THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 783/2023

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL FOR ECONOMIC DEVELOPMENT, GAUTENG	**FIRST APPELLANT**
GAUTENG GROWTH AND DEVELOPMENT AGENCY SOC LTD	**SECOND APPELLANT**

and

SIBONGILE VILAKAZI	**FIRST RESPONDENT**
THANDIWE GODONGWANA	**SECOND RESPONDENT**
LENTSWE MOKGATLE	**THIRD RESPONDENT**
DAVID MAIMELA	**FOURTH RESPONDENT**
THEMBISA FAKUDE	**FIFTH RESPONDENT**

Neutral citation: *MEC for Economic Development, Gauteng and Another v Sibongile Vilakazi and Others* (783/2023) [2024] ZASCA 126 (17 September 2024)

Coram: DAMBUZA, MOCUMIE, KGOELE and SMITH JJA, and DOLAMO AJA

Heard: 23 August 2024

Delivered: 17 September 2024

Summary: Civil procedure – whether requirements for interim interdict satisfied – appealability of interim order – order has final effect and disposed substantial portion of disputes – mootness – whether judgment will have practical effect.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Nyathi J, sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel, where so employed.

2 The order of the high court is set aside and replaced with the following order:

'(a) The application is dismissed.

(b) Costs shall follow the result of the relief sought in Part B of the notice of motion.'

JUDGMENT

Smith JA (Dambuza, Mocumie and Kgoele JJA, and Dolamo AJA concurring):

Introduction

[1] This is an appeal against the judgment of the Gauteng Division of the High Court, Pretoria (the high court), delivered on 18 May 2023 and granting the respondents interim relief pending the finalisation of a review application. The first appellant is the Member of the Executive Council for Economic Development, Gauteng, (the MEC). The second appellant is the Gauteng Growth and Development Agency (Proprietary) Limited (the Agency), a company established in terms of the Gauteng Growth and Development Agency Act (Proprietary) Limited Act 5 of 2003 (the Act). Its objects are, inter alia, to promote economic growth, enable private sector investment and to create sustainable employment opportunities in the Province.[1] The respondents were members of the Agency's board of directors until 24 March 2023, when the MEC, being of the view that the relationship between her and board members had irretrievably broken down, terminated their directorships and dissolved the board.

[2] Aggrieved by the MEC's decision, the respondents brought an application, inter alia, for an order reviewing and setting aside the decision. Their notice of motion was

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[1] Section 3 of the Gauteng Growth and Development Agency (Proprietary) Act 5 of 2003.

structured in two parts, with Part A, inter alia, seeking the suspension of the MEC's decision pending the finalisation of the relief sought in Part B, which is the review application.

[3] The high court (per Nyathi J) found for the respondents and ordered that: (a) the MEC's decision to terminate the directorships of the respondents was suspended with effect from 24 March 2023; (b) the respondents were reinstated as board members with effect from the same date; and (c) the MEC was interdicted from appointing any board members in substitution of the respondents. The high court also ordered the appellants, jointly and severally, to pay the respondents' costs on the attorney and client scale. The punitive costs order was based on a finding that, in dissolving the board, the MEC was motivated by ulterior purposes.

[4] The appellants contend that the high court failed to consider properly whether the respondents had established the legal requirements for interim relief and has impermissibly purported to pronounce finally on issues which fell for decision in the review application. They appeal against the order with the leave of the high court.

The factual background

[5] The following material facts are common cause. On 1 October 2021, the MEC's predecessor, Mr Parks Tau (Mr Tau) appointed the respondents as members of the Agency's board of directors for a period of three years in terms of s 8 of the Act. That section provides that the MEC must appoint a board of directors, consisting of not less than nine and no more than 12 members. A board member's term of office is three years, and he or she is eligible to be reappointed for another term. In terms of s 8 of the Act, a board member may, however, not serve more than two consecutive terms. The MEC also appointed the first respondent as the Chairperson of the board. In terms of s 8(2) of the Act, the MEC also has the power to appoint the Agency's Group Chief Executive Officer (the GCEO).

[6] By the time that the MEC had replaced Mr Tau as the responsible member of the executive council, the board had already commenced the recruitment process for the appointment of a GCEO. That process was purportedly undertaken in terms of the department's 'Transversal Policy on Recruitment and Secondment' and overseen by

the Head of the Department of Economic Development. Upon completion of the recruitment process, the board submitted a report to Mr Tau recommending the appointment of the acting GCEO, Mr Simphiwe Hamilton (Mr Hamilton), on a five-year fixed term contract.

[7] Mr Tau concurred with the board's recommendation and, on 27 September 2022, he prepared a memorandum to the executive council recommending that Mr Hamilton be appointment as GCEO. However, before he could present the memorandum to the executive council, the Premier announced a reshuffling of the executive council. Mr Tau was removed as MEC of Economic Development and replaced by the current MEC.

[8] On 10 November 2022, the first respondent, in her capacity as Chairperson of the board, met with the MEC to introduce herself, and to brief her regarding organisational strategy and the profile of the preferred candidate for appointment as the new GCEO. At that meeting, the MEC informed the first respondent that she already had a person in mind for the position of GCEO. According to the MEC, that person would assist her in areas where she considered herself challenged, such as interacting with investors. The MEC's preferred candidate was not amongst those who had been interviewed and shortlisted by the board.

[9] The MEC thereafter sent the profile of her preferred candidate to the first respondent by WhatsApp. The latter, being of the view that the candidate did not have the requisite skills and experience, informed the MEC that her preferred candidate did not meet the minimum requirements for the position. The MEC then undertook to arrange for her and the first respondent to meet with her preferred candidate, whereafter they would agree on the way forward. The MEC, however, never arranged the meeting but instead met separately with Mr Hamilton. She told Mr Hamilton that even though he had been recommended by the board, she preferred the recruitment process to start afresh and that he was welcome to apply for the position.

[10] Being of the view that the recruitment process was a matter jointly for the board and the MEC, the board took offence at the MEC's intervention and, on 18 January 2023, wrote to her seeking her concurrence in Mr Hamilton's appointment.

The MEC responded on 3 February 2023, expressing the view that the board's submission was incomplete since it did not address the risk posed by the former GCEO's legal challenge to his dismissal. The board replied that in its view there was no such risk since the position was vacant and had to be filled to ensure organisational stability.

[11] The letter that appeared to have precipitated the breakdown in the relationship between the board and the MEC was penned by the latter on 22 February 2023. In that letter the MEC, inter alia, asserted her statutory powers, reminding the board that the power to appoint the GCEO vested in her, both in terms of the Act and the Memorandum of Incorporation. The MEC also took the board to task for its attempts to enlist the concurrence of the Provincial Government (as shareholder) and stated that in terms of the enabling legislation, she alone exercised the powers of the shareholder.

[12] She also stated that she would 'be restarting the process to appoint a GCEO in line with s 8 of the GCDA Act'. She requested the board to nominate a person to serve on the recruitment panel which will be responsible for shortlisting, interviewing and recommending a person to be appointed as the GCEO.

[13] The board replied to that letter on 25 February 2023, apologising if the tone of its letter 'came across as disrespectful, undermining or an act of defiance'. It also stated that the board members had deliberated about the matter and resolved to meet with her to discuss the differences regarding 'interpretation and implications' of her instruction.

[14] The MEC's response, on 24 February 2023, was firm and categorical. She was of the view that there was nothing to discuss since the relevant statutory provisions are unambiguous regarding her powers to appoint the GCEO. She insisted that her instructions were therefore lawful. She accordingly refused the request for a meeting and asked the board members to provide written reasons, on or before 6 March 2023, why her lawful instructions could not be executed by the board.

[15] After writing to the MEC to explain that the board members' conduct should not be construed as an act of defiance against the MEC but merely an attempt to clear misunderstandings between them, the board again wrote to her on 13 March 2013, invoking the dispute resolution process provided for in the Shareholders Compact. While the MEC initially indicated her willingness to engage in the process, she wrote to the board members, on 22 March 2023, informing them that after having obtained legal advice, she decided to withdraw the letter wherein she indicated her willingness to submit to the dispute resolution process. She further informed them that they were required to submit written reasons, by 17h00 on 23 March 2023, why they should not be removed as board members.

[16] Only the first, fourth and fifth respondents submitted representations before the deadline. On 24 March 2023, the MEC wrote to them informing them that she was of the view that there had been a breakdown of trust, the relationship between her and the board was no longer functional and she had therefore decided to terminate their directorships. She also wrote to the second and third respondents on the same day confirming that they had failed to submit representations and informing them of the termination of their directorships.

[17] It is against the backdrop of the foregoing factual matrix that this Court must consider the following issues:
(a) Is the order of the high court a 'decision' as contemplated in terms of s 16(1)*(a)* of the Superior Courts Act 10 of 2013 (the Superior Courts Act), in other words, is the order appealable?
(b) Has the appeal been rendered moot because the respondents' terms of office as board members will expire on 31 September 2024?
(c) And, depending on the findings in respect of (a) and (b), whether the respondents satisfied the requirements for an interim interdict.

Appealability of the high court's order

[18] The first issue that I must consider regarding the appealability of the high court's order, is the relevance, if any, of a judgment of that court (per Van de Schyff J; case

number 2023-032601, delivered on 14 August 2023),[2] in an application brought by the MEC for relief in terms of s 18(2) of the Superior Courts Act for the suspension of the order pending the finalisation of the appeal. The high court, in addition to dismissing the application, also declared that '[t]he order handed down by Nyathi J on 18 May 2023 is an interim order that does not have the effect of a final judgment'.

[19] While the respondents initially contended that the judgment was dispositive of the issue of appealability, they understandably did not really pursue that point with any vigour in argument before us. There is a fundamental reason why that order cannot bind this Court. It is trite that once leave to appeal to this Court against an order of the high court has been granted, this Court becomes seized of, not only the appeal but of all other ancillary issues, including that of the appealability of the order. The order, having been granted by the high court in the context of s 18 proceedings, is therefore inconsequential as to the question whether the jurisdiction of this Court has been engaged. That remains an issue to be determined by this Court in the exercise of its appellate jurisdiction.

[20] The respondents also contend that the high court's order is 'classically interlocutory' and therefore not appealable. In support of this submission, counsel for the respondents placed particular emphasis on the fact that the high court's order was explicitly stated to be '[p]ending the finalization of the review envisaged in Part B of the notice of motion' and submitted that the MEC's decision was merely 'suspended' as opposed to 'set aside.' Properly construed in terms of the accepted canons of construction, the order is manifestly temporary in nature and effect, or so counsel argued.[3]

[21] In *Zweni v Minister of Law and Order* (*Zweni*), this Court laid down the following requirements for appealability of an order: (a) the decision must be final in effect and not open to alteration by the court of first instance; (b) it must be definitive of the rights

[2] *MEC responsible for Economic Development, Gauteng v Vilakazi and Others* [2023] ZAGPPHC 686.
[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18.

of the parties; (c) and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[4]

[22] It is, however, now established law that even if an order does not meet the *Zweni* test, a matter may be appealable if it is in the interests of justice that it should be regarded as such. In *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (*Lebashe*), the Constitutional Court made it clear that the 'interests of justice approach' is not limited to the Constitutional Court but applies equally to this Court.[5]

[23] In *Government of the Republic of South Africa and Others v Von Abo*, this Court summarised the present approach to appealability of orders in our law as follows:
'It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.'[6]

[24] The fact that the interim order was interlocutory to the review application is not decisive as to appealability.[7] In *Lebashe*, the Constitutional Court explained that:
'In deciding whether an order is appealable, not only the form of the order must be considered, but also, and predominantly, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might appear, according to its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect.'[8]

[25] Applying these legal principles to the facts of this matter, there can, in my view, be little doubt that the order is appealable. First, as I said earlier, the judgment purports

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[4] *Zweni v Minister of Law and Order* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532J–533.
[5] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC) para 45.
[6] *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) para 17.
[7] *Cyril and Another v The Commissioner for the South African Revenue Service* [2024] ZASCA 32.
[8] *Lebashe* para 41.

to make final pronouncements regarding virtually all the issues that will fall for decision in the review application. These relate not only to the rationality of the MEC's decision but also her bona fides. Moreover, a punitive costs order was made against her based on those findings. The judgment thus has the effect of disposing of a substantial portion of the relief sought in Part B of the notice of motion.

[26] Second, the suspension of the MEC's decision to dissolve the board and the reinstatement of the respondents as board members have immediate and substantial consequences for the second appellant. Apart from the fact that her decision to terminate the respondents' memberships of the board has been suspended, she is also interdicted from appointing other board members in their stead. This undesirable situation has now endured for more than 18 months. I am accordingly satisfied that the high court's order meets all the requisites for appealability enunciated in *Zweni* and that, in any event, it is in the interest of justice that the appeal be heard. I am accordingly satisfied that the order of the high court is a 'decision' contemplated in s 16(1)*(a)* of the Superior Courts Act.

Is the appeal moot?

[27] This appeal was heard on 23 August 2023. It is common cause that the respondents' term of office will expire on 31 September 2024. They contend that for this reason the appeal has become moot and will serve no practical purpose. Any pronouncement that this Court will make regarding the disputes between the parties will therefore amount to 'advisory opinions and abstract propositions of law'.

[28] Mootness is when a matter 'no longer presents an existing or live controversy'. The doctrine is based on the notion that judicial resources ought to be used efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are 'abstract, academic or hypothetical'.[9]

[9] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 para 21.

[29] The Constitutional Court, in *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others*,[10] held that 'mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require.' The Court 'has discretionary power to entertain even admittedly moot issues.'[11]

[30] Factors which guide the exercise of the court's discretion include:

'(a) whether any order which it may make will have some practical effect either on the parties or on others;
(b) the nature and extent of the practical effect that any possible order might have;
(c) the importance of the issue;
(d) the complexity of the issue;
(e) the fullness or otherwise of the arguments advanced; and
(f) resolving the disputes between different courts.'[12]

[31] In my view, there are various compelling factors in this matter that militate against a finding of mootness. First, as I explain below, even though the high court's order is framed as an interlocutory order, it is final in effect. The high court has finally pronounced on all the issues that will fall for decision in the review application. Instead of limiting its enquiry to the issue of whether the respondents have established reasonable prospects of success in the review, it has effectively and impermissibly pronounced on the review application. The high court has, inter alia, finally pronounced on the nature and extent of the MEC's statutory powers and how such powers should be exercised by the MEC. That finding has far-reaching implications for the MEC and her future interactions with the Agency's board.

[32] Second, and as the appellants' counsel pointed out, the respondents will, upon the expiry of their terms of office, become eligible for re-appointment for another term.

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[10] *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation SOC Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) (*Normandien Farms*) para 48.
[11] *POPCRU v SACOSWU* [2018] ZACC 24; 2019 (1) SA 73 (CC); 2018 (11) BCLR 1411 (CC) para 44; see also *President of the Republic of South Africa v Democratic Alliance* [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC) para 17.
[12] *Normandien Farms* para 50.

The reasons for the termination of their directorships will no doubt be relevant when the MEC considers whether to reappoint them.

[33] Finally, the high court found that, in terminating the respondents' membership of the board, the MEC has acted maliciously and for ulterior reasons. That finding was the basis for imposing the punitive costs order. This is also a final decision which will prejudice the MEC in her defence in respect of the review application. For these reasons, I am of the view that the judgment of this Court will have a practical effect and that the matter is consequently not moot.

Discussion

[34] The respondents challenged the MEC's decision to dissolve the Agency's board of directors (communicated to them on 24 March 2023), on the following grounds:

(a) The MEC's decision was 'capricious' and she acted with ulterior motives, namely that she wanted to impose a candidate of her choice, even though he had not been shortlisted and interviewed for the position. Her decision was therefore influenced by bias and is consequently unlawful;

(b) The MEC's instruction to the board to commence the recruitment process afresh constituted an abuse of her powers;

(c) The decision was procedurally unfair since they were only given 24 hours to make representations – that period was unreasonably short in the circumstances;

(d) The MEC interfered in the recruitment process in 'a corrupt, unethical, unprofessional manner against governance rules and the law';

(e) The power to recruit and select the GCEO had been delegated to the Agency in terms of the Transversal Recruitment Policy. The policy does not usurp the statutory powers of the MEC but allows the exercise of those powers within a corporate governance framework that promotes efficiency, transparency and fairness. The MEC's unwarranted interference in the recruitment process thus constituted an abuse of her powers and was consequently unlawful; and

(f) The decision offends the principle of legality because it was irrational and unreasonable.

[35] As mentioned, the high court, although being mindful of the fact that it was only seized with Part A of the notice of motion, nevertheless made substantive and final

findings regarding matters which fell for decision in Part B of the notice of motion. Although it correctly summarised the legal requirements for interim relief, it identified the 'central issue to be decided' as being 'whether the MEC has the powers to appoint directors and the CEO'. It then found that the conduct of the MEC was 'left wanting' because she did not obtain the shareholder's resolution to dissolve the board, thereby lending credence to the respondents' assertions that she had ulterior motives; impermissibly cancelled the dispute resolution process; ignored the involvement of her predecessor in the matter; and refused to meet with the board on more than three occasions, thus failing to comply with the shareholder compact.

[36] The high court then found that 'the inescapable conclusion is that the board has unbeknown to it, through asserting its independence and by being diligent invited the wrath of the first respondent, resulting in its demise'. And, based on its earlier finding that the MEC was motivated by ulterior motives, and she has behaved in an 'inordinately harsh and heavy-handed' manner, the high court expressed its 'displeasure by way of a punitive costs order'.

[37] There is no indication in the judgment that the high court has given any consideration to whether the respondents have established the legal requirements for interim relief. For this reason, it falls to this Court to decide whether, on the facts put up by the respondents, they were entitled to the interim interdict.

[38] The respondents' application for interim relief was based on the following contentions:

(a) They have been affected by the allegations made by the MEC in 'their various professional, full-time, and non-executive director roles'; they continue to suffer 'reputational damage'; and the termination of their directorships will impact their economic prospects and opportunities for future appointments in the public or private sector. They will therefore not be able to obtain substantial redress in due course;

(b) The constitutional rights of the directors have been violated and they had no alternative but to seek legal protection of those rights;

(c) It is in the public interests that the Agency should be stable and subject to proper corporate governance and the MEC's decision has had the effect of destabilizing the Agency;

(d) There was a reasonable apprehension that the MEC would swiftly appoint a new board. Such an appointment would be invalid and would lead to fruitless and wasteful expenditure;
(e) The unlawful dissolution of the board has had serious consequences for the second appellant's four subsidiaries. As a result of the dissolution, meetings of their risk and auditing committees had to be cancelled before their risk plans could be finalised in accordance with the Public Finance Management Act 1 of 1999, thus creating a governance crisis; and

(f) The MEC's decision to terminate Mr Hamilton's acting appointment before the expiry of his acting period has had a negative effect on the Agency's stability.

[39] The requirements for an interim interdict are: (a) a prima facie right, even if it is open to some doubt; (b) injury actually committed or reasonably apprehended; (c) the balance of convenience; and (d) the absence of similar protection by any other remedy.[13]

[40] An applicant is not required to establish his or her right on a balance of probabilities. It is sufficient if the right is prima facie established, though open to some doubt. The proper approach is to take the facts averred by the applicant together with any facts averred by the respondent and which the applicant cannot dispute. The court must then consider whether, on the probabilities, the applicant could on those facts obtain final relief in due course. In other words, an applicant must establish that he or she has reasonable prospects of success in the main proceedings.[14]

[41] As explained above, it is trite that the approach that a court hearing an application for interim relief will adopt in considering whether a proper case has been made out for the relief sought is radically different from that applicable to final relief. In respect of the latter, the principles enunciated in *Plascon Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd*[15] are applicable, meaning that the application is

[13] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Webster v Mitchell* 1948 (1) SA 1186 (W) (*Webster v Mitchell*) at 1187.
[14] *Webster v Mitchell* at 1189.
[15] *Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (AD).

effectively decided on the respondent's version. The court hearing an application for interim relief must therefore be cautious not to make any final findings in respect of issues that will fall for consideration in the main proceedings.

[42] Furthermore, the Constitutional Court, in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (*Urban Trolling Alliance*), held that the prima facie right that an applicant is required to establish is not merely the right to approach a court in order to review an administrative decision, '[i]t is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made.'[16]

[43] While it was not immediately apparent from the respondents' founding affidavit exactly what prime facie rights they sought to assert in the application for interim relief, during argument, their counsel nailed their colours firmly to the mast of a constitutional entitlement to a fair procedure. In this regard, their counsel submitted that the 24 hours allowed for them to provide reasons why their directorships should not be terminated, was wholly inadequate and unfair.

[44] Section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), provides that administrative action that materially and adversely affects the rights and legitimate expectations of any person must be procedurally fair. However, s 3(2)*(a)* of PAJA provides that 'fair administrative procedure depends on the circumstances of each case'. In *Zondi v MEC for Traditional and Local Government Affairs*, the Constitutional Court held that the overriding consideration will always be what fairness demands in the circumstances of a particular case.[17]

[45] Section 3(3) of PAJA provides that, in order to give effect to the right to fair administrative action, an administrator must give the affected person adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action;

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[16] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*Urban Trolling Alliance*) para 50.
[17] *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) para 114; see also s 3(2)*(a)* of PAJA and *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

adequate notice of any right of review or internal appeal; and adequate notice of the right to request reasons in terms of s 5.

[46] The respondents' main complaint regarding the procedure adopted by the MEC was that the period of 24 hours allowed for representations was unreasonably short in the circumstances. Although 24 hours may, on the face of it, appear to be a rather short period for written representations, the abovementioned authorities confirm that procedural fairness is contextual. Thus, what may be an unreasonably short period in the context of a particular factual matrix, may well be regarded as reasonable in another.

[47] There are various factors that rendered the period of 24 hours eminently reasonable in the circumstances. First, there had been extensive correspondence between the parties regarding the very issue in respect of which the MEC required representations, namely the board's refusal to comply with her instructions regarding the recruitment process. The MEC had, in several letters addressed to the board, expressed her views regarding the applicable statutory provisions and what she expected from the board. Board members could, therefore, hardly have been under any illusion regarding the cause of her dissatisfaction. Moreover, it is evident from the correspondence between the board and the MEC that the former had, on various occasions, comprehensively addressed the MEC's assertions regarding their respective roles in the recruitment process. The board members could, thus, hardly have reasonably complained that they required more time to formulate their representations.

[48] Second, the first, fourth and fifth respondent did, in fact, submit their written representations by the stated deadline and it appears from the founding affidavit that they were able to do so relatively comprehensively. Furthermore, not one of them has indicated that they would have said more if they had more time. I am accordingly not persuaded that they have been able to prove prima facie rights.

[49] Furthermore, on the common cause facts, the scales had been tipped comprehensively in favour of the appellants in respect of the other requisites for interim relief. It is common cause that four directors had resigned and four did not bother to

make representations. The directorships of the latter group were also terminated and they did not challenge the MEC's decision. Since the Act provides that the board must have at least nine members at any time, the interim re-instatement of the respondents was legally inconsequential and had no practical effect.

[50] The high court also failed to consider that the respondents had made serious allegations of misconduct against the MEC, inter alia, accusing her of corruption. Apart from the fact they had failed to provide any factual basis for these serious allegations, it undoubtedly had the effect of further souring the relationship between the parties and removing any possibility of the level of cooperation which good corporate governance would demand. The balance of convenience was therefore manifestly in favour of the appellants.

[51] The respondents also failed to establish that they would suffer irreparable harm if the interim were not granted. Their claims that they would suffer reputational harm and that their prospects of future appointments would be prejudiced if they were not vindicated through reinstatement were exaggerated, if not farfetched. It is common cause that their directorships were terminated because of the breakdown of the relationship between them and the MEC and not because of any alleged misconduct on their part. The only harm that they could possibly have suffered would have been financial in nature. There was therefore no reason why they could not obtain substantial redress in respect of any financial losses that they may be able to prove in due course.

[52] Finally, the respondents also failed to show that there are reasonable prospects that they would succeed in the review application. They have conceded that s 8 of the Act unambiguously vests the power to appoint the Agency's GCEO and board of directors in the MEC (and by implication also the power to terminate their memberships). There is no requirement in the Act that she must enlist the concurrence of the Provincial Government when exercising those powers. Furthermore, the respondents' assertions regarding bias and ulterior motives on the part of the MEC are bald allegations without any factual bases. The correspondence annexed to their founding affidavit evince that the MEC terminated the respondents' directorships because they were unable to see eye to eye regarding the recruitment process for a

new GCEO; the board refused to acknowledge her statutory powers; and, in her view, the relationship between her and the board members had broken down irretrievably. There is no indication in the judgment that the high court considered the respondents' prospects of success in the review application in the light of these factors. For the purposes of this appeal, I need not put it any higher than this.

[53] There is another reason why the high court should have refused the interim relief and it is the following. In *Urban Tolling Alliance*, the Constitutional Court held that in deciding whether to interdict the exercise of executive or legislative powers a court must carefully consider how the interdict will disrupt those functions and thus 'whether its restraining order will implicate the tenet of the division of powers'.[18] The Court further cautioned that:

'While a court has the power to grant a restraining order of that kind , it does not readily do so, except when a proper and strong case has been made for the relief and, even so, only in the clearest of cases.'[19]

[54] For the reasons set out above, I am of the view that this is not one of those cases where judicial limitation of executive powers can be justified. The high court should thus have refused the interim relief for this reason also. I am consequently of the view that the respondents failed to establish the requisites for interim relief and the appeal must therefore succeed.

Order

[55] In the result I make the following order:

1 The appeal is upheld with costs including the costs of two counsel, where so employed.

2 The order of the high court is set aside and replaced with the following order:

'(a) The application is dismissed.

(b) Costs shall follow the result of the relief sought in Part B of the notice of motion.'

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[18] *Urban Trolling Alliance* para 65.

[19] Ibid.

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J E SMITH

JUDGE OF APPEAL

Appearances

For the appellants:	M Sello SC with M E Manala
Instructed by	Mncedisi Ndlovu & Sedumedi Attorneys Johannesburg Honey Attorneys, Bloemfontein.
For the respondents:	M Majozi
Instructed by:	Mgeno Mteto Inc., Johannesburg Kramer Weihmann Attorneys, Bloemfontein.