misunderstanding ensued after Mr Becker reported to Mr Moonsamy about the outcome of his two-hour virtual meeting with civil society organizations on 22 July 2021. He reported that various issues emerged and in particular concerning the process and sequence by which authorisations are granted. After Mr Moonsamy forwarded this email to the CEO of the Regulator, Dr Tyobeka, he seemed to think that Mr Becker hosted the meeting as a representative "**of**" the Board and not "**on**" the Board. It is not clear how Dr Tyobeka, made this confusion as Mr Becker was clear in his email of 19 July 2021 that he was hosting a meeting for the civil society organizations in his capacity as rep (sic) on the board. In a situation where he made the agenda of the meeting known to the Regulator, it is inconceivable how the allegation of him representing the Board without authorisation to do so came about.

[69] A further issue emanated from an email dated 27 July 2021 that Mr Becker addressed to the Chairperson of the Board raising a query regarding the Long-Term Operation (LTO) of Koeberg, an internal communication Mr Becker said he sought guidance on issues of concern after the Board members were encouraged by the Chairperson of the Board to seek guidance internally if they needed clarity. It came as a surprise to him when he was called to account in their first Board meeting of 29 July 2021, and accused of raising these issues publicly and bringing the Board into disrepute. However, the Board resolved to seek a legal opinion on his conduct. The legal opinion essentially concluded that he committed misconduct in various ways and as a result thereof the power to discharge Mr Becker rested with the Minister.

[70] After the Minister received a legal opinion from the Board and a legal opinion from Mr Becker he proceeded to suspend Mr Becker on 18 January 2022. Mr Becker challenged the Minister's decision to suspend him as there was no express authority to proceed as such. After some negotiations by the parties, The Minister invited him to make representations by 11 February 2022 why he should not be discharged. Before Mr Becker made those representations, the Minister made public pronouncement on 3 February 2022 in Newsroom Afrika suggesting that he had made up his mind to discharge him. As a result, his discharge on 25 February 2022 came as no surprise to Mr Becker.

[71] Mr Becker identified at least nine (9) areas or mistakes that the Minister relied on in discharging him:

71.1 The Minister made public statements on 7 May 2022 at an ANC conference and was quoted on News 24 to have said:

"*If you resist nuclear and you [are] a board member, I fire you, simple. You can't be in board of something you're not advocating for. We want nuclear there in Port Elizabeth.*"

Mr Becker stated that his comments are entirely consistent with the reasons he provided for discharging him as a Director of the Board. The Minister thought it is the business of the Board to advocate for nuclear energy. His decision was clearly influenced by a mistaken understanding. The Regulator is an independent regulator that does not promote or oppose nuclear activities in South Africa and its primary concern is with the safe conduct of nuclear activities in South Africa.

71.2 The Minister harboured under the wrong impression that a member of the Board can be fired for opposing nuclear. It was stated that that was an irrelevant consideration and a fatal misdirection. It is irrational and is not authorised by the Act.

71.3 The Minister in his decision stated that Mr Becker expressed his views publicly on the desirability of nuclear energy. As his views did not align with government policy that would create a conflict of interest when he participates in the Board's decision-making. Mr Becker stated that no evidence was provided to that effect and there is no conflict when regard is had to the object of the Regulator and the Board.

71.4 The Minister believed wrongly that he can discharge a member because he thought he would be biased. For instance, Mr K Maphoto who was already on the Board, made a radio interview on desirability of nuclear energy and no-steps

were taken against him. The Minister's reasons it was said were merely based on future perception.

71.5 The Minister wrongly equated the obligation of a Board member with the obligations of a Board of Company. The Regulator is not a company but an independent regulator. He was supposed to act in the public interest in accordance with the Act. Section 8(2)(a) of the Act give guidance on the objects of the Regulator.

71.6 The Minister wrongly thought it is misconduct for the Board member to disclose his views on desirability of nuclear energy.

71.7 The Minister wrongly thought that the Board is a representative of the shareholder. It was stressed that the Board is an independent body.

71.8 The Minister seems to think that Mr Becker has been leading marches. Mr Becker denied that he has ever led a march against any decision of the Board.

71.9 The Minister wrongly thought that Mr Becker would not be able to bring his independent mind to bear in an unbiased, fair and even handed manner when making decisions. It was said that this is material reason put forward by the Minister based on incorrect information.

[72] For this Court to fully come to grips with whether the decision taken by the Minister was administrative or executive action it would assist to analyse the facts starting from Mr Becker's appointment up until Mr Becker's discharge. If that is clearly ascertained, this Court would be able to conclude whether or not the process was vitiated by procedural unfairness or the principle of legality should apply.

[73] The Constitutional principles subjects every exercise of public power to the rule of law, including the administrative and executive actions. Therefore, Courts are there

to effect a system of checks and balances to avoid abuse of power. In my view, this is a separate inquiry altogether and does not amount to judicial overreach and / or violation of the doctrine of separation of powers. However, if the Courts find that the executive should be allowed to regulate its functions, they would not hesitate to defer to that arm of government.

[74] In *Motau (supra)*[20], the Constitutional Court stated that:

> "*It is also true that the distinction between executive and administrative action is often not easily made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula".*

[75] It appears that a determination of whether the Minister's power in discharging Mr Becker exercised an administrative or executive decision requires some level of scrutiny. This therefore means that there is no blanket application of these concepts. Each case has to be decided according to its own merits, hence there has been incrementally conflicting judgments. Khampepe J,[21] stated that the starting point is to identify the nature of power involved – where is it derived from. Where power flows directly from the Constitution, one could deem the power to be executive in nature, and if the power is sourced in legislation, it is likely to be administrative in nature. Substantial constraints on the power would be an indication that the power is administrative in nature. However, the Courts have repeatedly stated that the nature of the power can be determined with reference to the appropriateness of subjecting the power to the stricter form of judicial scrutiny represented by the edifice of administrative

[20] Motau supra at para 36
[21] Motau supra at para 41 - 42

law contained in PAJA. As stated in *Motau* above, the Constitutional Court warned that the consideration of factors in the interrogation of power is not decisive.

[76] Throughout these proceedings the Minister characterised his decision as an executive action, and thus subjecting his decision to the lower level of scrutiny. He relied extensively on the *Masetlha* decision and he interpreted it to exclude procedural fairness.

[77] In this matter, in making his decision, the Minister derived his power from Section 9(1) of the Act. It should be recalled that the process of appointment of Mr Becker was a public one. There was a call for nominations for candidates to be appointed to the Board. Mr Becker was subsequently nominated by various civil society organisations to serve on the Board. After a shortlist was made, the Minister appointed him in terms of Section 8(4)(iii) of the Act – "a person representing communities, which may be affected by nuclear activities."

[78] Section 8 – **Control and management of affairs of Regulator** – envisages divergent component of the Board. The twelve-member Board is constituted by representatives from, labour, organised business, communities affected by nuclear activities, department of Minerals and Energy and Environmental Affairs, and so on. In my view, different knowledge and background of these individuals would enhance the level of discussion of issues related to the objects of the Board. The legislature deemed it meet to include all these representations in order to heighten the level of deliberations and engagement at the Board. The Minister, likewise, was not mistaken when he appointed Mr Becker on the Board. The presence of a representative from a

community affected by nuclear activities was of vital importance as instructed by legislation.

[79] It appears Mr Becker's views were not of concern when he was a non-board member. His utterances became of utmost concern days after he was appointed to the Board. On considering the record, it does not appear that there was any constructive engagement between the Board and Mr Becker on how to conduct himself in accordance with the prescripts of the Board shortly after he made the first statement. In my opinion, the Chairperson of the Board would have done much greater to invite Mr Becker in an informal or formal meeting (with or without the involvement of the full Board for that matter) to counsel him on how to conduct himself publicly as a newly appointed member of the Board. The correspondence between Mr Becker and the Regulator is telling that he always sought "guidance" from the Regulator on the issues that he needed clarity. For instance, his correspondence of 19 July 2021 and subsequent correspondence serve as proof to that effect.

[80] Mr Becker has been a spokesperson of KAA, prior to his appointment to the Board. He therefore remained the KAA spokesperson and a member of the Board. Without him being advised that it – would not bode well with the public if he wore those two (2) hats simultaneously – he remained none the wiser. The manner in which the Board dealt with Mr Becker is not commendable. The Board should have addressed Mr Becker's conduct promptly after the *Energize* article was published on 30 June 2021 given the fact that the new board members were not yet inducted at that time. In my opinion, the Board did not address and deal with Mr Becker's conduct swiftly, considering that his conduct was of grave concern to them. These complaints were

only dealt with in their first Board meeting of 29 July 2021 *albeit* in a confrontational manner, after Mr Becker sent various correspondences to the Regulator on various issues. In my view, Mr Becker's conduct should have been dealt with better and in a more constructive manner than the one that presents itself before Court. It would not have escalated to this level if the Board had managed it pragmatically and in a more professional manner. The Board, after a resolution to seek legal opinion from MacRoberts attorneys unanimously agreed with the conclusion to discharge Mr Becker and proceeded to report the alleged misconduct to the Minister.

[81] Based on MacRobert's legal opinion, Mr Becker was suspended on 18 January 2022. Notwithstanding, there is nothing on record to suggest that the communities that nominated Mr Becker to the Board were advised of his suspension. This was the individual who was appointed on the Board in his representative capacity to represent the communities affected by the nuclear activities. The Minister's contention that this issue has nothing to do with the public is unassailable. Nonetheless, the Minister afforded him an opportunity to make representations by 11 February 2022 why he should not be discharged. This process, again failed to acknowledge that he was nominated by civil society organisations and are therefore entitled to be informed about their representative's alleged misconduct. Public interest is of utmost importance in this matter.

[82] On 29 July 2021, the Board queried the potential conflict arising from Mr Becker's position on the Board and his position as a KAA member, and invited him to explain how he would manage situations where he had to take a position at civil society that was opposed to that of the Board. This query is difficult to reconcile with the

Minister's appointment of Mr Becker knowing well that he was a KAA member and the Board's subsequent argument that it is not condemning Mr Becker's KAA's membership or his stance on anti-nuclear activity. It appears to be the Board's concern that his failure to disassociate himself from public comments made by KAA which openly challenges the integrity of the Regulator and its institutional independence is of utmost concern.

[83] In its attempt to water down Mr Becker's argument that the decision is one which affects the public and as such the public ought to be heard, the Minister suggested that KAA has not filed anything in support of Mr Becker. Mr Becker was not only nominated by KAA to the Board. In a situation where the Minister has not advised the communities that he intended to suspend and or/ discharge their representative, it is inconceivable therefore at what stage, he expected KAA or any other organisation for that matter to support Mr Becker. If the communities have a right to representations on the Board, equally, they have a right to be formally advised that such right is about to be terminated and they should make representations so that their views could be considered.

[84] Despite the reasons that were given by the Minister for discharging Mr Becker on 25 February 2022, he subsequently provided further reasons, *inter alia* that Mr Becker refused to recuse himself from decisions and discussions concerning the extension of Koeberg lifespan. It boggles one's mind why Mr Becker's input on the Board should be sanctioned, even before such discussions are tabled for discussion. Instead, the Board should have considered themselves fortunate to have a representative who represent communities affected by nuclear activities. Their input should have enlightened the

Board since it would have brought a different perspective to their discussions other than the government policy that was referred to by the Minister. Much to this Court's dismay, in a Board consisting of twelve (12) members it is not clear how Mr Becker's only opinion could have swayed all other members to his direction, unless his reasons are valid. Also, the allegations that his public views concerning desirability of nuclear energy are said to be 'contagion' that would 'infect' the Board's decision is fanciful. In my view, having Mr Becker on the Board should have enhanced the Board and brought fresh and robust ideas on the table for discussion. In any event, the subsequent reasons by the Minister in his answering affidavit are impermissible.

[85] A decision-maker is bound by the reasons it advanced for its decision and is barred from relying on additional, or *post hoc* reasons. Cachalia JA in *National Lotteries Board (supra)*[22] stated:

> *"The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards-even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision."*

[86] However, in interrogating the power of the Minister to discharge Mr Becker, this Court concludes that he embarked on an administrative action. It is trite that the Minister is bound to exercise his power lawfully, reasonably, and procedurally fair and within the confines of the provisions of Section 33 of the Constitution.

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[22] At para 27

[87] Such decisions, in my view, should be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with the requirement. In *Pharmaceutical Manufacturers Association of South Africa: Ex Parte President of the Republic of South Africa*[23], the Constitutional Court stated:

> *"Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our constitution and therefore unlawful…A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."*

[88] In the circumstances, I agree with Mr Becker's contention that the *audi* principle should apply in discharging non-executive directors especially where there are allegations of misconduct. This consideration is made fully aware that Mr Becker was appointed as a Board member of the regulatory body. His conduct and duties cannot be equated with the fiduciary duties of a director appointed in terms of the Companies Act. In the same token, the Minister's decision is not policy related and is not an executive decision. As stated, some higher level of accountability is required. In fact, the present matter is distinguishable from that of *Masetlha (supra),* as the exercise of executive power in that matter included a high degree of policy consideration. In this case, the alleged misconduct of Mr Becker has nothing to do with the government policy. As indicated, it is my considered view that the Minister's decision should be subjected to a higher level of scrutiny in terms of PAJA. I repeat, there is no evidence to sustain the contention that the Minister's decision is an executive action. The

[23] 2000 (2) SA 674 (CC) at para [90]

Minister simply preferred the executive action since it is subject to the less exacting constraints imposed by the principle of legality.

[89] Given the sensitivity of matters that the Regulator may be required to pronounce upon at the Board level, and more so that its objects and functions, *inter alia*, are to provide for safety standards and regulatory practices for protection of persons, property and the environment against nuclear damage it is inevitable that the views of the general public would be left unheard.

[90] On the other hand, it has always been said that if the higher level of scrutiny is not appropriate given the fact that the power bears on particularly sensitive subject matter or policy matters – the Court should show the executive a greater level of deference. However, this is not the case. In my view, the Board may not formulate government policy regarding the desirability or not of nuclear power. In turn, for the Courts to defer to the executive, it must demonstrate that its decision was clearly rational. The fact that the Minister did not seek the views of the constituency represented by Mr Becker on the Board and the fact that the Minister did not advise the constituency he represented that he has removed him from the Board, in my view, was totally irrational. Mr Becker did not serve in his own capacity on the Board.

[91] Most shockingly, on 3 February 2022, before Mr Becker made his representations, the Minister made statements on Newsroom Afrika which suggested that he had prejudged Mr Becker and had decided to remove him from the Board. Even though the Minister and the Board denied that to be so, however, the ultimate decision on 25 February 2022 proved to be consistent with his utterances. I tend to agree with

Mr Becker's submissions that the Minister predetermined his decision. In so doing, the Minister acted in bad faith and with ulterior motives.

[92] Misconduct is not provided for in the Act. The submissions by the respondents that the Directors Misconduct is provided for in the publication by the Institute of Directors South Africa does not find application in this instance. As indicated above Mr Becker was appointed as a non-executive director of the Board, his duties are distinct from those of a Company director. In giving his reasons for the discharge, the Minister relied on the comments on the *Energize* article; hosting the meeting with civil society organisations as their representative on the Board; public engagement for the Board without authorisation (delegated authority); bringing the Board and staff moral into disrepute - as the reasons constituting misconduct. As stated previously, the reasons that were proffered in the answering affidavit are impermissible. Misconduct as defined "*on the online dictionary-Merriam-webster.com: 1. Mismanagement especially of government military responsibilities 2: intentional wrongdoing, specifically: deliberate violation of law or standard especially by a government official*." **Emphasis added**. In my view, for purposes of transparency to the public, on acceptance of his position of a non-executive director of the regulator, Mr Becker should have relinquished his position as a spokesperson of KAA for the lines not to be blurred. His activism as the spokesperson of KAA while a seating member of the Board was clearly undesirable in the circumstances. However, the complaints raised about his conduct could have been sorted out by a counselling session and would not have amounted to the alleged misconduct befitting a sanction of discharge.

[93] In *Albutt v Centre for the Study of Violence and Reconciliation and Others,*[24] the issues concerned the power of the President to grant pardon under section 84(2)(i) of the Constitution to people who claimed that they were convicted of offences committed with a political motive. An interdict was brought against the President to prevent him from hearing the cases without the views of the victims. The issue was raised whether the President's power amounted to an administrative decision or an executive decision. It then follows that if the decision is an executive one, it would not be constrained to a need for procedural fairness. The Court found that in order to act rationally and constitutionally, one would have to hear the other side in order to reach a decision on whether the crimes committed were politically motivated.

[94] Similarly, in this matter, the process leading to the discharge of Mr Becker is patently vitiated by procedural unfairness. Fairness dictates that the rules that ensures the principles of natural justice are upheld. Fair procedure requires that decisions should not be taken that plainly have an adverse effect on the rights of the public or class of persons included in the definition of public in PAJA without consulting them first. The Minister bent over backwards to discharge Mr Becker without allowing a fair process to unfold. This Court finds the process leading to his discharge to be procedurally unfair.

[95] In conclusion, the statements made in public, the request for information from the Regulators employees, and the meeting with the members of his constituency cannot be construed as misconduct by Mr Becker as stated in Section 9 (1) (c) of the Act. Even if there was a perception of conflict of interest, in my view, it was capable of being mitigated. It then follows that a sanction of discharge is unsustainable.

[24] [2010] ZACC4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC)

[96] In the result, I make the following order:

96.1 The decision of the Minister taken on 25 February 2022 to discharge Mr Becker with immediate effect is declared unlawful, unconstitutional and invalid in terms of Section 172(1)(a) of the Constitution;

96.2 The reasons and decision of the Minister taken on 25 February 2022 to discharge Mr Becker from his office as a Director of the Board is reviewed and set aside.

96.3 The first, second and third respondent are ordered to pay costs of this application including costs of two (2) Counsel.

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MANTAME J

WESTERN CAPE HIGH COURT