THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 91/2014

GLENCORE OPERATIONS SOUTH AFRICA PROPRIETARY LIMITED COAL DIVISION	**Applicant**
and	
MINISTER OF MINERAL RESOURCES	**First Respondent**
THE MINE HEALTH AND SAFETY INSPECTORATE	**Second Respondent**
LJA BEZUIDENHOUT, N.O	**Third Respondent**
A B NKOSI, N.O	**Fourth Respondent**

Heard: **5 January 2016**

Delivered: **3 February 2016**

Summary: **Review-Section 6 of PAJA-Recommendation - Section 55A of MHSA-Decision-Section 55B-Imposition of fine-Recommendation and Decision-Administrative action in terms of PAJA-Decision making process flawed-principal inspector of mines deciding administrative fine will be**

imposed-principal inspector of mines requested inspector to make a recommendation-principal inspector of mines decided to impose administrative fine-bias as to subject matter and prejudice-concepts of impartiality, independence and bias considered-test for bias-considered Sections 55A and 55B of MHSA-principal inspector of mines prejudged-Decision to impose a fine a fait accompli.

JUDGMENT

VENTER, AJ

Introduction:

[1] This is an application for the review and setting aside of a recommendation ("the Recommendation") and subsequent decision ("the Decision") of the third and fourth respondents, taken pursuant to the provisions of the Mine, Health and Safety Act[1] ("the MHSA") to impose an administrative fine upon the applicant.

[2] The applicant seeks the review and setting aside of the Recommendation and Decision in terms of the Promotion of Administrative Justice Act[2] ("PAJA") on the basis that the Recommendation and Decision amount to unlawful administrative action. Alternatively, the applicant seeks the review and setting aside of the Decision and Recommendation on the basis that the Decision and Recommendation violate the rule of law and the doctrine of legality in terms of section 1(c) of the Constitution of the Republic of South Africa[3] ("the Constitution").

[3] In addition and should the Court review and set aside the Decision, the applicant seeks an order that the first or second respondents repay to it the amount of R500 000.00 together with interest at a rate of 15.5% per annum to be calculated from 2 August 2013 to date of payment.

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[1] Act 29 of 1996, as amended.
[2] Act 3 of 2000.
[3] Act 108 of 1996.

[4] Despite filing a notice of opposition,[4] the first, second, third and fourth respondents failed to deliver an answering affidavit.

Background facts:

[5] The applicant is the owner of a coal mine, South Witbank Colliery ("SWC") and conducts mining operations in terms of a mining right issued to it pursuant to section 23 of the Mineral and Petroleum Resources Development Act.[5]

[6] The applicant is responsible for the health and safety of all the persons within the mining area of the SWC and is the employer for purposes of the MHSA.

[7] On 2 October 2012, an employee of M&S Projects (Pty) Ltd, Mr Barry Paxton ("Paxton"), was fatally injured in an accident underground while a crew was welding brackets onto equipment.

[8] Following the incident, an enquiry in terms of section 65 of the MHSA ("the Section 65 Enquiry") was convened. The third respondent, Louis Bezuidenhout ("Bezuidenhout"), who at the time was employed by the second respondent in the capacity of principal inspector of mines, presided over the Section 65 Enquiry. The Section 65 Enquiry was conducted on 11 and 12 December 2012.

[9] On 13 January 2013, Bezuidenhout, in his capacity as presiding officer of the Section 65 Enquiry, issued a written report in terms of section 72 of the MHSA detailing his findings, recommendations and remedial steps ("the Section 72 Report").[6]

[10] In the Section 72 Report, Bezuidenhout found that:[7]

> 'Although no person can be held directly responsible for the death of Mr. Barry Grant Paxton, the lack of the proper level of supervision during underground cutting and welding operations certainly contributed to the contravention of various regulations and safety measures that led to the death of Mr. Paxton.

[4] Pages 845 - 846 of the record.
[5] Act 28 of 2002.
[6] Page 901 of the record.
[7] Pages 903 and 904, paras 7.1 and 7.2 of the record.

> The prescribed safety measures of the underground cutting and welding permission have been grossly violated and will form part of an administrative penalty or alternatively a permanent stoppage of the practice in terms of section 54 of the Mine Health and Safety Act as disregard for these safety measures can have catastrophic consequences.'

[11] The Section 72 Report was posted to the applicant, the South African Police Services, the Chief Inspector of Mines, Mrs Paxton and the Senior Public Prosecutor under cover of letters dated 13 February 2013.[8]

[12] The applicant did not receive the Section 72 Report.

[13] On 18 February 2013, the fourth respondent, AB Nkosi ("Nkosi"), employed at the time by the second respondent in the capacity of inspector submitted the Recommendation to Bezuidenhout in terms of section 55A of the MHSA.[9] At the time of making the Recommendation, Nkosi was acting under the empowering provision of section 55A(1) of the MHSA.

[14] Nkosi, in the introductory paragraph of the Recommendation, states as follows:

> 'I recommend that a fine be imposed on, the employer at South Witbank, who has contravened or failed to comply with the provisions as contemplated in section 91(1B) of the Mine Health and Safety Act, 1996 (Act 29 of 1996) as amended. Actions taken during the underground welding on 2 October 2012 were contraventions of a Code of Practice implemented in terms of Section 9(2) of the Mine Health and Safety Act.'

[15] In the Recommendation, Nkosi lists nine contraventions of "a Code of Practice implemented in terms of section 9(2) of the Mine, Health and Safety Act".[10]

[16] Nkosi's reference to the "Code of Practice implemented in terms of section 9(2) of the Mine, Health and Safety Act" is reference to the applicant's Hot Work Underground Procedures EP7[11] ("Hot Work Procedure"). Nkosi refers to

[8] Pages 896 - 900 of the record.
[9] Pages 890 - 895 of the record.
[10] Pages 890 - 894 of the record.
[11] Pages 613 - 616 of the record.

various paragraphs in the Hot Work Procedure and then sets out the particular contravention thereof in the Recommendation.

[17] In addition to these nine contraventions, Nkosi found that regulation 10.1(2)(b) of the MHSA and regulations 21.3.1, 21.7.3 and 21.14.3 of schedule 4 of the MHSA were also contravened by the applicant.[12]

[18] Under the heading 'Reasons for the Recommendation',[13] Nkosi stated that:

> 'The contravention of the requirements of the Procedures for Cutting, Welding and Grinding Underground, Exhibit H3 of the fatal accident inquiry, is seen in very serious light as it could have catastrophic consequences. The Kinross Mine disaster was initiated by underground flame cutting and it led to the death of 187 employees. Various coal mine fires and explosions of flammable gas in South Africa killed a large number of employees.'

[19] Reference to Exhibit H3 of the Section 65 Enquiry is reference to the Hot Work Procedure.

[20] In correspondence dated 28 February 2013 received by the applicant on 2 April 2013, Nkosi informed the applicant that "an Inspector of Mines has recommended to the Principal Inspector of Mines to impose an administrative fine to the employer at South Witbank Colliery".[14] The reference to inspector of mines is Nkosi himself and the reference to the principal inspector of mines is to Bezuidenhout.

[21] Nkosi invited the applicant to make written representations to Bezuidenhout, in his capacity as principal inspector of mines, within 30 days from date of receipt of the invitation.

[22] The applicant submitted its written representations ("the Representations") to Bezuidenhout (in his capacity as principal inspector of mines) on 6 May 2013.[15]

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[12] Page 894 of the record.
[13] Page 895 of the record.
[14] Page 888 of the record.
[15] Pages 864 - 881 of the record.

[23] The Representations were detailed. The applicant responded to each of the nine contraventions of the Code of Practice referred to by Nkosi in the Recommendation as well as Nkosi's findings as to the contraventions of regulation 10.1(2)(b) and regulations 21.3.1, 21.7.3 and 21.14.3.

[24] In essence, the applicant's submissions were that:

1. There were no contraventions of the Hot Work Procedure.

2. In the event that there was a breach, the Hot Work Procedure is not a Code of Practice as contemplated in section 9(2) of the MHSA and breach thereof does not fall within section 91(1B) of the MHSA and it is accordingly not possible to impose an administrative fine for breach thereof.

3. Regulation 10.1(2)(b) has been repealed.

4. There were no contraventions of regulations 21.3.1 and 21.7.3.

5. Regulation 21.14.3 was not complied with, however, it would be inappropriate to impose an administrative fine as it would not be consistent with the hierarchy of enforcement as contemplated in the Enforcement Guideline ("the Guideline")[16].

[25] On 28 June 2013, Bezuidenhout, in his capacity as principal inspector of mines, took the Decision.

[26] The Decision was communicated to the applicant in correspondence dated 28 June 2013.[17]

[27] In the first paragraph of the correspondence, Bezuidenhout stated as follows:

> 'Under section 55D(2) of the Mine Health and Safety Act, 1996 (Act No. 29 of 1996), after considering the recommendation of the Inspector of Mines on form DMR 198, dated 2013-06-28, I have decided to impose an administrative fine for R500 000-00 (Five Hundred Thousand Rand).'

[16] Pages 617 - 635 of the record.
[17] Page 858 of the record.

[28] Bezuidenhout did not give any reasons for the Decision.

[29] The correspondence communicating the Decision was received by the applicant on 19 July 2013 and on 2 August 2013 the applicant made payment of the administrative fine in the amount of R500, 000.00 without prejudice to its rights.[18]

[30] On 17 January 2014 and within the 180 days prescribed by section 7(1)(b) of PAJA, the applicant launched the application for the review and setting aside of the Decision of Bezuidenhout and the review and setting aside of the Recommendation of Nkosi, to the extent necessary.

Relevant Provisions of the MHSA

[31] For purposes of this judgment, I feel it necessary to set out the relevant sections of the MHSA that applied to Bezuidenhout's and Nkosi's exercise of their powers granted to them by the MHSA and which are relevant to the adjudication of the applicant's grounds of review.

[32] A primary objective of the MHSA is to ensure that mines carry on operations in a manner that is healthy and safe for employees and members of the public.

[33] In order to protect the health and safety of persons on mines and to ensure compliance with the provisions of the MHSA and its Regulations by employers, the MHSA provides a number of enforcement mechanisms. The second respondent and its inspectors are the custodians of the MHSA and are tasked in terms of various empowering provisions with the enforcement of the MHSA. Inspectors are given wide ranging powers to monitor and enforce compliance with the MHSA.[19]

[34] In the enforcement of the MHSA, inspectors have the power to recommend the imposition of punitive enforcement mechanisms.[20] The relevant empowering provision is the following:

[18] Page 825 of the record.
[19] Sections 50 to 55 of the MHSA.
[20] Sections 55A and 55B of the MHSA.

'**55A Inspector's powers to recommend a fine**

(1) An inspector may make a recommendation in writing to the Principal Inspector of Mines that a fine be imposed on an employer who has failed to comply with any provision contemplated in section 91(1B).

(2) ….

(3) The inspector concerned must serve a copy of the recommendation on-

(a) the employer;

(b) the health and safety committee, or if there is no health and safety committee, to any health and safety representative responsible for the working place in question; and

(c) the representative trade union, or if there is no representative trade union, to every registered trade union with members at the mine.

(4) The employer may make written representations to the Principal Inspector of Mines within 30 days of the recommendation.

(5) A representation made in terms of this section may not be used against the employer in any criminal or civil proceedings in respect of the same set of facts.'

[35] The principal inspector of mines, in the enforcement of the provisions of the MHSA, is given the power to impose an administrative fine on an employer. The relevant empowering provision is the following:

'**55B Principal Inspector of Mines impose fines**

(1) The Principal Inspector of Mines, after considering the recommendation and any representations made in accordance with section 55A, may-

(a) disregard the recommendation;

(b) impose a fine not exceeding the maximum amount mentioned in Table 2 of Schedule 8; or

(c) refer the matter to the prosecuting authority for a decision as to whether the employer should be charged with an offence.

(2) The Principal Inspector of Mines must notify the employer, committee, representative and trade union contemplated in section 55A(3), as the case may be, of any decision made in terms of subsection (1).

(3) An employer must pay any fine imposed in terms of this section within 30 days of the imposition of the fine.

(4) If the employer fails to pay the fine within the specified period, the Chief Inspector of Mines may apply to the Labour Court for the fine to be made an order of that court.'

[36] For purposes of the MHSA, particularly sections 55A and 55B, an inspector and the principal inspector of mines are defined as follows:

'"**Inspector**" means an officer appointed in terms of section 49(1)(c), a Medical Inspector and any Principal Inspector of Mines.

"**Principal Inspector of Mines**" means the officer appointed by the Chief Inspector of Mines to be in charge of health and safety in any region established in terms of section 47(2).'

[37] The empowering provision under which Nkosi as inspector made the Recommendation was section 55A of the MHSA.

[38] The empowering provision under which Bezuidenhout as the principal inspector of mines made the Decision was section 55B of the MHSA.

Has the applicant exhausted internal remedies?

[39] The applicant seeks the review and setting aside of the Decision and Recommendation in terms of PAJA. Section 7(2)(a) of PAJA provides that a court or tribunal may not review an administrative action unless any internal remedy provided for in any other law has first been exhausted.

[40] The MHSA does not provide for internal remedies where the principal inspector of mines has exercised his powers in terms of section 55B of the MHSA. An internal remedy is in fact expressly excluded by the MHSA.

[41] Section 57(1) of the MHSA provides as follows:

> **'Right to appeal inspectors' decisions**
>
> (1) Any person adversely affected by a decision of an inspector, except a decision contemplated in section 55B, may appeal against that decision to the Chief Inspector of Mines.'

[42] As no internal remedy is provided, the applicant is entitled to approach this court and seek the review and setting aside of the administrative action in terms of PAJA.

Does PAJA apply to the Recommendation and Decision?

[43] Before considering the applicant's grounds of review, the question to be determined is whether the Recommendation and Decision constitute administrative action falling within the provisions of PAJA. Section 6 of PAJA will only come into play if the action taken by Nkosi and Bezuidenhout falls within the definition of administration action in terms of section 1 of PAJA.

[44] The definition of administrative action in section 1 of PAJA[21] has seven main elements, namely a decision, by an organ of state, exercising a public power

[21] Administrative action is defined as 'any decision taken, or any failure to take a decision, (a) by an organ of state, when - exercising a power in terms of the Constitution or provincial constitution; (ii) or exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include- *(aa) the* executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution; (bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution; (cc) the executive powers or functions of a municipal council; *(dd)* the legislative functions of Parliament, a provincial legislature or a municipal council; (ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law; (ff) a decision to institute or continue a prosecution; (gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law; (hh)

or performing a public function, in terms of any legislation, that adversely affects rights, that has a direct external effect and does not fall under any of the listed exclusions. [22]

[45] The term decision is defined by PAJA as:

> 'Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-
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> (a) making, suspending, revoking or refusing to make an order, award or determination;
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> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
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> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
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> (d) imposing a condition or restriction;
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> (e) making a declaration, demand or requirement;
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> (f) retaining, or refusing to deliver up, an article; or
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> (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.'

[46] The term empowering provision is defined as:

> 'A law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which administrative action was purportedly taken.'[23]

[47] The Decision of Bezuidenhout made in terms of section 55B of the MHSA, is a decision of an administrative nature made under an empowering provision

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any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or (ii) *any* decision taken, or failure to take a decision, in terms of section 4(1).

[22] Section 1(i)(aa) - (hh) of PAJA.

[23] Section 1(vi) of PAJA.

which adversely affected the rights of the applicant and had a direct, external legal effect. The Decision, accordingly, falls within the definition of administrative action.

[48] The question as to whether the Recommendation of Nkosi made in terms of section 55A of the MHSA constitutes administrative action for purposes of PAJA requires more attention.

[49] In this regard, I refer to the *dicta* in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*:[24]:

> 'While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals.'

[50] PAJA gives effect to section 33 of the Constitution.[25] The definition of administrative action in section 1 of PAJA must be construed consistently with section 33 of the Constitution. Section 33 of the Constitution must also not be narrowly construed in view of its purpose being a coherent and overarching system for the review and setting aside of administrative action.[26]

[24] 2005 (6) SA 313 (SCA) at para 23.
[25] Section 33 provides that: "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given reasons.'
[26] See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para 25 and *Oosthuizen Transport (Pty) Ltd and Others v MEC, Road Traffic Matters, Mpumalanga & others* 2008 (2) SA 570 (T) at paras 18 and 19.

[51] In terms of section 55A, an inspector may make a recommendation to the principal inspector of mines to impose a fine on an employer who has failed to comply with any provision of the MHSA contemplated in section 91(1B).

[52] Before a recommendation can be made in terms of section 55A of the MHSA, there must be a failure by the employer to comply with the provisions contemplated in section 91(1)(B).

[53] In terms of section 55B, the principal inspector of mines, after considering of the recommendation and the employer's representations, has three options. The principal inspector of mines can disregard the recommendation, impose an administrative fine on the employer or refer the matter to the prosecuting authority for a decision on criminal prosecution.

[54] It is clear from sections 55A and 55B that a decision by the principal inspector of mines to impose an administrative fine can only be taken after the inspector has made the recommendation and only after the principal inspector of mines has considered the inspector's recommendation and the employer's representations.

[55] In determining whether the Recommendation is administrative action as defined by PAJA, the Constitutional Court's approach in *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others*[27] is noteworthy.

[56] The *New Clicks* judgment dealt with the regulation making process. The Constitutional Court had to consider whether PAJA applied to the recommendations of the Pricing Committee and the subsequent making of Regulations by the Minister.[28]

[57] The regulation making process involved a two stage process being a recommendation by the Pricing Committee and a decision by the Minister on whether to accept the recommendation.

[27] 2006 (2) SA 311 (CC).
[28] The Constitutional Court was divided on whether regulation making constituted administrative action. The view of the majority of the Court was that regulation making was not administrative action.

[58] In considering the question, the Constitutional Court regarded the regulation making process holistically.

[59] Chaskalson, CJ held that[29]:

> 'In the circumstances of the present case, to view the two stages of the process as unrelated, separate and independent decisions, each on its own having to be subject to PAJA, would be to put form above substance.'

[60] Ngcobo, J (as he then was) held that:

> 'The process conducted by the Pricing Committee and the making of the regulations based on the recommendation of the Pricing Committee are interlinked. The one is incomplete without the other. Once the process is complete, in the sense that the regulations are made, they become inseparable. Thus the recommendation of the Pricing Committee represents part of the process of regulation-making. The process of making regulations on the specific matters set out in section 22G(2)(a)-(c) must therefore be seen as a single process involving the recommendation of the Pricing Committee and the making of regulations by the Minister based on that recommendation. If the process followed by the Pricing Committee is flawed, the ensuing recommendation is similarly flawed, so are the regulations based on such recommendation. It is this process that we are concerned with in these proceedings. And the question is whether PAJA applies to this process.'

[61] Sachs, J held that:[30]

> 'As did the Chief Justice and Ngcobo J, I consider the making of regulations under section 22G(2)(b) one continuous process involving at different times the Pricing Committee and the Minister up to the point of promulgation.'

[62] In *Oosthuizen's Transport (Pty) Ltd and Others v MEC, Road Traffic Matters Mpumalanga and Others*,[31] the Transvaal Provincial Division of the High Court of South Africa had to consider the question of whether a recommendation made to the MEC by an investigation team in terms of section 50 of the

[29] *New Clicks* decision (*supra*) at para 137.
[30] *Ibid* at para 672.
[31] 2008 (2) SA 570 (T).

National Road Traffic Act ("the NRTA")[32] constituted administrative action. Any decision of the MEC in terms of section 50 of the NRTA could only be taken on the basis of a recommendation by the investigating team.

[63] The MEC argued that as the recommendation is only a preliminary step, has no finality or direct external legal effect and is only a pre-requisite that has to be present before the MEC can make his decision, the recommendation is not administrative action.

[64] In deciding whether the recommendation was administrative action in terms of PAJA, Fabricius, AJ held as follows:[33]

> 'Inasmuch as s 6 of PAJA refers to 'administrative action', and inasmuch as the definition of 'administrative action' requires a decision, and inasmuch as a decision must 'adversely affect the rights of any person and which has a direct, external legal effect, the argument is that the so-called impact threshold requirement in most instances requires a decision that is final, in the sense that it has direct external legal effect which adversely affects the rights of a person. I have no problem with that interpretation if this is subject to the very important qualification that it does not follow as a matter of logical reasoning or statutory interpretation that a recommendation does as a matter of law, not have a direct external legal effect which adversely affects the rights of a person. If that is respondent's contention, as it seems to be, I do not agree.
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> Even a preliminary decision can have serious consequences especially where it lays 'the necessary foundation for a possible decision' which may have grave results. See *Van Wyk NO and Another v Van Der Merwe* 1957 (1) SA (A) at 188B - 189A.'

[65] A recommendation made by an inspector in terms of section 55A of the MHSA is a preliminary decision, a jurisdictional fact and prerequisite for the exercise by the principal inspector of mines of his power in terms of section 55B. The principal inspector of mines cannot impose an administrative fine without a recommendation by an inspector. The recommendation together

[32] Act No. 93 of 1996
[33] *Oosthuizen's Transport (supra)* at paras 24 and 25.

with the employer's representations forms the basis of the decision of the principal inspector of mines to impose the administrative fine. The recommendation lays the foundation for the decision. As such, the recommendation may have serious consequences for the employer and "has the capacity to affect legal rights".

[66] In *Oosthuizen Transport*, Fabricius, AJ held that the recommendation of the investigation team was a decision in terms of PAJA.[34]

[67] In coming to this conclusion, Fabricius, AJ considered the view expressed in *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* (*supra*) that administrative action is action that has the capacity to effect legal rights. Fabricius, AJ held that:[35]

> 'It is clear therefrom that according to the German definition the administrative act need not to have direct legal external consequences. It is sufficient if such administrative act is 'aimed at' such consequences (*gerichtet ist*). When I say 'aimed at' I mean a decision that is addressed at or trained at a certain consequence and not one that *will* have those consequences. That is how I understand the German authorities, and that is why I presume the learned judge of appeal used the phrase 'capacity to affect legal rights'. This interpretation in my view would accord with s 33 of the Constitution and also the common law.
>
> I therefore hold that the decision of the investigating team to recommend suspension was 'administrative action' as defined in s 1 of PAJA.'

[68] Nkosi recommended that an administrative fine be imposed on the applicant. The Recommendation had the capacity to affect the legal rights of the applicant as it would and did form the basis upon which Bezuidenhout made the Decision.

[69] A recommendation in terms of section 55A of the MHSA and a decision in terms of section 55B of the MHSA form part of one continuous process. If the

[34] *Oosthuizen Transport* (*supra*) at paras 27 and 30.
[35] *Oosthuizen Transport (supra)* at paras 29 and 30.

recommendation is flawed, so is the decision and if the decision is flawed, so is the recommendation.

[70] The Recommendation of Nkosi was a decision and constitutes an administrative act for purposes of PAJA.

[71] It is worth mentioning that the first and second respondents regard the action by its inspectors when enforcing the provisions of the MHSA as administrative action in terms of PAJA.

[72] The second respondent's Enforcement Guideline of 1 April 2011[36] provides that:

> **'Due process**: The principles of administrative justice must be observed and enforcement carried out within the powers and processes of the legislation. The principles of administrative (sic) are addressed by the Promotion of Administrative Justice Act, 2000; Note Section 33 of the Constitution of South Africa provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been affected by an administrative action has the right to be given written reasons.'[37]

[73] Having found that both the Decision and Recommendation are administrative action for purposes of PAJA, I now turn to consider the applicant's grounds of review.

Grounds of review:

[74] The applicant, in its founding affidavit, sets out eleven grounds of review in respect of the Decision and nine grounds of review in respect of the Recommendation.[38]

[75] The applicant submits that in respect of both the Decision and the Recommendation, Bezuidenhout and Nkosi, respectively, were not

[36] At pages 617 - 635 of the record.
[37] At page 619. The Enforcement Guideline was set aside by this court for non-compliance with section 49(6) of the MHSA as it was not published in the Government Gazette. See *International Ferro Metals (SA) (Pty) Ltd v Minister of Mineral Resources and Others* (J1673/13) [2015] ZALCJHB 9 (21 January 2015).
[38] Pages 53 - 69 of the record.

empowered to make the Decision and Recommendation,[39] the Decision and Recommendation were materially influenced by errors of law,[40] were made because irrelevant considerations were taken into account or relevant considerations were not considered,[41] were arbitrary and capricious,[42] and were procedurally unfair in that the Section 72 Report was not furnished to the applicant.[43]

[76] In respect of the Decision only, the applicant has raised a further ground of review that Bezuidenhout was bias or reasonably suspected of bias[44]. The submission in this regard is essentially that as Bezuidenhout had already made a finding against the applicant in the Section 72 Report in his capacity as presiding officer, he did not consider the Recommendation in his capacity as principal inspector of mines, in an impartial and unbiased manner.[45]

[77] The last ground of review is that the Decision is not rationally connected to the reasons given for it as no reasons were given.[46]

Merits of Grounds of Review

[78] I do not intend to deal with all eleven grounds of review in respect of the Decision and all nine grounds of review in respect of the Recommendation as I am of the view that this application can be decided solely on the ground of review in terms of section 6(2)(a)(iii) of PAJA.

[79] When evaluating administrative action in terms of the grounds of review in PAJA, the following passage in *Schoonbee and Others v MEC for Education, Mpumalanga and Another*[47] the then Transvaal Provincial Division of the High Court of South Africa is instructive:

> 'Now the litmus test for evaluating administrative actions is well settled in our law. It has been the subject of judicial pronouncements over several decades.

[39] Section 6(2)(a)(i) of PAJA.
[40] Section 6(2)(d) of PAJA.
[41] Section 6(2)(e)(iii) of PAJA.
[42] Section 6(2)(e)(vi) of PAJA.
[43] Section 6(2)(c) of PAJA.
[44] Section 6(2)(a)(iii) of PAJA.
[45] Pages 54 - 55 of the record.
[46] Section 6(2)(f)(ii)(dd) of PAJA.
[47] 2002 (4) SA 877 (T).

> More lately the Legislature saw fit to bring into being the Promotion of Administrative Justice Act 3 of 2000. The Act contains in great part what one may regard as partial codification of administrative law with specific reference to administrative actions, I do not propose to set out each of these tests to be found in the Act. Where appropriate, I will refer to specific test as I evaluate particular conduct on the part of the second respondent.
>
> Suffice to say that an administrative action should not be taken on account of bias or a reasonable suspicion of bias. The action has to fall within the parameters of the law, in other words, where there is a material procedure or condition which the law prescribes, the wielder of power is obliged to have regard to that. Administrative action has to be procedurally fair and it should not be undermined by an error of law or, put otherwise, an error of understanding or application of the law. For this purpose, lastly, it is quite settled law that the official who takes the administrative action should not be persuaded by matters other than those which are relevant for purposes of the decision before it; he or she should not have regard to or be persuaded or moved by some ulterior purpose or motive or make considerations which are irrelevant. He or she must act honestly, he or she cannot act arbitrary, or capriciously. He or she must act rationally.'

[80] When exercising the powers of review, this court must have regard to the words of O'Regan, J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[48] that:

> 'In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be

[48] 2004 (4) SA 490 (CC) at para 48.

> shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.'

Bias or Reasonable Suspicion of Bias

[81] Section 6(2)(a)(iii) of PAJA provides that a court or tribunal has the power to judicially review an administrative action if the administrator who took it was bias or reasonably suspected of bias.

[82] The applicant's submissions in support of this ground of review are that there was an uncomfortable conflation of offices by Bezuidenhout in that he rubberstamped his own initial finding and as a result the decision was *a fait accompli*.[49]

[83] Mr Martin, who appeared on behalf of the applicant, submitted that Bezuidenhout, by presiding over the Section 65 Enquiry, put himself in an untenable position. Bezuidenhout wore two hats and when making the Decision merely rubberstamped his initial decision. Mr Martin argued that Bezuidenhout, in concluding as he did in the Section 72 Report i.e. that the violations "will" be the subject of an administrative fine, went too far. When Bezuidenhout typed the section 72 Report, he knew that it would form the basis of the Recommendation. Bezuidenhout was at that stage already of mind that the decision could only go one way. I agree with these submissions for the reasons set out below.

[84] In scrutinising the Recommendation and Decision in determining whether Bezuidenhout was bias or reasonably suspected of bias, I regard the

[49] Pages 26 - 30 of applicant's heads of argument.

Recommendation and Decision as one continuous decision making process, for the reasons set out above.

[85] The requirement that administrative action must be free from bias is part of the common law rule against bias namely *nemo iudex in sua causa.*[50]

[86] The rule against bias flows from the principles that no one should be a judge of his own case and justice should not only be done but also seen to be done.

[87] Bias is defined in the Oxford Dictionary as "an indication, a propensity, a predisposition; (towards) prejudice".[51]

[88] A presiding officer should therefore not only be impartial and independent but should also be in a position to objectively apply his mind to the issue before him/her. A presiding officer who has prejudged the case before him is unable to objectively and impartially apply his mind when exercising his powers and making a decision.

[89] In *Liebenberg and Others v Brakpan Liquor Licensing Board and Another,*[52] Solomon, J held that:

> 'Every person who undertakes to administer justice, whether he is a legal official or is only for the occasion engaged in the work of deciding the rights of others, is disqualified if he has a bias which interferes with his impartiality; or if there are circumstances affecting him that might reasonably create a suspicion that he is not impartial (*Law v Chartered Institute of Patent Agents* (1919, 2 Ch. 276). The very idea of adjudication connotes impartiality, for the integrity of justice is threatened as soon as self-interest, actual or probable, in the mind of the person adjudicating is tolerated. So strict are the Courts that, even where justice would seem to have been done by persons unaffected by bias, yet the mere presence at their consultation of a non-impartial official will vitiate the proceedings.'

[90] Solomon, J quoted with approval the words of Lord Hewart, CJ in *Rex v Sussex Justices*[53]that:

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[50] "No one may be a judge of his or her own cause".
[51] The Shorter Oxford English Dictionary, volume 6, 2007.
[52] 1944 WLD 52 at page 55.

'… it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

[91] In *De Lange v Smuts NO and Others,*[54] the Constitutional Court in considering the concepts of independence and impartiality considered the Canadian jurisprudence and quoted with approval the judgment of the Canadian Supreme Court of Appeal in *R v Valente*[55]. The Constitutional Court held as follows:

> 'In Valente the fundamental distinction between the concepts of independence and impartiality, which is particularly relevant in the present case, was emphasised in the following two passages in the Court's judgment:
>
> > "Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' . . . connotes absence of bias, actual or perceived. The word 'independent' in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive Branch of government, that rests on objective conditions or guarantees."
>
> Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence for purposes of s. 11(d) of the Charter should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the

[53] 1924 1 K. B. 256 at page 259.
[54] 1998 (7) BCLR 779 (CC) at para 71.
[55] 1985 2 S.C.R. 673.

> respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees".'

[92] The then Appellate Division considered the definition of bias in *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers Union and Another*[56] and held as follows:

> 'For present purposes there may be adopted the definition of 'bias' stated in the House of Lords by Lord Thankerton in *Franklin v Minister of Town and Country Planning* [1948] AC 87 (HL) at 103. It was there said that the proper significance of the word
>
> > "… is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office."'

[93] Biasness comes in many forms. The applicant has submitted that the biasness of Bezuidenhout has its source in bias in relation to the subject matter.[57] This source of bias is also known as prejudice. Prejudice arises if the decision maker has (or is perceived to have) associated him/herself with one side of the dispute.

[94] Baxter describes prejudice as follows:[58]

> 'Real or apparent prejudgment of the issues to be decided by the decision-maker gives rise to disqualification on grounds of bias. Prejudice usually arises as a result of the decision-maker's past activities, past relationship with the affected individual, current external commitments, or his manner of conduct during the decision-making process. The most obvious form of

[56] (1992) 13 ILJ 803 (A) at page 817.
[57] Page 29 para 74 of the applicant's heads of argument.
[58] Baxter *Administrative Law* (1984) at pages 564 and 565.

prejudice is that which arises when someone is both prosecutor and judge in the same case.

On a more general level, past activities may well reveal an official to have so identified himself with a particular view, directly relevant to the subject-matter of the administrative decision, that there is a reasonable apprehension that he cannot remain impartial.'

[95] In *Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee and Others,*[59] the Cape Provincial Division stated as follows with regard to prejudice:

'It is our view that it is not bias *per se* to hold certain tentative views about a matter. It is human nature to have certain *prima facie* views on any subject. A line must be drawn, however, between mere predispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other hand. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions, but when it shuts its mind to any submissions made or evidence in support of the case as it has to decide. No one can fairly decide a case before him if he has already prejudged it. Thus pre-judgment of the issues to be decided which is in a sense prejudice constitutes bias. The entire proceedings become tainted with bias. (See *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C) at 444 - 5 and the authorities there cited; *Loggenberg and Others v Robberts and Others* 1992 (1) SA 393 (C) at 405 - 6; *Anglo American Farms t/a Boschendal Restaurant v Konjwayo* (1992) 13 *ILJ* 573 (LAC) at 587; *Council of Review, South African Defence Force, and Others v Monnig and Others* 1992 (3) SA 482 (A) at 490.)'[60]

[96] Impartiality is an inherent quality of any tribunal or officer tasked with exercising a power entrusted to them and making a decision which could affect the rights of others.

[59] 2000 (4) SA 621 (C) at para 67.
[60] See also *De Lille and Another v Speaker of National Assembly* 1998 (3) SA 430 (C).

[97] The Constitutional Court in *SA Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafood's Division Fish Processing*)[61] defined impartiality as follows:

> 'Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party, or to the judge's own predilections, preconceptions and personal views - that is the keystone of a civilized system of adjudication. Impartiality requires in short 'a mind open to persuasion by the evidence and the submissions of counsel'; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. The reason is that:
>
> > "A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before courts and other tribunals… Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."'

[98] In *SA Commercial Catering and Allied Workers Union and others v President, Industrial Tribunal and Another,*[62] the Supreme Court of Appeal held that:

> 'It is beyond question that members of the tribunal had to act impartially. It is, moreover, not only actual bias, but the outward appearance of bias that may vitiate the decision of a body such as the tribunal as justice must be seen to be done.'

Was Bezuidenhout bias?

[99] In determining whether Bezuidenhout was bias in making the Decision, the manner in which the decision making process was conducted by Nkosi and Bezuidenhout in terms of the empowering provisions is to be scrutinised.

[100] Bezuidenhout, in his capacity as presiding officer, conducted the Section 65 enquiry, listened to the evidence of the witnesses, questioned the witnesses, assessed the evidence, made credibility findings and issued the Section 72

[61] 2000 (3) SA 705 (CC) at para 13.
[62] (2001) 22 *ILJ* 1311 (SCA) at para 10.

Report. In the Section 72 Report, Bezuidenhout concluded that there were gross violations which would be subject to an administrative fine or permanent stoppage of the practice.

[101] Bezuidenhout, in the Section 72 Report, identifies himself with a particular view being that of gross violations of the prescribed safety measures and also the imposition of an administrative fine on the applicant.

[102] Bezuidenhout, after issuing of the Section 72 Report and having identified himself with the imposition of an administrative fine, then requested Nkosi, a subordinate to Bezuidenhout and inspector who played no role in the Section 65 Enquiry, to recommend to him (as the principal inspector of mines) the imposition of an administrative fine on the applicant. It is unclear in what capacity Bezuidenhout requested Nkosi to draft the Recommendation (that of presiding officer or that of principal inspector of mines).

[103] Whilst I appreciate that Nkosi could compile the Recommendation by simply reading the record of the Section 65 Enquiry and the Section 72 Report, there are a number of difficulties with the process followed by Bezuidenhout which in my view raises serious causes of concern and evidences a flawed decision making process.

[104] Nkosi is a subordinate to Bezuidenhout which raises the question of whether Nkosi, as a decision maker and person exercising the power in terms of section 55A(1) of the MHSA, was in a position to, independently and without influence from Bezuidenhout, consider the evidence led at the Section 65 Enquiry, consider the Section 72 Report and make the Recommendation.

[105] In considering the concepts of independence and impartiality, the Cape Provincial Division of the High Court of South Africa in *Ruyobeza and Another v Minister of Home Affairs and Others*[63] stated as follows:

> 'To revert for a moment to the dictionary definition of 'independent' which I have quoted above, the servant in that position seems to me to have not a single one of the qualities essential to independence in this context: for he is

[63] 2003 (5) SA 51 (C) at 61G-H.

> dependent upon the authority of another (his master); he is in a position of subordination (to his master); he is subject to external control or rule (by his master); and he is neither self-governing nor free as regards work: he is obliged to work, and to do the work in the manner and at the time and place directed by his master.'

[106] The High Court further stated that:

> '… by its very nature, the relationship of servant to master has inherent in it the subservience, in matters of work to be done, of the servant to the wishes and directions of the master.'[64]

[107] Independence is defined in the Oxford Dictionary[65] as 'not depending upon the authority of another, not in a position of subordination, not subject to external control or rule, self-governing, free'.

[108] In my view and in light of Bezuidenhout's findings in the Section 72 Report and the position of subordination of Nkosi to Bezuidenhout, Nkosi's ability to independently and impartially assess the facts and to make the Recommendation was severely curtailed. Could Nkosi, as a subordinate to Bezuidenhout, independently and impartially, without influence from Bezuidenhout, assess the evidence and make the Recommendation? I do not think so.

[109] Another difficulty that I have is that from a reading of the Section 72 Report and the Recommendation, it is apparent that the authors being Bezuidenhout and Nkosi have used the same language and have committed the same error of law.

[110] In the Section 72 Report,[66] Bezuidenhout uses the words "catastrophic consequences". Nkosi uses the same words in the Recommendation.[67] In the Section 72 Report, Bezuidenhout makes reference to Regulation 10.1(2)(b)

[64] At page 59.
[65] The Shorter Oxford English Dictionary, volume 6, 2007.
[66] Page 904 of the record.
[67] Page 895 of the record.

which was repealed on 2 July 2002.[68] Nkosi makes the same error in the Recommendation by referring to the same repealed Regulation 10.1 (2)(b).[69]

[111] The use of the same words "catastrophic consequences" could be a coincidence, however, the reference by both Bezuidenhout and Nkosi to a repealed regulation creates the perception that Bezuidenhout (in his capacity as presiding officer of the Section 65 Enquiry and author of the Section 72 Report) had input in the compilation of the Recommendation, or that Nkosi was influenced by Bezuidenhout when making the Recommendation or that Nkosi failed to independently apply his mind to the facts and merely followed the direction of Bezuidenhout, his master, when making the Recommendation.

[112] Nkosi's ability to make an independent and impartial recommendation in light of Bezuidenhout's unequivocal finding in the Section 72 Report and Nkosi's subservient position to Bezuidenhout is questionable.

[113] It is unfortunate that the first and second respondents, Bezuidenhout and Nkosi, chose not file an answering affidavit in which an explanation is given for Bezuidenhout having requested a subordinate (who played no role in the Section 65 Enquiry)[70] to make a recommendation to impose a fine where he had already decided that an administrative fine would be imposed.

[114] As no explanation has been forthcoming from Bezuidenhout or Nkosi, the Court is left with having to guess why Bezuidenhout would have acted in this manner. A possible explanation could be that in order for justice to be seen to be done and in order to circumvent the provisions of sections 55A and 55B of the MHSA in that Bezuidenhout as principal inspector of mines could not be seen to be considering his own recommendation to impose a fine, Bezuidenhout had Nkosi make the Recommendation in order to allow him (Bezuidenhout) to approve same in terms of section 55B of the MHSA. I discuss this issue further below.

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[68] 2 July 2002 Government Gazette number GNR 904/2002. At page 903.
[69] Page 894.
[70] See pages 83 and 84 of the record.

[115] After Nkosi made the Recommendation, the applicant made comprehensive Representations.

[116] The purpose of representations contemplated by section 55A(4) of the MHSA is to persuade the principal inspector of mines, who will ultimately make the decision whether to impose the fine, not to impose an administrative fine. The representations of the employer made in terms of section 55A(4) of the MHSA is the employer's opportunity to state its case and to influence the principal inspector of mines when making the decision. Section 55A(4) of the MHSA gives effect to one of the rules of natural justice, namely, *audi alteram partem* or "listen to the other side".

[117] The importance of the employer's representations contemplated in section 55A(4) of the MHSA cannot be overstated. The MHSA, in section 55B(5), elevates the representations to privileged or without prejudice statements.[71]

[118] The purpose of section 55B(5) of the MHSA could only be to encourage employers to make comprehensive representations without the fear that its acceptance of blame or responsibility in the written representations will be used against it in future proceedings which could be instituted against it. An employer is encouraged by section 55B(5) to be honest and transparent in the representations and to fully disclose all facts despite those facts possibly being incriminating.

[119] On receipt of the Representations and in terms of section 55B, Bezuidenhout in his capacity as the principal inspector of mines, was required to apply his mind to the Recommendation and the Representations and without prejudice and objectively arrive at a decision, to disregard the Recommendation or to impose an administrative fine or to refer the matter to the prosecuting authority.

[120] In my view, given Bezuidenhout's manifest attitude towards the applicant as reflected in the Section 72 Report and his perceived input into the Recommendation or influence over Nkosi when drafting the

[71] Section 55A(5) provides that 'a representation made in terms of this section may not be used against the employer in any criminal or civil proceedings in respect of the same set of facts'.

Recommendation, Bezuidenhout was in no position to impartially and objectively consider the Representations.

[121] I agree with the applicant that in making the definitive finding in the Section 72 Report that the gross violations would be the subject of an administrative fine, the Decision was *a fait accompli*.

[122] Having come to the finding in the Section 72 Report (as presiding officer), Bezuidenhout in his capacity as the principal inspector of mines, tasked with making a decision in terms of section 55B of the MHSA, was not open to influence or persuasion. Bezuidenhout could not be persuaded any other way as he had made up his mind, he had pre-judged, his mind was closed. Having presided over the Section 65 Enquiry and having pre-judged the matter as evident from the Section 72 Report, Bezuidenhout was disqualified on the grounds of bias, from exercising his power as the principal inspector of mines in terms of section 55B of the MHSA.

[123] The Decision, as contained in the correspondence of 28 June 2013,[72] in my view, evidences not only a closed mind or pre-judgment but also a failure to apply an objective and impartial mind to the Representations.

[124] Bezuidenhout, in his capacity as the principal inspector of mines, in communicating the Decision to the applicant, refers to a repealed section of the MHSA as the empowering provision.[73] Bezuidenhout states that he has considered the Recommendation and makes absolutely no mention of the Representations. No reasons, whatsoever, are given by Bezuidenhout for the Decision.

[125] Again it is unfortunate that Bezuidenhout did not provide an explanation in an affidavit before this Court for his conduct. The first and second respondents and Bezuidenhout elected not to provide this Court with any explanation for the manner in which Bezuidenhout conducted the decision making process and the matter in which he came to the Decision.

[72] Page 858 of the record.
[73] Section 55D(2) was repealed by section 20 of Act 74 of 2008 which came into effect on 30 May 2009.

[126] The Court is left guessing as to whether Bezuidenhout gave any consideration to the Representations. It would appear from the correspondence that Bezuidenhout failed to do so and did not apply his mind to the Representations.

[127] The manner in which Bezuidenhout conducted himself in the decision making process from the issue of the Section 72 Report to the making of the Decision, evidences a pre-judgment. Having come to the finding in the Section 72 Report that an administrative fine will be imposed, Bezuidenhout had made up his mind. Bezuidenhout had associated himself with a decision to impose an administrative fine. When tasked with the consideration of the Recommendation and Representations and making of the Decision; he had already pre-judged the issues; he was not open to influence or persuasion; he could not bring an objective and impartial mind to bear on the decision making process. He was the prosecutor and the judge.

[128] In my view, the entire decision making process was tainted with prejudice to the extent that the applicant was denied a fair hearing prior to the Decision being taken. Justice was not seen to be done and was not done. The applicant's right to fair administrative action was infringed.

[129] The Decision and Recommendation constitute unlawful administrative action.

The test for bias

[130] It is worth mentioning that the test for bias is the existence of a reasonable suspicion of bias.[74]

[131] In *BTR Industries*[75] the then Appellate Division in considering the test for bias held as follows:

> 'It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root

[74] See *BTR Industries* (*supra*) at page 693.
[75] *Ibid* at pages 694 and 695.

of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the *de minimis principle*) he is disqualified, no matter how small the interest may be. See in this regard the remarks of Lush J in *Sergeant and Others v Dale* (1877) QBD 558 at 567. The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended then that is an end to the matter. I find myself in complete agreement with what was forcibly stated by Edmund Davies LJ in the *Metropolitan Properties* case (*supra*) at 314 C-D:-

> "With profound respect to those who have propounded the 'real likelihood' test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged, and that any development which appears to emasculate that requirement should be strongly resisted."'

[132] In *S v Roberts*,[76] the Supreme Court of Appeal set out the four requirements of the reasonable suspicion test as follows:

1. There must be a suspicion that the officer might, not would be biased.
2. The suspicion must be that of a reasonable person in the position of the litigant.
3. The suspicion must be based on reasonable grounds.
4. The suspicion is one which the reasonable person referred to would, not might, have.

[76] 1999 (4) SA 915 (SCA) at paras 32, 33 and 34.

[133] Applying the reasonable bias test to the facts of this case, there is no doubt in my mind that Bezuidenhout's finding in the Section 72 Report that the violations would be the subject of an administrative fine, his perceived input into the Recommendation or perceived influence over Nkosi in making the Recommendation, his failure to apply his mind to the Representations and the lack of reasons given for the Decision, would have provided the reasonable person in the applicant's position with reasonable grounds to suspect that Bezuidenhout might be bias.

[134] Accordingly, if I am incorrect in finding that there was actual bias, on application of the test for bias, there is no doubt that the manner in which Bezuidenhout made the Decision gave rise to a reasonable suspicion of bias.

Sections 55A and 55B of MHSA

[135] Before dealing with the appropriate remedy, I wish to raise a concern I have with regards to the application and interpretation of sections 55A and 55B of the MHSA as highlighted by the facts of this case.

[136] In terms of section 55A of the MHSA, an inspector (which includes by definition the principal inspector of mines) may make a recommendation to the principal inspector of mines (as defined) to impose a fine.

[137] In terms of section 55B of the MHSA, only a principal inspector of mines can, after consideration of the recommendation of the inspector and representations of the employer, impose an administrative fine.

[138] Section 55A read with the definition of inspector in section 102 of the MHSA envisages a situation where the principal inspector of mines can recommend to himself to impose an administrative fine on an employer.

[139] Section 55B read with the definition of inspector in section 102 of the MHSA envisages that after recommending to himself to impose an administrative fine, the principal inspector of mines may after consideration of his own recommendation and representations from the employer, make a decision to impose an administrative fine.

[140] This, in effect, means that the principal inspector of mines can not only recommend to himself the imposition of an administrative fine on an employer but can also ratify his own recommendation to impose an administrative fine.

[141] This could have not have been the intention of the legislature as is clearly illustrated by the facts of this matter. This is contrary to fair administrative action.

[142] Inspectors are given wide powers when enforcing the provisions of the MHSA. This is understandable given the importance of the health and safety of persons on mines and the severe consequences such as loss of life and limb of contraventions by employers of the provisions of the MHSA and its regulations.

[143] Checks and balances are required in order to ensure that when exercising these wide powers, inspectors do not exceed their powers and at all times act in a fair and lawful manner.

[144] In my view, section 55B of the MHSA is one such check and balance provided for in the MHSA. The power to impose an administrative fine is reserved for the principal inspector of mines only. In terms of section 55B of the MHSA, only the principal inspector of mines can impose an administrative fine on an employer and only after he has objectively, impartially and independently considered the recommendation of the inspector (his subordinate) and the representations of the employer. I have extensively set out the principal inspector of mine's duties above when exercising this power and in giving effect to the *audi alteram partem* principle. The purpose of section 55B, as a check and balance, is to ensure that the inspector who makes the recommendation does not also impose the fine.

[145] An inspector would wield too much power over an employer if he was permitted to preside at the Section 65 Enquiry, issue the Section 72 Report, make a recommendation and ultimately take the decision to impose the administrative fine on the employer. This would undermine fair administrative action, contravene section 33 of the Constitution, and give rise to a flawed decision making process for the reasons as illustrated by this case.

[146] If sections 55A and 55B of the MHSA are regarded as a check and balance provided in the MHSA limiting the wide powers of the inspectors, two objective, impartial and independent minds would be involved in the decision making process, the inspector and the principal inspector of mines. If sections 55A and 55B of the MHSA are interpreted as a check and balance, the prosecutor will not also be the judge and the decision making process will not be open to scrutiny and challenge by the employer on the basis that the decision making process was tainted with actual bias or perceived bias.

[147] In my view, section 55A of the MHSA should be read to exclude the principal inspector of mines from the definition of inspector for the reasons mentioned above. The principal inspector of mines should not have the power to recommend the imposition of an administrative fine and to, based on his own recommendation, make a decision to impose an administrative fine on the employer.

Appropriate Remedy

[148] In terms of section 8(1) of PAJA, this Court may grant an order that is just and equitable which includes the setting aside of the administrative action.

[149] In *Sasol Intrachem v Sefafe and Others,*[77] the Labour Appeal Court stated that:

> 'To summarise, in cases where it was held that the presiding officer ought to have recused himself or herself at the outset, but failed to do so, the entire proceedings before the arbitrator or presiding officer are a nullity. In cases where it is found that the arbitrator or presiding officer did not have to recuse himself or herself despite bias, the appeal court generally has a discretion to cure any defect which in turn will depend on the facts and circumstances of every particular case. Bias may nevertheless be so severe and pervasive that it cannot be cured other than by a complete re-hearing of the matter, or the facts may be of the kind encountered in *Rondalia* and *Rall* where the court of appeal or review, depending on its powers, may cure the irregularity or perceived irregularity. The guiding principle is that a litigant has a

[77] 2015 36 ILJ 655 (LAC) at para 54.

> constitutional right to a fair hearing from the outset to its conclusion. The hearing must not only be fair, but must also be seen to be fair. Anything less than that would not suffice. The remedy employed must cure the irregularity; it must restore the right. Generally, nothing less than a complete rehearing would be required.'

[150] The *Sasol Infrachem* (*supra*) judgment dealt with the apprehension of bias where an arbitrator failed to disclose a close relationship with one of the parties in the dispute. The principle that a party is entitled to fair hearing and nothing less is, however, in my view equally applicable to prejudice by a presiding officer.

[151] The applicant must be granted a remedy that restores its right to a fair hearing and fair administrative action.

[152] The applicant does not seek to impugn the conduct of Bezuidenhout in the Section 65 Enquiry and the Section 72 Report. The applicant seeks to only impugn the Recommendation and Decision.

[153] The pre-judgment by Bezuidenhout is evidenced for the first time in the Section 72 Report where he identifies himself with the imposition of an administrative fine. As a result of this pre-judgment and the tainted decision making process that followed which ultimately led to the Decision, the applicant was denied its right to a fair hearing prior to the Decision being taken.

[154] Bezuidenhout's prejudice in the decision making process was severe and pervasive. The question to be considered is whether the reviewing and setting aside of both the Decision and Recommendation is necessary to restore the applicant's right to a fair hearing.

[155] The source or origin of the pre-judgment by Bezuidenhout is the Section 72 Report. Bezuidenhout's prejudice which manifested in the Section 72 Report set the tone for and is a noticeable feature throughout the entire decision making process thereafter. The Section 72 Report formed the basis of the Recommendation to impose the fine and, accordingly, the applicant's right to

a fair hearing will, in my view, not be restored should only the Decision be reviewed and set aside as the Recommendation will still stand.

[156] In my view, in order to restore the applicant's right to a fair hearing, it would be just and equitable to review and set aside both the Recommendation and Decision, being one continuous decision making process.

Costs

[157] As I have indicated in the judgment, it is a pity that the respondents decided not to furnish the court with an explanation for the decision making process or at least attempt to defend same.

[158] The applicant had no other remedy available to it to challenge the decision making process and the Recommendation and Decision made during such process other than to seek the review and setting aside thereof in terms of PAJA.

[159] I see no reason why the applicant, being successful in its application, should not be awarded the costs of the application. Costs should follow the result.

Order:

[160] The following order is made:

(a) The decision of the third respondent made in terms of section 55A of the Mine Health and Safety Act to impose an administrative fine on the applicant conveyed in a letter addressed from the third respondent to the applicant dated 28 June 2013, stamped 19 July 2013 and received by the applicant on 19 July 2013 is reviewed and set aside on the ground that it constituted unlawful administrative action and is invalid.

(b) The recommendation of the fourth respondent dated 18 February 2013 to impose an administrative fine upon the applicant is reviewed and set aside on the ground that it constituted invalid administrative action and is invalid.

(c) The first, alternatively the second respondent is directed to repay the amount of R500 000.00 (five hundred thousand rand) paid by the applicant pursuant to the invalid decision, together with interest to be calculated at 15.5% per annum from 2 August 2013 to date of payment.

(d) Payment of the amount of R500 000.00 together with interest at a rate of 15.5% per annum is to be made to the applicant within a period of thirty (30) days from date of this judgment.

(e) The first and second respondents are ordered to pay the applicant's costs on an unopposed scale.

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Venter, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate H Martin

Instructed by: Hogan Lovells South Africa