THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

SCA CASE NO: 620/2012

Reportable

In the matter between:

GAUTENG GAMBLING BOARD **FIRST APPELLANT**

SEFAKO PHANUEL PRINCE MAFOJANE **SECOND APPELLANT**

and

MEC FOR ECONOMIC DEVELOPMENT, GAUTENG

PROVINCIAL GOVERNMENT **RESPONDENT**

Neutral Citation: *GGB & another v MEC for Economic Development* (620/2012) [2013] ZASCA 67 (27 May 2013)

Coram: NAVSA and LEACH JJA, WILLIS, SWAIN and SALDULKER AJJA

Heard: 9 MAY 2013

Delivered: 27 May 2013

Summary: Member of the Executive Council for Economic Development, Gauteng Provincial Government dissolving the Gauteng Gambling Board, ostensibly for not complying with an instruction to relocate to a central location to enable efficient service delivery – held that she acted with an ulterior purpose – to pressurise the Board into accommodating, in a building owned by it, a commercial entity named by her – public officials are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law – principle of legality – decision to terminate the membership of all the members of the Board set aside – court expressing displeasure at the high-handed manner in which MEC behaved – courts in future should seriously consider holding such officials personally liable for costs.

ORDER

On appeal from the South Gauteng High Court, Johannesburg (Mathopo J sitting as the court of first instance.)

The following order is made:

(1) The appeal is upheld and the respondent is ordered to pay the costs of the first and second appellants on an attorney client scale.

(2) The order of the court below is set aside and substituted as follows:

'a. The termination on 23 January 2012 by the respondent of the membership of all the members of the Gauteng Gambling Board is declared unlawful and invalid.

b. The respondent is to pay the costs of the application on the attorney and client scale.'

(3) The substituted order set out in para 2 is effective from the date of this judgment.

JUDGMENT

NAVSA JA (LEACH JA, WILLIS, SWAIN & SALDULKER AJJA CONCURRING):

[1] Our country is a democratic state founded on the supremacy of the Constitution and the rule of law. It is central to the conception of our constitutional order that the Legislature, the Executive and Judiciary, in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law. This is the principle of legality, an incident of the rule of law.[1] Public administration must be accountable and transparent. All public office bearers, judges included, must at all times be aware that principally they serve the populace and the national interest. This appeal is a story of Provincial Government not acting in accordance with these principles.

[2] The appeal is by the Gauteng Gambling Board (the Board) and its chairperson Mr Sefako Phanuel Prince Mafojane (Mafojane), against the dismissal by the Gauteng High Court (Mathopo J), of an application to review and set aside the termination by the respondent's predecessor, of the membership of all the members of the Board. The respondent is the present Member of the Executive Council for Economic Development in the Gauteng Provincial Government. His predecessor (the MEC) dissolved the Board, ostensibly on the basis that they had unanimously decided against complying with her instruction to relocate their offices to a central hub in Johannesburg's central business district, in which her Department and associated statutory organs are housed.

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[1] *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458) at para 56 at 399D-E (SA) and para 58 at 400D-E (SA). See also *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para 17 at 687D-E (SA), *Gerber v MEC for Development Planning & Local Government, Gauteng* 2003 (2) SA 344 at para 35.

Essentially, the complaint by the appellants is that the MEC terminated their membership because they had refused to obey her earlier instruction to accommodate, in a building owned by the Board, the offices of a commercial entity named by her. The appellants contended that she had no power to dissolve the Board for the reasons contended by her or indeed on any other basis. The appeal is before us with the leave of this Court. The detailed background is set out in the paragraphs that follow.

[3] The Board is a statutory body established in terms of s 3 of the Gauteng Gambling Act 4 of 1995 (the Act). For some time the Board had conducted its operations from premises which it owned in Centurion. As its staff compliment and accommodation needs grew it was compelled to find accommodation elsewhere. The Board frequently holds public hearings to determine applications for gambling licences and thus has to cater for parking for applicants and others who attend such hearings. At the time that the Board contemplated relocating it considered that operating from Johannesburg would make it more accessible to those whom it serves.

[4] Whilst the Board itself took the decision to relocate, it nevertheless sought and obtained the approval of the MEC's predecessor in that regard. Since the relocation necessarily involved State expenditure the Board had also sought and obtained approval from both the provincial treasury and the MEC's predecessor, to utilize part of the surplus funds it had accumulated to that end. An amount of approximately R101 million was spent on purchasing the land and constructing a building that would meet the Board's specific needs and to enable it to discharge its responsibilities in terms of the Act. The new building to which the Board moved is situated in Bramley, Johannesburg.

[5] The Board had not relinquished ownership of the building it had vacated in Centurion and intended, in due course, to lease it to suitable tenants. At one point

during 2011 the MEC requested the Board to accommodate a commercial entity, styled African Romance, in its new building in Bramley. The building was not designed or able to house more than the Board itself. Thus, the Board found itself unable to accede to the request. It did, however, offer to lease the building it owned in Centurion to African Romance.

[6] In October 2011, in order to resolve the apparent impasse, a meeting was held between Board members, the MEC and members of her department and African Romance. At the end of that meeting the MEC *instructed* the Board to provide African Romance with 1000 square metres of office space at its Bramley Building – an instruction the MEC belatedly acknowledged, in her answering affidavit, to be unlawful. At the conclusion of the meeting the Board was also instructed to relocate to Main Street in the Johannesburg Central business district where the MEC's department is housed.

[7] Board members ultimately took the view that they could only operate and conduct themselves within the parameters of their statutory powers and duties. They considered themselves bound by the prescripts of the Public Finance Management Act 1 of 1999 (the PFMA) and the Treasury Regulations (the Regulations). In relation to the leasing of premises owned by it the Board, as a public institution, would have to follow prescribed procedures and would require to be financially prudent and accountable in incurring any expense not budgeted for. All the more so, because it had recently expended more than R101 million of public money. I intend, later in this judgment, to deal with the relevant provisions of the PFMA and the Regulations.

[8] At the time the Board took the view articulated in the preceding paragraph, it also adopted the position now recanted, that if the MEC delegated her power to them they would be enabled to conclude a lease agreement with African Romance, but

nevertheless thought it necessary to get approval from the Provincial Treasury. The Board would at that time have preferred to lease its Centurion building to African Romance rather than attempt to accommodate it in Bramley. The Board ascertained that there were other premises available to African Romance in Bramley and informed the MEC about this in a memorandum to her head of department (HOD). The memorandum also set out the Board's views referred to in para 7.

[9] I consider it necessary to quote in full the HOD's written response:

'Your memorandum dated 17 October 2011 is hereby acknowledged.

As you are aware EXCO recently took a decision to rationalize agencies. As a result of this decision all Agencies reporting to the Department of Economic Development were instructed to move to 124 Main Street, Johannesburg. The decision to move all Agencies were considered in line with and adherence to all legislative requirements, amongst others the Public Finance Management Act, 1999 (PFMA) and Treasury Regulations.

The Gauteng Gambling Board is listed as a 3 C Public Entity in terms of the PFMA. Treasury Regulations and more specifically Regulation 19.2 define a trading entity as an entity operating within the administration of a department. It is implied by the provisions of Regulation 19.2 that the Member of the Executive Council (MEC) or Head of Department (HOD) can request or instruct Agencies through the Board or CEO of the relevant Agency to adhere to and implement operational decisions taken by EXCO which might affect them. In addition to the above the Gauteng Gambling Act 2001 also explicitly gives the MEC certain powers to instruct the Board in writing to perform certain functions.

With reference to the meeting held on 11 October 2011 at the Hyatt Hotel and your subsequent memorandum alluded to above the Department of Economic Development (DED) is of the view that the instruction by the MEC to the Gauteng Gambling Board (GGB) to provide accommodation to Wakegem (Pty) Ltd t/a African Romance and for GGB to move its place of business to 124 Main Street, Johannesburg, is of an operational nature and does not require the involvement or decision making of the Board.

In light of the above and in the spirit of good governance by the instruction of the MEC, you are requested to immediately start with the process of identifying adequate office space for GGB at

124 Main Street in order for GGB to be able to relocate by no later than 31 December 2011. The CEO is also requested to immediately identify, secure and enter into an arrangement with African Romance in respect to them leasing the building from GGB.

Should a need arise to discuss this matter further, please do not hesitate to call my office.'

The reference to EXCO is a reference to the Executive Council of the Gauteng Provincial Government.[2]

[10] The Board predictably took legal advice on the contents of the HOD's letter, as a result of which it decided to refuse to comply with the MEC's instructions. There were threats by the MEC, reported in the media, that the Board was to be dismissed in its entirety. Subsequently, the MEC telephoned the chairperson of the Board and informed him that she expected the entire Board to resign. The Board unanimously refused to do so. On 16 January 2012 the MEC wrote a letter to each member of the Board requesting reasons as to why she should not terminate his or her membership of the Board. They were given two days – until 16h30 on 18 January 2012 – to respond. These actions moved the Board, on 18 January 2012, to launch an urgent application in the South Gauteng High Court for an interim interdict, inter alia, to prevent the MEC from carrying out her threat to dissolve the Board. After the application was launched and, as it now appears, before the MEC became aware of it she purported, on 23 January 2012, to dismiss the entire Board. The material parts of the letter purporting to terminate the membership of all the members of the Board, is reproduced hereunder:

'In my letter addressed to you dated the 10th January 2012, in my capacity as the responsible Member for the Department of Economic Development and in exercise of my powers under Section 8(2) of the Gauteng Gambling Act 4 of 1995 I invited you to provide reasons, if any, why your membership on the board of the Gauteng Gambling Board (GGB) should not be terminated.

[2] Executive Councils are established in terms of s 132 of the Constitution which provides:
'(1) The Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature.
(2) The Premier of a province appoints the members of the Executive Council, assigns their powers and functions, and may dismiss them.'

For amplification, I record that the decision of the Gauteng Executive Committee to rationalise the Gauteng Provincial State Owned Agencies (GPSOA), which includes the Gauteng Gambling Board, was influenced inter alia by the intention of the Provincial Government to facilitate service delivery in having the identified GPSOA operating in the same premises.

In a letter dated the 18th January 2012 and in the letter addressed to me purportedly signed by the Chairperson, Mr SP Mafojane of the Gauteng Gambling Board it has been communicated to me that Mr Mafojane is mandated to respond to my letter dated the 10th January 2012 that you elected not to furnish me with any reasons but instead to state that, "those reasons are contained in the court papers", which papers have not been furnished to me.

In the circumstances I hereby terminate your membership of the Gauteng Gambling Board with immediate effect.'

[11] The application for the interim interdict was thwarted by the MEC's termination of the membership of all the members of the Board, which was effected after the litigation was launched but before the matter was heard. On 26 January 2012 when the urgent interdict and an associated application by the Board for final relief to set aside the terminations effected by the MEC were to be heard, the parties agreed that the following order should be issued by the High Court:

'1. The decision of the respondent to terminate the membership of the members of the Board communicated on 23 January 2012 is hereby stayed.

2. The parties are directed to make every reasonable effort within the meaning of the Inter-governmental Relations Framework Act, 1995 to settle the dispute in this matter.

3. Each party to pay its own costs.

4. The proceedings are adjourned sine die.'

[12] An attempt to resolve matters by way of mediation failed.[3] This resulted in, the approach to the High Court by way of an application for final relief in the following terms:

'4. Setting aside the purported termination on 23 January 2012 by the Respondent of the membership of the members of the Gauteng Gambling Board ("the Board").

5. Interdicting the Respondent from unlawfully interfering with the operations of the Applicant herein.

6. Interdicting the Respondent from appointing an administrator pending the finalization of the review application that was launched in this Court on 18 January 2012.

7. Alternatively to paragraph above, and in the event that an administrator has been appointed, setting aside that appointment forthwith.'

[13] The basis of the Board's urgent and later application in the court below was that it has statutory obligations and powers within which it is constrained to operate. It asserted that it was for it as a Board to make the decision on where it is to be located and when state expenditure is to be incurred it cannot act without considering its obligations in terms of the PFMA and the Regulations. The Board adopted the position that the MEC was ignoring the fact that it was obliged to follow certain prescribed procedures before it could sell or lease immovable property – in line with the Regulations. Furthermore, the Board took the view that since it had recently acquired the building it occupied, at great expense to the State, it would be acting in breach of its statutory and constitutional obligations to incur further relocation expenses, which would

[3] Section 41 (3) of the Constitution provides:
'An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a Court to resolve the dispute.'
Section 40 of the Intergovernmental Relations Framework Act states:
'40 All organs of state must make every reasonable effort –
(a) To avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and
(b) To settle intergovernmental disputes without resorting to judicial proceedings.'
Section 45 of the same Act states:
'45(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.'

be a further unwarranted drain on State finances. The Board feared that in complying with the MEC's instructions it might also incur criminal liability and be liable to statutory sanction in relation thereto. The Board considered that the MEC had no power to act in the manner complained of and more particularly that she could not so act on the postulated basis. In addition, the Board contended that the terminations were effected in a manner that was contrary to the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) both substantively and procedurally. Ultimately, the Board's position was that the MEC had acted unlawfully in terminating the membership of all its members.

[14] In resisting the relief sought by the Board and Mafojane, the MEC stated that her decision to dissolve the Board was that of EXCO, acting through her. In this regard she relied on the provisions of s 125(2)*(d)* and *(e)* of the Constitution, the material parts of which are as follows:

'The Premier exercises the executive authority, together with other members of the Executive Council by –

(a) . . .
(b) . . .
(c) . . .
(d) Developing and implementing provincial policy;
(e) Co-ordinating the functions of the provincial administration and its departments . . .'

[15] In essence the MEC contended that the provincial executive had taken the decision that statutory agencies, like the Board, linked to her department were to be located in a central hub to facilitate the functions of the Provincial Administration and that in doing so the executive had acted within its powers to develop and implement policy. It was contended by the MEC that the refusal by the Board to relocate frustrated the mandate of the provincial legislature and the executive and militated against service delivery.

[16] The MEC pointed out that eight other linked agencies namely Blue IQ, The Gauteng Economic Development Agency, Gauteng Enterprise Propeller, Gauteng Film Commission, Gauteng Tourism Authority, Cradle of Human Kind World Heritage Site and Dinokeng and The Liquor Board have all now moved into the building where her office is located.

[17] The MEC took the view that the decision to terminate the membership of the members of the Board was for 'good reasons' within the meaning of that expression in ss 8(2) and (3) of the Act, the provisions of which will be dealt with in due course.

[18] In her opposing affidavit dated 25 January 2012, the MEC revealed for the first time that subsequent to the purported dissolution of the Board she had appointed an administrator, which in her view was within her powers as set out in s 18(1) of the Act.[4]

[19] The MEC denied that she had failed to afford board members an opportunity to be heard. In this regard she referred to her letter mentioned in para 10 above. Far from being apologetic on this aspect, the MEC was emphatic that board members were to blame for failing to engage with her and make representations concerning her intended termination of their membership.

[20] In relation to her prior instruction that the Board accommodate African Romance, the MEC stated the following:

[4] Section 18(1) of the Act reads as follow:
'The responsible member may, after consultation with the Executive Council, by notice in the Provincial Gazette, appoint an administrator to perform the functions and exercise the powers of the Board, either in whole or in part, excluding the granting and revocation of licenses, if the responsible member is of the opinion that there is good cause to do so.'

‘I am advised and now accept that I or the Head of Department could not instruct the Board to conclude a lease agreement with any entity. The mistaken view was more intended to ensure that there are no financial losses as a result of the Board moving its operations to the City Centre. It was a view purely intended to mitigate any possible financial loss.’

[21] In respect of contentions by the Board and Mafojane that they were obliged by statutory prescripts, more particularly the PFMA and the Regulations, to be financially prudent and accountable and therefore not liable to follow her instructions to relocate, the MEC, in her answering affidavit, pointedly declined to join issue. Furthermore, the MEC did not join issue with the Board that the power to lease a building owned by it fell squarely within its domain.

[22] As stated above, the Board in motivating for interim relief, had referred to a newspaper article by the Mail and Guardian. Importantly, in that article, reference is made to an e-mail apparently sent by the MEC to the Board’s Acting Chief Executive in November 2011, in which she was alleged to have stated the following:

‘I sense that you want to use every trick in the book not to move offices. May I suggest that you speed the process of moving before I lose my cool with you. I want to reiterate what I said to you over the phone while I was overseas that the board has no role nor responsibility on this matter and if they want to get involved in admin work I will remove all of the board ASAP. If you have serious problems with my decision please tender your resignation . . . ‘

In the founding affidavit Mafojane referred to the apparent existence of the e-mail as an indicator that the MEC, whatever the cost, was intent on dissolving the Board, which she considered to be obstructive. The MEC’s response was that she did not intend to respond to newspaper reports. Thus she did not join issue on the existence of the e-mail. It is common cause that subsequent to the newspaper article the MEC phoned Mafojane requesting the Board to resign.

[23] It is unchallenged that on Monday, 16 January 2012, at a meeting of Chief Executive Officers of provincial entities over which the MEC held oversight she told them that she intended to fire the Board and appoint an administrator. It will be recalled that on the same day the MEC wrote the letter referred to in para 10.

[24] It will also be recalled that in motivating her instruction for the Board to relocate the MEC relied on a decision made by EXCO. The latter took the decision based on a document entitled *Business Case for [Department of Economic Development] Agencies Migration* compiled by the MEC's department. Significantly, that document provides for the relocation of agencies which apparently are linked to the department, namely the Gauteng Film Commission, The Gauteng Tourism Authority, Cradle of Human Kind, Gauteng Economic Development Agency, Gauteng Enterprise Propeller and Blue IQ. That document was very specific in dealing with the accommodation needs of the stated related agencies and the budget was specific and limited to those agencies. Although the MEC referred to the relocation of the liquor board being part of the EXCO decision, its relocation was not motivated in the document. It is worth noting that the named agencies all have a statutory origin and the parties are agreed that they are all subject to the PFMA. No particulars were supplied of the circumstances under which *they* took their decisions to relocate and of the extent to which they complied with their statutory obligations, either in respect of the statute in terms of which they were established or the PFMA.

[25] Before the hearing of the present appeal we received an application for leave to intervene on behalf of persons who were purportedly appointed as a 'new Board' by the Respondent, subsequent to the decision of the court below, but pending the hearing before us. The purpose of the application for leave to intervene was stated by the principal deponent, Mr Bally Paul Makgweba Chuene (Chuene), formerly the administrator, appointed by the MEC, to be as follows:

'I proceeded to serve as the Administrator from [18 May 2012] . . . .

13.4 Accordingly during this period, in my capacity as the Administrator, I made a wide range of decisions affecting third parties. These included:

13.4.1 More than 150 decisions concerning the amendment or variation of gambling licences, in order to accommodate (for example) changes in shareholding or changes in gaming positions;

13.4.2 Decisions approving expenditure, for example for salaries and performance bonuses; and

13.4.3 Decisions concerning the appointment of staff.

13.5 It is, I submit, imperative that the validity of these decisions not be imperilled by any order given by this Court in the pending appeal.'

[26] I shall refer to the persons who sought leave to intervene as the purported successors. In the affidavit in respect of the application for leave to intervene they were adamant that they did not seek to become involved in the question of whether the MEC's decision to terminate the Board was lawful. They adopted no view in this regard and instead confined themselves to the question of the remedy (if any) to be granted in the event that this Court upheld the Board's submissions.

[27] A useful starting point in resolving the dispute between the parties is a reference to the material parts of the Act in terms of which the Board was established. The Act regulates and controls gambling within the province. Section 3 establishes the Board as a juristic person. Section 4 stipulates the functions and powers of the Board, namely:

'(a) to oversee and control gambling activities in the Province;

(b) to advise and make recommendations to the responsible Member on matters in connection with the licensing of persons to conduct, and the regulation and control of, gambling in the Province, either of its own accord or at the request of the responsible Member; and

(c) to exercise such powers and perform such functions and duties as may be assigned to the board in terms of this Act and any other law.'

[28] In terms of s 4A the MEC 'must', for each financial year after consulting the Board, identify the Board's objectives and outcomes and determine performance measures and indicators for assessing the Board's performance in relation thereto. The Board itself is obliged to submit proposals to the MEC in relation to matters referred to above by no later than nine months prior to the start of each financial year or on a date otherwise prescribed. The constitution of the Board is dealt with in s 5 of the Act. The persons identified as comprising the Board are intended to achieve a balanced board with the necessary skills and expertise to meet their needs.

[29] Sections 8(2) and (3) under which the MEC purported to act reads as follows:

'(2) 'The responsible Member may, after giving the board member concerned an opportunity to be heard and after consultation with the Standing Committee of the Provincial Legislature responsible for economic affairs, terminate the membership of any member of the board if good reasons exist for doing so.

(3) Without limiting the scope of subsection (2), the reasons contemplated in subsection (2) may relate to –

(a) the manner in which the Board has performed its functions or exercised its powers.'

[30] Section 11 deals with the manner in which the Board is to hold meetings and take decisions. Section 12 provides for the staff of the Board, including the Chief Executive Officer. Section 14 allows for committees to be appointed to assist the Board. Section 15 permits the Board in meeting its objectives to call on expert and other assistance. Importantly, s 16(1) provides:

'The Board shall, subject to subsection (2), function in a transparent and open manner.'

This provision is made subject to non-disclosure of confidential and other information which for present purposes require no further exploration.

Section 17 deals with how the funds of the Board are to be acquired and dealt with. Section 18 is of special importance in that it deals with the accounting responsibilities of the Board. Section 18(1) expressly makes the Board an accounting authority subject to the provisions of the PFMA. Section 18(4) provides that the Board must:

'*(a)* exercise the duty of utmost care to ensure reasonable protection of the assets and records of the board;

(b) act with fidelity, honesty, integrity and in the best interest of the board in managing the financial affairs of the board;

(c) on request, disclose to the responsible Member or the provincial legislature, all material facts, including those reasonably discoverable, which in any way may influence the decisions or actions of the responsible Member or provincial legislature; and

(d) seek within the sphere of influence of the board, to prevent any prejudice to the financial interest of the state.'

[31] Section 18B entitles an MEC, if he or she is satisfied that the Board has failed to perform any function or exercise any proposed power imposed on it in terms of the Act or to comply with its strategic planning, to instruct the Board to perform the functions or exercise the power concerned, which must be specified. The notice for such instructions must set out the reasons therefor and the steps that must be taken and the period within which the instruction must be complied with. Failure by the Board to comply would have enabled an MEC to take further steps.

[32] If an individual staff member is involved, disciplinary steps could ultimately be compelled by the MEC[5]. If an individual board member is involved, that board member's membership may ultimately be terminated by the MEC[6]. If an entire board is involved,

[5] Section 18B(6).
[6] Section 18B(7).

the Board may in its entirety be dissolved by the MEC[7]. In all of these instances, in terms of s 18B(7), there has to be 'good reasons' for the MEC's actions.

[33] In the event of the entire board being dissolved, s 18C(1) enables the MEC to appoint an administrator after consultation with EXCO. The administrator is empowered to perform the functions and exercise the powers of the Board, excluding the granting and revocation of licences.

[34] As can be seen from all these provisions, the Board has a regulatory, statutory framework to which it owes its existence and from which its powers and obligations are derived. Put simply, even though the MEC has oversight and can take steps to ensure that the Board conducts its operations in accordance with the provisions of the Act, the Board nevertheless has an independent statutory existence with its members being obliged to comply with their obligations in terms of the Act.

[35] Thus, the Board is subject to the provisions of the PFMA which the Act makes expressly applicable. It is to those provisions that I now turn, the material parts of which are set out in the paragraphs that follow.

[36] Section 6 obliges the National Treasury inter alia, to exercise control over the implementation of an annual national budget, including any adjustment budgets. Furthermore, the National Treasury must monitor implementation of Provincial Budgets and promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.

[7] Section 18B(7).

[37] Section 18 imposes obligations on the Provincial Treasury to exercise control over the implementation of provincial budgets as well as promoting and enforcing transparency and effective management in respect of revenue, expenditure, assets and liabilities of provincial departments and provincial public entities. Section 21 obliges the provincial treasury to enforce compliance with the provisions of s 226 of the Constitution. Section 226 of the Constitution provides that money may only be withdrawn in terms of an appropriation by a provincial Act or as a direct charge against the Provincial Revenue Fund when it is provided for in the Constitution or a Provincial Act.

[38] Section 34 deals with unauthorized expenditure and the circumstances and processes required for it to be subsequently ratified. Section 36 obliges every department and every constitutional institution to have an accounting officer. Section 38 obliges accounting officers to ensure that represented institutions maintain effective, efficient and transparent systems for financial and risk management and internal control. In addition accounting officers are required to take effective and appropriate steps to prevent unauthorized, irregular and fruitless and wasteful expenditure as well as losses resulting from criminal conduct.'

[39] It is not my intention to deal in any detail with the Regulations. The Regulations published in terms of s 76 of the PFMA[8], inter alia, contain provisions to prevent financial misconduct by officials and employees of all departments and constitutional institutions. Furthermore, they are designed to ensure budgetary controls to prevent unauthorised, irregular and wasteful expenditure. They also deal with asset and liability management. Accounting officers have a responsibility to ensure that institutions they represent implement systems and procedures when dealing with third parties that are open, competitive and transparent and that provide safeguards against favouritism, improper practises and opportunities for fraud, theft and corruption. Parts of the regulations, as can be expected, echo the provisions of the PFMA.

[8] No. R. 556 31 May 2000 (as amended).

[40] The Board was therefore obliged and well within its rights to be concerned about fiscal prudence and accounting responsibility in terms of the PFMA, the Regulations and the Act. Indeed, it is startling that the MEC, in issuing her instruction for the Board to accommodate African Romance and to relocate and in dealing with the Board's resistance, showed scant concern, if any, in this regard.

[41] Counsel representing the MEC was rightly constrained to concede that the sequence of events, the written and verbal communications between the Board and the MEC and her department as well as other utterances and documents, led to the ineluctable conclusion that the MEC was motivated to act in the manner complained of by an ulterior purpose, namely, to compel compliance with the prior instruction to accommodate African Romance.

[42] Initially the MEC solicited the Board's assistance in housing African Romance. Her request then turned into an instruction. Opposition to the instruction led to further pressure being applied by the MEC. Persistent opposition by the Board led to the drastic, unwarranted act of dissolution.

[43] The MEC then instructed the Board to move to a central location, ostensibly because this is what EXCO had decided was the best means of achieving administrative efficiency and service delivery. This clearly was contrived. The Business Plan on which the MEC relied does not provide a basis for the instruction or the subsequent dissolution of the Board. On the contrary, as pointed out above, the Board was never included in that plan as an 'agency' destined for relocation. It, in any event, is questionable whether an instruction without more to relocate offices is rightly within the MEC's powers.

[44] The MEC's reliance on s 8 was misplaced. That section was intended primarily to deal with the disqualification of individual members of the Board. First, on the basis set out in s 6 of the Act, all of which is inapplicable[9]. Second, a member of the Board is required to vacate office if he or she has been absent for more than two consecutive meetings of the Board without leave of the Chairperson. In these instances the MEC, in terms of s 8(2), may terminate the membership of any member of the Board. Admittedly, s 8(2) is worded widely, empowering the MEC to terminate the membership of any member of the Board, if 'good reasons' exist to do so, as is the case with s 8(3), which provides that the 'reasons' contemplated in s 8(2) may relate to 'the manner in which the Board has performed its functions or exercised its powers'. In the scheme of the Act, s 8 deals with instances unrelated to the facts of this case. They fall to be dealt with in terms of another section of the Act.

[45] If, as alleged, the MEC had been dealing with a truly errant board, the applicable statutory provision would have been s 18B which, as appears above, provides that the MEC may issue an instruction to a board failing to perform any function or exercise any power imposed on it by the Act. Section 18B(7) sets out the consequences for failure of the board to comply with such an instruction, and reads as follows:

'The responsible Member may at any time terminate the term of office of any member of the Board or the *entire* Board if in the responsible Member's opinion there are good reasons for doing so.' (My emphasis)

It is the only provision of the Act that deals with the dissolution of the board en bloc. The similarity between s 18B(7) and ss 8(2) and (3) is that, in respect of action taken under either section, 'good reasons' have to exist.

[9] The disqualifications there relate to issues personal to the individual disqualified, such as citizenship or being a member of a political party or having an interest in gambling activity.

[46] More than six decades ago this court in *Van Eck N.O. and Van Rensburg N.O. v Etna Stores* 1947 (2) SA 984 (A) said the following:

'For to profess to make use of a power which has been given by statute for one purpose only, while in fact using it for a different purpose, is to act *in fraudem legis*, construing that term in the more restricted manner adopted by the majority of this Court in the case of *Dadoo Ltd. v Krugersdorp Municipal Council* (1920, A.D. 530) (see also *Commissioner of Customs & Excise v. Randles Bros. & Hudson Ltd*. (1941, A.D. 369)). Such a use is a mere *simulatio* or pretext. . . . And I should add that, of course, if the person exercising the power avowedly uses it for some purpose other than that for which alone it has been given, he acts simply *contra legem*: where, however, he professes to use it for its legitimate purpose, while in fact using it for another, he acts *in fraudem legis* (*D*.1.3.29, as explained in *Dadoo's* case, and compare *In re Marsden's Trust* (*supra*)).'

[47] In present-day jurisprudence, acting with an ulterior motive or purpose, is subsumed under the principle of legality[10]. Section 6(2)(*e*)(ii) of PAJA makes administrative action taken for an ulterior purpose or motive subject to review. The classification of an action taken by a member of government is immaterial. As stated at the commencement of this judgment, the Legislature, the Executive and Judiciary, in every sphere, are constrained by the principle that they may exercise no power and perform no function beyond that conferred on them by law.

[48] Having regard to the concession rightly made by counsel on the respondent's behalf and taking into account the manner in which the MEC conducted herself in relation to the Board, it is clear that she resorted to the stratagem of employing a power of regulation for an ulterior purpose, namely, to pressurise the Board into accommodating African Romance. She also failed to consider the confines of the statutory provisions on which she relied and did so without due regard for the

[10] See *Fedsure Life Assurance* op cit paras 56, 58, *President of the RSA v SARFU* 2000 (1) SA (CC) para 148, Cora Hoexter *Administrative Law in South Africa* 2nd ed at para 5.7 pages 307-310 and the further authorities there cited.

consequences on the fiscus and on transparent and accountable governance. Her decision to dissolve the Board falls to be set aside. It is therefore not strictly necessary to debate the correctness of the Board's contention that they were not afforded an opportunity to make representations to the MEC concerning her threat to dissolve the board. It is, however, worth noting that her motivation and mind-set was such that it is clear that she had no intention of being swayed from terminating their membership. To sum up, the MEC had acted beyond her legal powers and contrary to the principle of legality.

[49] There are two further aspects that require brief attention. First, it is necessary to say something to demonstrate the court's displeasure at the manner in which the MEC behaved, over and above the manner in which she terminated the membership of all the members, more particularly her conduct subsequent to the litigation being launched. It is true that the Board is bound by the MEC's denial that she had not actually seen the court papers for a few days after they had been served. Her behaviour and that of her department was strange indeed. Her HOD knew of the threat of litigation and knew of the litigation once it had occurred. The application papers were not immediately brought to the MEC's attention. This is strange behaviour by a department which primarily should be concerned about the proper functioning of the Board. One is driven to the conclusion that it was convenient for the MEC not to have sight of the application and supporting documents. The MEC appointed an administrator almost immediately after dissolving the Board. The respondent, whilst not actively associating himself with the MEC's prior conduct, nevertheless went ahead and appointed the purported successors. This was done even though the present appeal was pending.

[50] More than a century ago Mason J in *Li Kui Yu* 1906 TS 181 said the following:

'That being so, it is impossible for me to pass over without some notice what is, I consider, an offence of a serious kind, namely that of interfering with the administration of justice by taking an action which is bound to prevent the Court granting a remedy.'

[51] The decision in *Li Kui Yu* was qualified in *Roberts v Chairman, Local Road Transportation Board* 1980 (2) SA 472 (C) at 488 on the basis that, for an act to constitute contempt, it was necessary that there be an intention to defeat the course of justice.

[52] Our present constitutional order is such that the State should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights. In *Tswelopele Non-Profit Organisation v City of Tshwane Municipality* 2007 (6) SA 511 at para 17, this court stated the following:

'This places intense focus on the question of remedy, for though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in *Fose v Minister of Safety and Security*) "without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced":

"Particularly in a country where so few have the means to enforce their rights through the Courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated."'

[53] At para 27 of the same case, the following appears:

'Vindication, Kriegler J noted, "recognises that a Constitution has as little or as much weight as the prevailing political culture affords it." Essentially, the remedy we grant should aim to instil recognition on the part of the governmental agencies that participated in the unlawful operation that the occupiers, too, are bearers of constitutional rights, and that official conduct violating those rights tramples not only on them but should bear the instructional message that respect for the Constitution protects and enhances the right of all. It is a remedy special to the Constitution, whose engraftment on the *mandament* would constitute an unnecessary superfluity.'

[54] In the present case the best that can be said for the MEC and her department is that their conduct, although veering toward thwarting the relief sought by the Board, cannot conclusively be said to constitute contempt of court. However, that does not excuse their behaviour. The MEC, in her responses to the opposition by the Board, appeared indignant and played the victim. She adopted this attitude whilst acting in flagrant disregard of constitutional norms. She attempted to turn turpitude into rectitude. The special costs order, namely, on the attorney and client scale, sought by the Board and Mafojane is justified. However, it is the taxpayer who ultimately will meet those costs. It is time for courts to seriously consider holding officials who behave in the high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers. Regrettably, in the present case, it was not prayed for and thus not addressed.

[55] Lastly, it is necessary to deal with the concern expressed by the purported successors, namely the danger of not preserving decisions made by them and the administrator in pursuance of the Board's statutory objectives. This court, particularly having regard to the circumstances of this case, will not shrink from granting the Board consequential relief following on the declaration of the invalidity of the MEC's decisions to dissolve the Board. The purported successor's concern can be met by limiting the retrospective effect of the declaration of invalidity.[11] The effect of the order that follows is to render the installation of the purported successors invalid whilst preserving decisions by them and the administrator, which were otherwise properly taken in pursuit of the Board's objectives.

[56] The following order is made:

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[11] See s 172(1)*(b)* of the Constitution. In relation to PAJA, see s 8 of PAJA and *Bengwenyama Minerals v Genorah Resources* 2011 (4) SA 113 at para 82.

(1) The appeal is upheld and the respondent is ordered to pay the costs of the first and second appellants on an attorney client scale.

(2) The order of the court below is set aside and substituted as follows:

‘a. The termination on 23 January 2012 by the respondent of the membership of all the members of the Gauteng Gambling Board is declared unlawful and invalid.

b. The respondent is to pay the costs of the application on the attorney and client scale.’

(3) The substituted order set out in para 2 is effective from the date of this judgment.

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MS NAVSA

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	V Soni SC (with him K Millard)
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FOR INTERVENING PARTY:	G J Marcus SC