



REPORTABLE

CASE NO: SA 44/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF TRADE AND INDUSTRY

First Appellant

ATTORNEY-GENERAL OF NAMIBIA

Second Appellant

MINISTER OF FINANCE

Third Appellant

PRESIDENT OF THE REPUBLIC OF NAMIBIA

Fourth Appellant

and

MATADOR ENTERPRISES (PTY) LTD

First Respondent

DAIRY PRODUCERS ASSOCIATION OF NAMIBIA

Second Respondent

NAMIBIA DAIRIES

Third Respondent

and

MINISTER OF TRADE AND INDUSTRY

First Appellant

ATTORNEY-GENERAL OF NAMIBIA

Second Appellant

and

CLOVER DAIRY NAMIBIA (PTY) LTD

First

Respondent

PARMALAT SA (PTY) LTD

Second Respondent

DAIRY PRODUCERS ASSOCIATION OF NAMIBIA

Third Respondent

NAMIBIA DAIRIES (PTY) LTD

Fourth Respondent

MEAT BOARD OF NAMIBIA**Fifth****Respondent****Coram:** SHIVUTE CJ, MAINGA JA and HOFFJA**Heard:** 27 October 2016**Delivered:** 19 March 2020

Summary: The Dairy Producers Association, representing the interests of producers of dairy products in Namibia made an application to the Minister of Trade and Industry for the Minister to institute interim measures controlling the importation of dairy products into Namibia. The application to the Minister was necessitated by the increase in the importation of dairy products in the country and resulted in lower prices for some of those products, which made it difficult for the Namibian produced dairy products to compete with imported products.

After initial consultations with interested parties and the promise of further consultations, which never took place, Government Notice 245 in Government Gazette 5285 of 16 September 2013 was published informing the public that a decision had been made by the Minister prohibiting the importation into Namibia of specified dairy products without an import licence.

Aggrieved by the restrictive measures implemented, companies such as Matador, Clover and Parmalat, alleging that their businesses had been adversely affected by the measures, brought review applications in the High Court seeking the decision of the Minister to be reviewed and set aside. They also sought an order declaring ss 2 and 3 of the Import and Export Control Act 30 of 1994, in terms of which the decision was allegedly taken, unconstitutional.

The High Court found the decision to impose the quantitative restrictions of the importation of certain dairy products to be invalid and set the decision aside. This order was informed by the conclusion that the Minister applied the wrong Act (the Import and Export Control Act, instead of the Dairy Products Act 30 of 1961). The

court *a quo* further reasoned that even if the Minister acted correctly by applying the Import and Export Control Act, the decision would still be unlawful, because it was taken by the Cabinet and not by the Minister as required by the Import and Export Control Act. Further, the High Court found that because the decision amounted to an administrative action, the Minister was obliged to comply with Art 18 of the Namibian Constitution, ie procedural fairness, a duty he owed to the affected companies, but he failed to do so.

On the constitutional challenge, the High Court did not find it necessary to decide the issue as the dispute had been decided on review grounds.

On appeal to this court, certain preliminary issues were raised. This included whether the appeal was properly lodged in this court as well as whether the company Parmalat had *locus standi* in this matter.

Held per Shivute CJ (Mainga JA and Hoff JA concurring):

That the former issue lacks substance in that, although the notice of appeal did not bear the office and address of the Registrar of this court in terms of the Rules, the notice was stamped by the Registrar of this court. In other words, there was substantial compliance with the Rule. On the latter preliminary issue, this court held that Parmalat lacks the necessary *locus standi* in this matter premised on the basis that it has no direct and substantial interest in the matter.

Turning to the merits of the appeal, the issues for adjudication were whether the Minister applied the correct legislation; whether the decision taken amounted to administrative or executive action; whether the Minister took the decision or he unlawfully abdicated from the responsibility to take the decision; whether Matador, Parmalat and Clover have the right to procedural fairness and if so, whether the Minister acted in a procedurally fair manner; whether the Minister applied his mind when the decision was taken to impose the quantitative restrictions; whether the court *a quo* erred when it failed to pronounce itself on the constitutional challenge;

and whether the impugned decision and s 2 and s 3 of the Import and Export Control Act are unconstitutional.

Held per Shivute CJ (Mainga JA and Hoff JA concurring):

That the Minister applied the correct legislation, the Import and Export Control Act.

That the impugned decision amounted to an executive action, because it involves the formulation of a policy to impose restrictions on selected imported dairy products.

That the High Court was correct not to decide the constitutional challenge and that this court too declines to decide the issue, reasoning that it was undesirable to do so as a court of first and final instance as a party dissatisfied with the court's decision would have no recourse to the appeal process.

Held per Mainga JA (Hoff JA concurring):

That the decision was taken by the Minister and not by the Cabinet.

That the Minister had the legal authority to determine a question affecting the rights of Matador and Clover. He was therefore, required to observe the principles of natural justice when exercising the authority. Here where he made a decision without all the information necessary for the decision, the decision was irrational and it was correctly set aside.

That continuous restrictions that have no basis, was not in the best interest of the consumer, SACU and our international relationship at large.

That the Minister failed to give audience to Matador and Clover. His decision lacked transparency and adversely impacted upon the right to be heard.

That the whole process leading up to the publication of the Notice was flawed and therefore the decision of the Minister was irrational and Government Notice 245 of Government Gazette 5285 of 16 September 2013 was correctly set aside by the High Court.

APPEAL JUDGMENT

SHIVUTE CJ

[1] This is an appeal against the judgment of the High Court which set aside the decision to impose quantitative restrictions on the importation into Namibia of certain dairy products. The decision was communicated through a notice in the *Government Gazette*, published under the name and signature of the Minister of Trade and Industry.

[2] The disputes between the parties revolve around two Acts of Parliament, namely the Control of the Importation and Exportation of Dairy Products and Dairy Product Substitutes Act 5 of 1986 and the Export Control Act 30 of 1994, which will for convenience be referred to in this judgment as the 'Dairy Products Act' and the 'Import and Export Control Act' respectively.

The parties and factual background

[3] The first appellant is the Minister of Trade and Industry (the Minister). The other appellants are the Attorney-General of Namibia (second appellant), the Minister of Finance (third appellant) and the President of the Republic of Namibia (fourth appellant). The third appellant did not participate in the proceedings in the

High Court or in this court. In this judgment, therefore the expression 'appellants' refers to the Minister, the Attorney-General and the President only.

[4] The respondents are Matador Enterprises (Pty) Ltd (Matador), Clover Dairy Namibia (Pty) Ltd (Clover) and Parmalat SA (Pty) Ltd (Parmalat). For ease of reference, unless the context otherwise requires, the respondents will be referred to by their names.

[5] In order to appreciate the issues that must be decided in this appeal, it is imperative to outline the key events leading up to the issuing of the notice in the *Government Gazette*. A chronology of events assists in the analysis of the contentious issues raised by the parties. I now turn to these events.

[6] Following the termination of the Infant Industry Protection (IIP) in 2007, there was an increase in the importation of dairy products, a development which had an impact of reducing the prices of certain dairy products on the Namibian Market. The local dairy producers could not compete with the lower prices of mainly South African imported dairy products. The Dairy Producers Association (the DPA), representing the local producers, made an application to the Minister in April 2013, requesting the Minister to institute urgent interim measures to secure the continuation of the Namibian dairy industry until the Meat Industry Act 12 of 1981 could be amended to include dairy products as controlled products within the ambit of that Act for the purpose of controlling the importation of dairy products into Namibia.

[7] On 14 May 2013, the Minister published an advertisement in the local media notifying the public of the application received from the DPA to implement restrictions on the importation of dairy products into Namibia. The same notice called upon interested parties to make submissions no later than noon of 24 May 2013 in support of or objection to the application by the DPA.

[8] Both Clover and Matador submitted representations to the Minister, objecting to the proposed restrictions but further requesting an extension of the deadline to allow them to make detailed submissions. The request was granted and both of them were able to make further written submissions to the Minister.

[9] Pursuant to the written submissions made by Clover and Matador, the Ministry of Trade and Industry (the Ministry) issued another public notice in the local media indicating that it would hold a public consultation meeting to which all interested stakeholders would be invited to come and make representations in support of or objection to the application made by the DPA. The meeting was held on 18 July 2013, and both Matador and Clover attended and made submissions. The Ministry's Permanent Secretary promised to hold another meeting to consult further with the interested parties, but this promise did not materialise.

[10] Shortly after the meeting and on 7 August 2013 a report in a daily newspaper stated that Cabinet had approved quantitative restrictions on the importation of certain dairy products. This report elicited correspondence by the lawyers representing the respondents. Matador's lawyers requested the Minister to clarify if it was true that he had made a decision to impose the quantitative import

restrictions. In the event that the Minister had indeed made the decision, the lawyers asked him to clarify why he made the decision without honouring his commitment to circulate a summary of representations made at the 18 July 2013 meeting, circulating the recommendations made to him following the 18 July 2013 meeting, and holding the meeting which his Permanent Secretary had promised.

[11] The Permanent Secretary responded to Matador's lawyers clarifying that the consultation process had not yet been concluded and that the Ministry was preparing the record of 18 July 2013 meeting and this would be circulated in due course.

[12] Clover and Parmalat's lawyer also wrote to the Minister on 15 August 2013 enquiring from him the basis on which Cabinet was approached for approval of the restrictions. They argued in their letter to the Minister that Cabinet did not have the authority to make this decision because s 2 of the Import and Export Control Act authorised the Minister to make such a decision. The Permanent Secretary reverted on 10 September 2013 and advised Clover that the Government Attorney would respond to their query. No such response was ever received.

[13] On 16 September 2013, Government published a notice in the *Government Gazette* titled 'Prohibition on Importation of Dairy Products into Namibia: Import and Export Control Act, 1994' (the Notice). The Notice communicated that a decision had been made by the Minister to prohibit the importation into Namibia of certain dairy products without an import licence. The schedule to the Notice provided for applications for import permits and their issue, presentation and

period of validity. In the annexure to the schedule, the dairy products were specified and included UHT milk, other milk as well as buttermilk, curdled milk and cream, yoghurt, kefir and other fermented or acidified milk and cream.

[14] On 23 September 2013, Clover wrote to the Minister requesting reasons for the decision to impose the quantitative restrictions contained in the notice. In the meantime, Matador launched an application in the High Court, seeking an order setting aside the decision. After failing to receive the written reasons, Clover made a similar application to the High Court on 30 October 2013.

[15] After the applications were served, the record of the impugned decision-making process was made available to the applicants in terms of rule 53 of the old Rules of the High Court and it showed the following:

(a) There were two letters, dated 20 October 2013, prepared in the name of the Minister but not signed by him, addressed to the lawyers of Matador and Clover, explaining the reasons for the decision to impose the quantitative restrictions. The letters were not received by Matador's and Clover's lawyers.

(b) A memorandum was submitted to Cabinet on 27 June 2013 in which the Minister sought to:

'obtain the approval of Cabinet for the Ministry of Trade and Industry to institute restrictions on the quantities of fresh, Extended Shelf Life, Ultra High Temperature milk, buttermilk, curdled, yoghurt and other fermented milk that are being imported into the country as an interim measure in

terms of the relevant provisions of the Import and Export Act, 1994 (Act No. 30 of 1994).'

(I may pause to observe that it is apparent from the date on it that this memorandum was submitted to the Cabinet prior to the holding of the public consultation meeting of 18 July 2013, but after the receipt of written submissions whose deadline was 24 May 2013).

(c) Cabinet had taken a decision on 2 July 2013, in response to the Minister's memorandum. The Cabinet decision:

'direct[ed] the Ministry of Trade and Industry to institute interim quantitative restrictions on imports of fresh, extended shelf life (ESL), ultra-high temperature (UHT) milk, buttermilk, curdled, yoghurt and other fermented milk through the introduction of an import permit system to be administered by the Meat Board of Namibia . . . '

(As the date indicates, the decision by Cabinet was made prior to the public consultation meeting held by the Minister with Matador and Clover on 18 July 2013 but after the Minister had received written submissions from Matador and Clover.)

(d) The Permanent Secretary of the Ministry had written a letter on 20 September 2013 to the Chairperson of the Meat Board stating that:

'Cabinet by its decision number 10th/02./07.13/004 directed that the Ministry of Trade and Industry institute two interim quantitative restrictions on imports of fresh, extended shelf life (ESL), ultra-high temperature (UHT) milk, buttermilk, curdled, yoghurt and other fermented milk through the

introduction of an import permit system to be administered by the Meat Board of Namibia...'.(Emphasis added)

Issues before the court *a quo*

[16] The High Court was urged to:

(a) Review the Notice;

(b) Decide whether Parmalat had standing to launch the review proceedings or not;

(c) Pronounce itself on the constitutionality of s 2 and s 3 of the Import and Export Control Act.

Summary of the High Court's findings and reasoning

[17] The High Court's findings may be summarised as follows: On Parmalat's *locus standi*, the court *a quo* found that Parmalat had demonstrated sufficient standing and its application should therefore be entertained by the court. On review of the impugned decision, the court *a quo* found the decision to impose the quantitative restrictions to be invalid and it set the decision aside. On the constitutional challenge, the court *a quo* found it unnecessary to decide the issue in light of its findings on the review grounds.

[18] The court's reasoning on the issues described in para [16] above can be summed up as follows:

- (a) Parmalat SA has a substantial financial interest in Namibia and would substantially be hurt by the impugned decision because its agent, Matador, will no longer be able to import dairy products produced by Parmalat;
- (b) The decision to impose quantitative restrictions was an administrative action and should therefore be reviewed in terms of Art 18 of the Namibian Constitution, and consequently the following applied:
- (i) The decision was unlawful because the Minister failed to apply the correct Act. The Minister applied the Import and Export Control Act instead of the Dairy Products Act.
 - (ii) Even if it were to be accepted that the Minister acted correctly by applying the Import and Export Control Act, the decision remained unlawful because it was taken by the Cabinet and not the Minister as required by the Import and Export Control Act.
 - (iii) Even if it were to be accepted that the Minister applied the correct Act, the decision should be set aside because the Minister failed to properly fulfil his duty as required by Art 18 of the Namibian Constitution to ensure procedural fairness - a duty he owed to Matador, Parmalat and Clover.

- (c) As the impugned decision was invalid, there was no need to deal with the constitutional challenge.

Appeals in this court

[19] There are two appeals both arising from the decision of the court *a quo*. Firstly, there is the appeal by the Minister, the President and the Attorney-General. The three appellants have submitted two sets of heads of argument which raise similar issues, against both Matador and Clover. Secondly, there is a cross-appeal by Matador, Clover and Parmalat in which they appeal against the High Court's decision not to declare s 2 and s 3 of the Import and Export Control Act unconstitutional. The three have also submitted two sets of heads of argument which raise similar issues.

Consolidated issues on appeal

[20] The issues that are to be considered and determined by this court are as follows:

- (a) Whether the appeal has been properly placed before this court.
- (b) Whether Parmalat has *locus standi* to pursue the review application.
- (c) Whether the Minister applied the correct legislation.

- (d) Whether the impugned decision was an administrative or executive action.
- (e) Whether the Minister took the decision or he unlawfully abdicated from the responsibility to take the decision.
- (f) Whether Matador, Parmalat and Clover have the right to procedural fairness and if so, whether the Minister acted in a procedurally fair manner.
- (g) Whether the Minister applied his mind when the decision was taken to impose the quantitative restrictions.
- (h) Whether the court *a quo* erred by failing to decide the constitutional challenge.
- (i) Whether the impugned decision and s 2 and s 3 of the Import and Export Control Act are unconstitutional.

Discussion of the issues on appeal

Preliminary points raised

[21] Before I consider the other issues that fall to be decided, I first deal with the preliminary issues raised in this appeal which are: whether the appeal is properly before this court and whether Parmalat had the standing to launch the review application.

Whether the appeal was properly lodged

[22] The respondents submit that although it was apparent from the record that the notice of appeal had been lodged with the registrar of court appealed from, the appellants failed to do the same with the registrar of this court. The respondents therefore contend that the failure to lodge the notice with this court is fatal to the appellants' case and on that basis it must be struck from the roll with costs.

[23] Rule 5(1) of the old Rules of the Supreme Court provided that a notice of appeal must be lodged with the registrar of the court appealed from and the registrar of this court.

[24] An inspection of the notice of appeal reveals that the part of the notice which traditionally reflects the office and address of the registrar of this court is lacking from the notice. Nonetheless, the notice discloses that it was received and it was date stamped by the registrar of this court. This is evident from the first page of the notice. Therefore, despite the said omission, there was substantial compliance with the relevant rule of this court. The appeal is thus properly before this court. As this particular preliminary issue has no substance, it is rejected.

[25] Apart from resisting the review application on the merits, the appellants had raised a point *in limine* challenging Parmalat's *locus standi* to bring the application in the Clover matter. I now turn to deal with this challenge.

Did Parmalat have locus standi?

[26] The appellants objected to Parmalat's standing on the ground that it is not a distributor or importer of dairy products in Namibia. They argue that Parmalat sells its products in South Africa and such products, through entities such as Matador, find their way into Namibia. The respondents, in particular Clover and Parmalat, counter argue that Parmalat has a direct and substantial interest in the case and therefore has *locus standi*.

[27] The principles regulating *locus standi* have been dealt with in numerous decisions of our courts and I do not intend to repeat the exercise here except to say that a party contending for standing has to show that it has 'a direct and substantial interest' in the subject-matter and outcome of the application. Our courts have interpreted 'direct and substantial interest' to mean that; an applicant is required to show a 'legal interest' in the case,¹ and not merely an indirect financial or commercial interest.

[28] In addition, an applicant's interest must be 'current' and 'actual'; meaning that legal standing cannot be based on an interest that is abstract, academic, hypothetical or remote.² It is generally accepted that a direct and substantial interest is more than a mere pecuniary or financial interest. Thus a pecuniary interest, on its own, may not be enough to establish *locus standi*. In light of these principles, is it correct that Parmalat lacked standing to institute the review proceedings?

¹ *Trustco Insurance t/a Legal Shield Namibia & another v Deed Registries Regulation Board & others* 2011 (2) NR 726 (SC) para 16 (where the Court also noted the existence of exceptions to this rule set out in *Wood & others v Ondangwa Tribal Authority & another* 1975 (2) SA 294 (A) ('to prevent an injustice where people who are deprived of their liberty are unable to approach a court for relief'); *Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd & others* 2012 (1) NR 331 (HC) para 11.

² *Mweb Namibia (Pty) Ltd* para 11; *Uffindell v Government of Namibia* 2009 (2) NR 670 (HC) para 12.

[29] To answer this question, it is apposite at this stage, to refer to the relevant averments of the parties in view of the conclusion reached by the court *a quo* on those averments. Graig Deyzel, the deponent to the founding affidavit on behalf of Clover and with which Parmalat expressly associated itself, described Parmalat as follows:

‘Second applicant is Parmalat SA (Pty) Ltd, a company with limited liability duly incorporated and registered as such pursuant to the company laws applicable in South Africa. Second applicant’s head office is situated at Strand Road, Stellenbosch, Western Cape, South Africa. Second applicant is a producer, distributor and wholesaler of dairy products and exports its produce to Namibia where it [*sic*] is distributed by its agents in this country (Namibia).’

[30] Louise J Cooke, a deponent to an affidavit on behalf of Parmalat in paragraphs 2, 3 and 4 confirmed Mr Deyzel’s averments insofar as they related to Parmalat and restated that Parmalat was a South African registered company which exports dairy products to Namibia for distribution by its current agents, Matador Enterprises (Pty) Ltd. Cooke stated further that Parmalat’s relationship with ‘its agent’ commenced in 1986. I would assume without deciding that ‘its agent’ in this context refers to Matador. In response to the answering affidavits filed on behalf of the appellants, Ms Cooke had this to say:

‘Although Parmalat does not import dairy products and is not based in Namibia, its products are exported to Namibia through a distributor Matador Enterprises (Pty) Ltd who distributes Parmalat’s products. The restriction on imports does affect Parmalat’s export business. The notice also interferes with Parmalat’s contractual relationship with Matador Enterprises (Pty) Ltd. As such Parmalat has an interest in this matter.’

[31] Furthermore, the founding affidavit on behalf of Matador deposed to by Mr Jan Johannes Brink described Matador as a locally based company engaged in the distribution of fast moving consumer goods of both locally produced products (for example poultry, fish, eggs) and importation of fast moving consumer goods (including dairy products) from South Africa into Namibia. This is Matador's trade and business, as envisaged and protected in Art 21(1)(j) of the Namibian Constitution. In his affidavit, Mr Brink does not confirm that there is any relationship of agency between Matador and Parmalat. This point is a crucial factor in determining the present issue and will be addressed below.

[32] The court *a quo's* finding on the issue is contained in paras [80], [81] and [82] of the judgment. I find it necessary to reproduce these paragraphs:

[80] In the Clover application, Parmalat has clearly stated the manner in which it is adversely affected by the notice. The fact that the other contracting party, namely the importer inside Namibia, would also have standing does not in my view mean that Parmalat would by virtue of that fact lack standing. The overall question remains as to whether it has a sufficient direct and substantial interest in the relief sought. In my view it has, given the impact of the notice upon its business. In my view, the facts raised by it establish a sufficient interest for it to have standing.

[81] In reaching my conclusion, I fully subscribe to the fundamental principle expressed in the *Trustco* matter that "the rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements."

[82] The preliminary point attacking Parmalat's standing is thus rejected, with costs.'

[33] The appellants disagree with the aforementioned finding and formulate their disapproval as follows:

‘Para 3 and 4 of the founding affidavit filed on behalf of Clover alleged that Parmalat is a South African registered company which exports dairy products to Namibia for distribution by its current agent, Matador Enterprise (Pty) Ltd. It is further alleged that Parmalat’s relationship with its agents commenced in 1986. On the other hand Matador who is alleged to be the agent of Parmalat alleged in its founding affidavit that it is a locally based company engaged in the distribution of fast moving consumer goods. It further alleged that its importation of fast moving consumer goods includes dairy products from South Africa into Namibia. The combined effect of the above allegations is that Parmalat as a matter of fact and law does not distribute dairy products in Namibia and it also does not import dairy products into Namibia. Rather what it does is selling its products in South Africa and such products, through entities such as Matador, find their way into Namibia.’

[34] The record placed before both the court *a quo* and this court shows that Parmalat is a South African based and registered juristic person. Neither Parmalat nor Matador dispute the claim made by the appellants that Matador does not confirm that it is an agent of Parmalat. Rather, Matador describes itself as an importer of the affected goods but does not confirm being an agent of Parmalat. In fact, there is nothing on the record to suggest that an agency agreement exists between Matador (as the agent) and Parmalat (as the principal), aside from the assertion that there is a ‘business relationship’ between Matador and Parmalat in terms of which Parmalat’s product find their way into Namibia. In my view, this casts a doubt as to whether there is any existing legal relationship (of agency) between Matador and Parmalat. In the absence of any confirmation of such relationship, this court cannot accept that Matador is an agent of Parmalat.

[35] There is no doubt that Parmalat has a pecuniary interest in the outcome of this case. However, the mere fact that Parmalat's business is affected by the outcome of this case cannot automatically entitle it the right to be heard by this court.

[36] Although it is true that this court in *Trustco*³ held that 'the rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements', Parmalat is neither a citizen⁴ of Namibia nor does it have any physical presence in this country. It only has financial interest in Namibia. The absence of evidence of a relationship of agency with Matador and/or physical presence in Namibia (ie registered or business office), deprives Parmalat of direct interest in this case.

[37] One further aspect pertaining to *locus standi* needs to be dealt with briefly. From the record that was served before the court *a quo* and in the heads of argument filed in this Court, Parmalat argued that 'it has a direct interest in its constitutional right to trade' as enunciated in the Namibian Constitution. Therefore, it is 'an aggrieved party' as contemplated in Art 18 of the Constitution. This argument fails on the same basis as I outlined above, namely that Parmalat is neither a citizen nor is it physically present in Namibia and is therefore unable to claim that constitutional right. In this analysis, I associate myself with the view taken in *Kerry McNamara Architects Inc & others v Minister of Works, Transport*

³ Para 18.

⁴ I note, however, that this court in *Immigration Selection Board v Frank & another* 2001 NR 107 (SC) at 170 held that Art 18 is of application to non-citizens (Per Strydom CJ) whose views on Art 18 were subscribed to by the majority).

*and Communication & others*⁵, that Art 18 provides a substantive right for aggrieved persons to claim redress and was not intended to widen the ambit to also include persons who would otherwise not have had standing to bring proceedings.

[38] For this reason and other reasons given above, I conclude that Parmalat did not show direct and substantial interest in the matter and therefore does not have *locus standi*. The contention by the appellants regarding Parmalat's standing is therefore upheld. I now turn to examine the argument regarding whether the Import and Export Control Act was the appropriate legislation upon which the impugned decision should have been taken.

The applicable legislation

[39] It so happens in the production and retail industry that legislation is passed which gives authorities the power to regulate various aspects of the industry, from production to distribution including exports and imports. Although it is not frequent that a general and specific statute both applies to the same product, instances of such nature do exist. And when decisions are made, legal questions arise regarding which statute is relevant and which authority should make a valid decision under which statute. This case is typical.

[40] The appellants argue that the Minister acted correctly when he invoked s 2 of the Import and Export Control Act, because it is the law which gives him the necessary powers to prohibit or restrict the importation of dairy goods into Namibia

⁵ 2000 NR 1 (HC).

for any purpose. The High Court agreed with the respondents that the Minister applied the wrong law. The court *a quo* held that the Minister should have applied the Dairy Products Act. The basis upon which the court *a quo* made this finding may be summed up as follows.

[41] The High Court applied a rule of statutory interpretation enunciated in *Khumalo v Director-General of Cooperation and Development*⁶ at 589 which states that:

‘(W)here there is an Act of Parliament which deals in a special way with a particular subject-matter, and that is followed by a general Act of Parliament which deals in a general way with the subject-matter of the previous legislation, the Court ought not to hold that general words in such a general Act of Parliament effect a repeal of the prior and special legislation unless it can find some reference in the general Act to the prior and special legislation, or unless effect cannot be given to the provisions of the general Act without holding that there was such a repeal.’

[42] On the basis of this rule, the High Court found that the Import and Export Control Act did not repeal the Dairy Products Act and therefore the Dairy Products Act should have been applied in making the impugned decision, because it is the Act which regulates matters relating to the dairy industry.

[43] More recently in South Africa, in *Minister of Justice and Constitutional Development & others v Southern Africa Litigation Centre & others*,⁷ the court stated specifically that:

⁶ 1991 (1) SA 158 (N).

⁷ 2016 (3) SA 317 (SCA).

'Where there is legislation dealing generally with a topic and, either before or after the enactment of that legislation, the legislature enacts other legislation dealing with a specific area otherwise covered by the general legislation, the two statutes coexist alongside one another, each dealing with its own subject-matter and without conflict. In both instances the general statute's reach is limited by the existence of the specific legislation.'

[44] This rule is also enunciated in other comparative foreign case law: *Fitzgerald v Champneys* 70 ER 958 at 968 as well as *Corporation of Blackpool v Starr Estate Co Ltd* (1992) 1 AC 27 at 34. The rule has been applied in previous cases in South Africa, notably *R v Gwantshu* 1931 EDL 29 at 31 and *Porter v Union Government* 1919 TPD 234 at 238.

[45] Put simply, the rule is that the general Act should be presumed not to have repealed the earlier special Act unless an intention do so is specifically declared in the general Act or if the general Act cannot be applied without the earlier special Act being deemed to have been repealed. The Dairy Products Act, being the special Act, was passed earlier than the Import and Export Control Act, being the general Act. Thus it should be presumed that the Import and Export Control Act does not repeal the Dairy Products Act. However, this presumption will fall away if it can be shown that the Import and Export Control Act specifically declares to repeal the Dairy Products Act or if the Import and Export Control Act cannot be applied without the Dairy Products Act being deemed to have been repealed.

[46] The appellants have submitted to this court that the two Acts are operational as there is no conflict between them. They further contended that the

Minister correctly applied the Import and Export Control Act because he needed to invoke the law which gives him the powers to restrict or prohibit the importation of dairy products into Namibia, for 'any purpose'. They emphasised that the Minister's intention was not to restrict the importation of dairy products for resale but for any purpose. They argued that the Import and Export Control Act is the correct legislation because it authorises the Minister to prohibit or restrict the importation of dairy products into Namibia 'for purposes of trade or any other purpose'. They further submitted that the Dairy Products Act, on the other hand, gives the Cabinet the authority to restrict or prohibit the importation of dairy products into Namibia 'for purposes of trading or reselling such products'.

[47] Clover has argued that the Import and Export Control Act does not apply to the regulation of dairy imports. Clover's reasoning is that the two Acts (the Dairy Products Act and the Import and Export Control Act) deal with different subject matters, and they further canvas their argument by attempting to explain the historical background of the two Acts. I do not agree with their approach in this regard for the reason that when interpreting legislation, the court should only refer to the historical background if the golden rule of statutory interpretation will lead to an absurd meaning of the legislation in question.⁸ The court must first consider the ordinary meaning of the words used in the legislation.

[48] It seems to me that when one considers the long title (legislative purpose) of the Import and Export Control Act, it is clear that the legislation aims to regulate the importation and exportation of 'all goods', with no exception. Further to that, if

⁸ *Grey v Pearson* (1857) 6 (H of L) 61 106. See also *Venter v R* 1907 TS 910 914 and *Principal Immigration Officer v Hawabu* 1936 AD 26.

the *Khumalo* rule of interpretation is applied, it seems to me that the Import and Export Control Act, as a general Act, does not seek to repeal the Dairy Products Act but it deals with matters which are not dealt with under the Dairy Products Act. The Dairy Products Act does not regulate dairy products which are imported into Namibia for purposes other than trade. It only regulates dairy products which are imported into Namibia for purposes of trade. However, the Import and Export Control Act deals with all goods imported into Namibia for any reason. This includes dairy products, to the extent that the Dairy Products Act does not deal with those matters.

[49] Therefore, the interpretation which appears to me to be consistent with the *Khumalo* rule and other rules of statutory interpretation is that, although the Dairy Products Act remains the main or primary legislation which must be invoked when regulating the importation and exportation of dairy products, Government may invoke either of the two Acts depending on the intention or purpose of restricting or prohibiting the importation of dairy products. The Dairy Products Act only gives power to restrict or prohibit dairy products from being imported into Namibia *for purposes of trade* and therefore, the power conferred by this Act cannot be invoked to prohibit or restrict the importation of dairy products into Namibia for *general use*.

[50] In the present case, it appears to me that the Minister sought to restrict the importation of dairy products not just for trade but 'for any purpose'. The Minister had to comply with the principle of legality, which dictates that the functionary must

only use the power to achieve the purpose for which the power is given at law.⁹ I agree with the appellants that he applied the correct Act because the Import and Export Control Act is the Act, between the two, which allows the Minister to regulate importation of any goods into Namibia, for trade or *any other use*. If the impugned decision had been taken in terms of the Dairy Products Act, as contended for by the respondents, to restrict the importation of dairy products into Namibia for any purpose, that decision would be unlawful because the Dairy Products Act does not provide for power to regulate the importation of dairy products into Namibia, for any purpose other than trade. The contention by the appellants that the Import and Export Control Act is the appropriate legislation is therefore upheld. I now proceed to deal with the question of whether the impugned decision is an administrative or executive action.

Whether the impugned decision is of an administrative or executive nature

The arguments by the parties

[51] This court has been asked to decide whether the impugned decision is of an administrative or executive action. The importance of the distinction that must be made in this respect cannot be overemphasised, because the standards of review to be applied will depend on the answer given to this question. If the court finds this decision to be administrative, then it will be reviewed against the standards imposed by Art 18 of the Namibian Constitution. If the impugned decision is found to be an executive action, it follows that it will be reviewable only against the standards imposed by the principle of legality.¹⁰

⁹ See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148.

¹⁰ See para 27 of *Minister of Defence and Military Veterans v Motau* 2014 (8) BCLR 930 (CC).

[52] The appellants contend that the court below erred when it found that the impugned decision is an administrative conduct. Their argument is clearly outlined in the Clover matter. They argue that the impugned decision was taken as part of the Minister's exercise of executive functions as contemplated in Art 40(d) and (k) of the Namibian Constitution and s 2 of the Import and Export Control Act. The reason they advance to support their argument is that the decision is polycentric in nature and is therefore an executive decision taken to formulate a foreign trade policy.

[53] Clover counter argues that the impugned decision constitutes an administrative action. Although Matador does not deal with this matter extensively in their heads of argument, counsel indicated during the oral hearing that they associate themselves with Clover's arguments on this issue.

[54] Clover summed up its argument as follows: The decision is administrative because it was taken as part of the implementation of legislation; the decision was taken by public officials; it was taken in the interest of the public, and it involves the exercise of coercive power or authority.

Assessment of the parties' arguments

[55] In *President of the Republic of South Africa v South African Rugby Football Union* (SARFU) cited in note 9 above, the court at para 143 made a very pertinent observation that it is rare to have a decision that is purely 'policy implementation' (administrative action) or 'policy formulation' (executive action). Most decisions

that are taken on review have characteristics of both administrative and executive action. Carl Friedrich¹¹ explains the reason for this as follows:

‘Public policy, to put it flatly, is a continuous process, the formation of which is inseparable from its execution. Public policy is being formed as it is being executed, and likewise being executed as it is being formed.’

[56] Thus certain decisions bear characteristics of both executive and administrative conduct because the process of policy formulation is not always completely divorced from the process of policy implementation. The impugned decision falls within this category of decisions.

[57] It has characteristics of both policy formulation and policy implementation. For instance, it can be rightly argued that the Import and Export Control Act outlines a broad policy that the Minister must, whenever necessary or it is in the public interest, impose quantitative restrictions on the importation of certain goods. Therefore, this policy is implemented when a decision is taken to impose the import restrictions. Yet it can also be an equally persuasive argument that imposing quantitative import restrictions is an act of formulating a foreign trade policy through which Government designates certain goods as prohibited or restricted imports. Thus the impugned decision cannot be regarded as purely ‘policy making’ and neither can it be regarded as purely ‘policy formulation’.

[58] Therefore on the facts of this case, the question to be determined by this court is not whether the impugned decision is administrative or executive action.

¹¹ See ‘Public Policy and the Nature of Administrative Responsibility’ in Rourke (ed) *Bureaucratic Power in National Politics* (1965) at 165 to 167.

Rather, it is whether the impugned decision leans more towards an administrative action or more towards executive action. This approach was suggested in *SARFU* where the court held that:

'Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls.'¹²

[59] To establish whether a decision is more of an executive or administrative action, the court in *SARFU* went on to suggest the following as factors which ought to be taken into consideration:

'The source of the power, though not necessarily decisive, is a relevant factor. So, too, is the nature of the power, its subject matter, whether it involves the exercise of a public duty and how closely it is related on one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is.'¹³

[60] I find this suggestion to be sound and persuasive. To establish whether the impugned decision leans more towards an executive or administrative action, I will consider the following factors: source of the power, nature of the power exercised and the subject matter dealt with by the impugned decision.

[61] There can never be any doubt that the source of the power is legislation. This decision was taken in terms of s 2 of the Import and Export Control Act.

¹² Para 143. See also *Permanent Secretary of the Ministry of Finance & others v Ward* 2009 (1) NR 314 (SC) para 29.

¹³ Para 143.

Regarding the nature of the power exercised, it is common cause that the impugned decision involves exercise of public power with a potential to adversely affect the interests or rights of certain sections of the public. These are typical characteristics of an administrative action.¹⁴ However, on their own these attributes do not distinguish administrative conduct from executive conduct. I demonstrate this in the paragraphs below.

[62] Similar to an administrative action, almost all forms of executive conduct constitute the exercise of public power with potential adverse effects on the interests and rights of certain members of the public. Furthermore, whilst decisions taken in terms of legislation are typically administrative, it is also possible that executive conduct may be taken in terms of legislation. See *Geuking v President of the Republic of South Africa*¹⁵ para 26 where, notwithstanding the fact that the President had exercised public power in terms of a legislation¹⁶, his decision was considered executive conduct because of the nature of the decision.¹⁷ Also see *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa*¹⁸ para 40-2, where the Court found the decision to be executive action even though the President had acted in terms of legislation.¹⁹ Further see *Minister of Defence and Military Veterans v Motau*²⁰ para 47 where the court found

¹⁴ See *Permanent Secretary, Department of Education and Welfare, Eastern Cape and another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) (*Ed-U-College*) para 18 and *SARFU* above note 28 para 142.

¹⁵ 2003 (3) SA 34 (CC).

¹⁶ Section 3(2) of the South African Extradition Act 67 of 1962.

¹⁷ Involving a consideration of political factors such as comity or reciprocity between the countries involved. See para 26.

¹⁸ 2013 (7) BCLR 762 (CC).

¹⁹ Section 12 of the Magistrates Act of South Africa.

²⁰ Note 10 above.

the Minister's decision to be an executive conduct although it had been taken in terms of legislation.²¹

[63] Therefore, Clover's characterisation of the impugned decision as administrative cannot be accepted as correct simply because it is public power, sourced from legislation, exercised by public officials, taken in the interest of the public and with adverse or coercive power. This court has to take the inquiry further to consider the subject matter of the impugned decision in order to establish whether the issues dealt with in making this decision are related more to policy implementation or policy formulation.

[64] In doing so, this court bears in mind that a decision is likely to be more of policy formulation if it is influenced by socio political considerations for which public officials are accountable to the electorate²² or where the decision is based on considerations of comity or reciprocity between Namibia and foreign states or involving policy considerations regarding foreign affairs,²³ or where the decision involves the balancing of complex factors and sensitive subject matter.²⁴

[65] The record placed before this court shows that, in taking the impugned decision, the functionary had to consider and balance a myriad of complex and competing socio political factors which on one hand include, the need to protect the existing jobs in companies which are currently importing and distributing the

²¹ Section 8(c) of the Armscor Act of South Africa.

²² *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374 (CC) paras 41 and 45.

²³ *Geuking v President of the Republic of South Africa* paras 26-27.

²⁴ *Waterberg Big Game Hunting Lodge Otjihewita (Pty) Ltd v Minister of Environment and Tourism* 2010 (1) NR 1 (SC); *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa* paras 43-45.

goods in question and on another hand, the need to protect and promote the domestic dairy industry. In making the impugned decision, the functionary would have to take into account Namibia's foreign relations with SACU member States. More importantly, the impugned decision involves a determination of the nature of dairy products to be included in the basket of restricted imports. A decision whether to include milk or yoghurt in the category of restricted imports sounds more of policy formulation than implementation.

[66] Thus, the impugned decision seeks to design or formulate the content of Namibia's foreign trade policy, particularly the identification of goods to be treated as restricted imports. This is a sensitive subject matter and the ultimate decision is influenced by political, socio-economic and foreign relations factors which often are in conflict with each other and the Minister has to balance those factors. I conclude then on this aspect that the subject matter is therefore typical of policy formulation rather than implementation. I now turn to assessing the nature of the power exercised.

[67] When assessing the nature of the power, the intention is to establish whether the power exercised is more related to policy formulation (in which case it should be regarded as executive authority) or the power is more related to policy execution (in which case it should be regarded as administrative authority). In conducting this assessment, I find the approach taken in *Minister of Defence and Military Veterans v Motau* to be helpful.

[68] At para 37 of *Minister of Defence and Military Veterans v Motau*, the Constitutional Court of South Africa distinguished executive powers from administrative powers as follows:

‘Executive powers are, in essence, *high-policy or broad direction-giving powers*. By contrast, “[a]dministrative action is . . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out *the daily functions* of the state, which necessarily involves *the application of policy, usually after its translation into law*, with direct and immediate consequences for individuals or groups of individuals’’. (My emphasis).

[69] Therefore, the difference appears to be that executive authority is the power exercised to formulate policy and this usually happens at intervals that are relatively far apart, while administrative authority is the power exercised as part of the daily functions of the State, to implement or apply a policy that has already been formulated. The same view was echoed in *Greys Marine Hout Bay (Pty) Ltd & others v Minister of Public Works & others*.²⁵

[70] The impugned decision concerns the imposition of quantitative import restrictions. This cannot be a typical daily function of Government. To ensure policy consistency and certainty, it is a decision that is taken at certain periodic intervals that are relatively far apart, after a careful consideration of a myriad of a wide range of factors. This court has looked back to see the frequency with which Government has taken this kind of a decision. In the year 2000 the Government imposed a levy of 42.5 cents per litre upon ultra-high temperature (UHT) milk

²⁵ 2005 (6) SA 313 (SCA) para 24.

imported into Namibia.²⁶ This policy remained in place for 7 years. A new policy was adopted in 2007²⁷ through which Government extended the levy to apply to extended shelf life (ESL) milk imported into Namibia. This policy remained in place for 5 years, until January 2012. Thus, the Government has been taking this kind of decision at an interval of 5 to 7 years. Clearly, it is not a daily administrative function of Government which the Minister would be expected to take frequently. It seems to me that the decision typifies policy formulation rather than policy implementation.

[71] Another factor to consider when assessing the nature of the power exercised is the level of discretion involved. The wide discretion accorded to the Minister in s 2 of the Import and Export Control Act confirms the above interpretation that the Act confers executive powers to formulate or design the content of a foreign trade policy. In *Minister of Defence and Military Veterans v Motau* para 41, the court held that where the scope of a functionary's power is closely circumscribed, it is likely that the power is administrative in nature. This is largely because, usually a functionary requires a wider discretion to make a policy while a narrower discretion is required when implementing a set policy. A similar view is echoed by prominent legal scholars who include Professor Lawrence Baxter in his book 'Administrative Law'²⁸ and L van Schalkwyk in the article *The discretionary powers of the Commissioner for the South African Revenue Service – Are they constitutional?*²⁹

²⁶ Government Notice 187 of 2000.

²⁷ Government Notice 61 of 2007.

²⁸ (1984) at 83-84.

²⁹ Meditari Accountancy Research Vol 12 No 2 (2004) at 166-167.

[72] Section 2 of the Import and Export Control Act gives the Minister authority to prohibit or restrict the importation of certain goods into Namibia 'whenever it is necessary or expedient in the public interest'. The Act does not give the Minister strict guidelines of factors which must be considered when deciding to prohibit or restrict goods from importation. It gives the Minister a wide discretion to determine whether it is 'necessary or expedient in the public interest' to designate certain goods as prohibited or restricted imports. This wide discretion mimics conferment of executive authority to formulate a policy which requires the Minister to consider and balance a whole range of issues which concern public interest.

[73] Having conducted this assessment, I am of the view that although the impugned decision has characteristics of both administrative and executive conduct, this decision leans more towards executive action, because of the subject matter dealt with by the impugned decision. In taking this view, I am further persuaded by the wide discretion given to the Minister and the fact that the decision is not a typical daily function of Government. The finding by the court *a quo* that the impugned decision is administrative conduct cannot therefore be supported and the contention by the appellants on this issue is upheld. I now proceed to deal with the contention regarding the *audi alteram partem* rule.

Did the Minister uphold the *audi alteram partem* rule?

[74] The appellants contend that the respondents were properly consulted before the final decision was made to impose the quantitative restrictions of the goods in question. The respondents counter-argue that they were not.

[75] As already mentioned, there were two rounds of consultations which the Minister conducted. The first was an invitation on 15 May 2013 calling on stakeholders to submit written submissions on the subject matter. The second was a consultative meeting held on 18 July 2013, during which verbal submissions were received by the Minister.

[76] Both respondents took part in the two rounds of consultations. However, the respondents' contention is that although the Minister accorded them the opportunity to participate in the consultative meeting of 18 July 2013, the Minister failed to disclose to them that Cabinet had already made a decision to impose the restrictions. They further allege that the failure to make such a disclosure robbed the respondents of their right to a fair hearing because the respondents were misled to make submissions on the question whether the restrictions should be imposed or not when in fact they were supposed to make submissions on why Government should back down from the decision to impose the quantitative restrictions.

[77] The court below found in favour of the respondents holding as follows in paras 104-105:

'What is clear from the record is that the Cabinet had deliberated upon the issue and made its decision to direct the Minister to proceed with quantitative restrictions under the Act. That is contrary to what the Act requires and is impermissible. This should also and in any event have been disclosed to the interested parties in the subsequent consultation which took place. The right to be heard after all contemplates that those affected by a decision should be in a position to address relevant material which is adverse to them. This did not occur by not disclosing the

Cabinet decision to them. This certainly lacked transparency and adversely impacted upon the right to be heard. The right to be heard and fairness demand that persons adversely affected by a decision be afforded the opportunity to be heard with a view to producing a favourable result and require that they are apprised of factors which they need to address.'

[78] The court *a quo* reached this conclusion because it treated the impugned decision as an administrative action. This court has already found that the impugned decision is an executive action, reviewable only on the basis of the principle of legality and not Art 18 of the Namibian Constitution. Therefore, the above approach adopted by the court *a quo* may only be upheld if this court finds procedural fairness to be a relevant consideration under the principle of legality. In that regard, this court must address the question whether the principle of legality enjoins the State to ensure procedural fairness when exercising executive powers.

[79] The principle of legality flows from the doctrine of the rule of law³⁰. The doctrine of the rule of law is enunciated in Art 1(1) of the Namibian Constitution as follows:

'The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State, founded upon the principles of democracy, the rule of law and justice for all.'

[80] Thus, the principle of legality, as a pathway to reviewing executive action, flows directly from Art 1(1) above. The application of the principle of legality to

³⁰ See *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC) para 49. Also see *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC).

reviewing executive action entails an inquiry into three main questions, which are: did the holder of public power act within the power lawfully conferred on him or her,³¹ did the decision maker properly construe his or her powers³² and was the power exercised rationally?³³

[81] The court *a quo* in footnote 30 of its judgment held that:

‘Even upon the narrower basis of the legality contended for by Mr Namandje (where administrative action is not involved), the process followed in reaching a decision must be rational and to exclude relevant stakeholders may render it irrational.’

[82] Thus the High Court was of the view that the impugned decision is irrational and must be set aside because it was taken without properly according the respondents their right to *audi* in the second round of the consultations. The court *a quo* cited *Albutt v Centre for the Study of Violence and Reconciliation & others* paras 65-68 and *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC).

[83] The appellants contend that the impugned decision, being executive action, is not susceptible to the ordinary rules of procedural fairness which are cardinal features and requirements of administrative reviews. They cite *Masetlha v President of the Republic of South Africa* to buttress their argument.

³¹ *Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others* 1999 (1) SA 374, para 58. See also *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 81.

³² *SARFU* para 148.

³³ *Masetlha v President of the Republic of South Africa* above para 81.

[84] I accept that procedural fairness is not, on its own, a requirement or standard of review under the principle of legality. In arriving at this position, I am persuaded by *Masetlha v President of the Republic of South Africa*, where the court was approached to review the decision made by the President to dismiss the head of the national security agency of South Africa. The question for determination was whether the power to appoint and the correlative power to dismiss the head of the Agency as conferred by s 209(2) of the Constitution of South Africa is subject to a requirement of procedural fairness.³⁴ At paras 77 and 78, the Constitutional Court held that:

‘[77] It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action. These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security. . .

[78] This does not, however, mean that there are no constitutional constraints on the exercise of executive authority. The authority conferred must be exercised lawfully, rationally and in a manner consistent with the Constitution. Procedural fairness is not a requirement.’

[85] Thus the court confirmed that, as a general rule, procedural fairness is not an automatic consideration which a court has to take into account when reviewing executive action on the ground of the legality principle. Therefore, even though the respondents’ interests would be affected by the impugned decision, they do not have an automatic right to be consulted before the executive decision is made. I respectfully agree with the court *a quo* that procedural fairness may be a relevant

³⁴ Para 74.

consideration as part of the review of rationality of the decision. I discuss this below.

[86] Procedural fairness is relevant under the principle of legality if an executive decision would be rendered irrational if taken without due regard to the right to *audi* for the affected persons. This was the case in *Albutt*.

[87] *Albutt* is a case in which the decision, by the President of South Africa, to introduce a special dispensation programme in which he would pardon perpetrators of politically motivated crimes committed during apartheid in South Africa was brought before the court for review. The programme did not cater for the consultation of the victims of these crimes, and when requested by the victims, the President refused to allow them an opportunity to be heard. The contention in court became that, by failing to consult the victims of the crimes when deciding to pardon the perpetrators, the President had failed to comply with procedural fairness as required by the right to administrative justice. The court rejected the contention that the decision was an administrative action. The court went on to hold as follows at para 50:

[50] To pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be *rationaly related* to the achievement of the objectives of the process. If it is not, it falls short of the standard that is demanded by the Constitution.' (My emphasis).

[88] In para 52, the court observed that:

[52] The applicant very properly concedes that this court has the constitutional authority to examine whether the means adopted by the President are *rationaly related* to the objective sought to be achieved by granting pardons to those convicted prisoners who claim to have committed offences with a political motive. I did not understand the state to contend otherwise. Nor is there any issue about the constitutional authority of the President to exercise his power to grant pardon as contemplated in the special dispensation process. Indeed under section 83(c) of the Constitution, the President has a duty to promote “the unity of the nation and that which will advance the Republic.” *The question for determination* [by the Court] *is reduced to whether the decision to exclude victims from participating in the special dispensation process is rationally related to the objectives that the President set out when he announced the process.*’ (My emphasis.)

[89] Thus in *Albutt*, the question for determination was whether procedural fairness was a relevant consideration in a review on the ground of rationality, given the circumstances of that particular case. The matter therefore turned on the particular facts.

[90] At para 61 of *Albutt*, the Constitutional Court made the following finding to confirm the above:

[61] Excluding victims from participation keeps victims and their dependants ignorant about what precisely happened to their loved ones; it leaves their yearning for the truth effectively unassuaged; and perpetuates their legitimate sense of resentment and grief. These results are not conducive to nation-building and national reconciliation. The principles and the spirit that inspired and underpinned the TRC amnesty process must inform the special dispensation process whose twin objectives are nation-building and national reconciliation. As with the TRC process, the participation of victims and their dependants is fundamental to the special dispensation process.’

[91] At para 72, the court held further as follows:

‘[77] In these circumstances, the requirement to afford the victims a hearing is implicit, if not explicit, in *the very specific features of the special dispensation process*. Indeed, the context-specific features of the special dispensation and in particular its objectives of national unity and national reconciliation, require, as a *matter of rationality*, that the victims must be given the opportunity to be heard in order to determine the facts on which pardons are based.’ (My emphasis)

[92] Thus the court was of the view that it would be irrational to aim to achieve national unity by pardoning the perpetrators without properly consulting the victims of the perpetrators’ crimes. The court did not find procedural fairness to be a stand-alone or automatic standard of review under the principle of legality. The court found procedural fairness to be relevant as an element of rationality, given the circumstances of the case.

[93] In my respectful view, the question therefore should be: whether procedural fairness must be treated as an implied element of rationality, given the circumstances of the case placed before us. Put differently, the question is: would the impugned decision be irrational or capricious if it were to be taken without properly consulting the respondents?

[94] In terms of s 2(1) of the Import and Export Control Act, the Minister may only impose quantitative import restrictions when such measures are in the public interest. The Permanent Secretary avers that it had become necessary to protect the domestic dairy production industry which had come under threat from the

lower priced imported products. Therefore, the public interest to be protected through the imposition of the quantitative measures is the protection of the local dairy industry from outside competition.

[95] But in order for the Minister to make a rational decision, he or she has to be armed with the relevant information which enables him or her to establish if indeed it is in the public interest to impose the restrictions. For instance, the Minister would need to have accurate information which shows the challenges being faced by the local dairy production industry, the amount of dairy products imports and their selling price, the competitive or unfair advantages that the external dairy production industry has had over the local industry and the country's international trade law obligations. Without such information, the Minister's decision may well be found to be arbitrary, capricious or irrational.

[96] But does the Minister have to consult the respondents to obtain the information he requires? Certainly, the Minister must consult the respondents and other relevant stakeholders in order to ensure that he or she obtains accurate and adequate information which enables him or her to make a rational decision.

[97] The record placed before this court shows that the respondents were consulted before the decision was taken, but it is the extent and scope of consultation which they are aggrieved by. The contention placed before this court is that the consultative meeting of 18 July 2013 (which was the second round of consultations) was flawed because the Minister failed to inform the respondents that he and the Cabinet had already made the decision to impose the restrictions.

[98] While I do not accept the contention that the entire consultative process was flawed, I agree with the court *a quo*'s characterisation of the second round of consultation as a charade because the Minister failed to disclose to the respondents that the decision to impose quantitative restrictions had already been made. The failure to disclose such important information gravely violated the *audi alteram partem* rule. The essence of the *audi* rule is that the person to be affected by the decision ought to be given sufficient and accurate information against which he or she must prepare their defence. The respondents should have been told that the decision to impose the restrictions had already been made. Should the decision be deemed invalid because the Minister failed to properly honour the *audi alteram partem* rule at this particular meeting and by failing to conduct the second meeting as the Permanent Secretary had promised?

[99] It has already been found that the impugned decision is an executive conduct. Therefore, this court will only invalidate this decision if it finds that it was irrationally taken. The impugned decision may be irrational if it was made without accurate and sufficient information for the Minister to establish if indeed it was necessary in the public interest to impose these restrictions. The record placed before this court shows that this decision was made before the contested consultative meeting of 18 July 2013. It was made when the Minister received the response to his Memorandum from Cabinet on 2 July 2013.

[100] The record placed before this court shows that by the time the Minister received the response from Cabinet, he had received a detailed application from

the Dairies Producers Association (the DPA) outlining the reasons why the quantitative restrictions must be imposed. The Minister also received written submissions from the respondents, counter-arguing why the restrictions should not be imposed. The Permanent Secretary also avers that Government had conducted an independent inquiry to obtain information on the same subject. This averment was not contested by the respondents. Therefore, I accept it. In view of these efforts by the Minister to obtain information, there is no reason for this court to doubt that by the time he sent the Memorandum to Cabinet, he had obtained accurate and sufficient information to make a rational decision. Therefore, although there is no doubt in my mind that the second round of the consultations was palpably flawed, the impugned decision had already been made on the basis of information gathered by 2 July 2013. Therefore, the flawed nature of the meeting of 18 July 2013 could not have had a bearing on the decision.

[101] For the avoidance of doubt, I have merely made the finding that the meeting of 18 July 2013 did not have an effect on the outcome of the final decision. This should not be understood to mean that the impugned decision is therefore rational. My finding at this stage is simply that the 18 July 2013 meeting had no bearing on the impugned decision. If the impugned decision is to be found to be irrational, that conclusion must be reached on some other basis which is not the flawed character of the 18 July 2013 meeting. I proceed to deal with the contention regarding the author of the impugned decision.

Who took the decision?

[102] The question regarding who took the impugned decision is best answered by assessing the unfolding of events leading to the publication of the Government Notice which sets out the decision to impose the quantitative restrictions. I have already found that the Import and Export Control Act is the appropriate legislation upon which the impugned decision should be made. Therefore, these events must be assessed against the legislative framework contained in s 2 of the Import and Export Control Act.

[103] As already noted, the Notice was published in the *Government Gazette* on 16 September 2013. The Notice makes it clear that it was published under the Import and Export Control Act. Section 2 of this Act prescribes that the Minister must make the decision to impose import and export restrictions. Therefore, it is the Minister who is empowered by law to make the decision and cause the decision to be communicated through the *Government Gazette*. The bone of contention is whether the Minister or Cabinet made the impugned decision.

[104] The court *a quo* recited the trite principle that where a functionary is vested with a power to take a decision in terms of legislation, that power has to be exercised by that very functionary and no-one else, except where he or she lawfully delegates the power. The court below took the view that the Minister in his memorandum to Cabinet, unlawfully abdicated his responsibility to make the decision.

[105] It has thus become necessary to closely examine the process leading to the publication of the Notice. At the end of the meeting of stakeholders of 18 July 2013

where Matador and Clover were represented, the attendees were informed by the Permanent Secretary in the Ministry of Trade and Industry that once the report of the meeting's proceedings had been received, it would be presented to the Minister for his consideration. They were further informed that the Minister was mandated by the Import and Export Act to take 'protection measure . . .'. and that 'we have to make an assessment whether that requires prior consultation within SACU and of course notification of the WTO'. The Minister by then had made a submission to Cabinet, contained in a Memorandum dated 27 June 2013, subsequent to the application made to him by the Dairy Producers Association (the DPA). In the comprehensive Memorandum the Minister carefully articulated what factors and circumstances he considered in formulating the intended policy regarding the importation of dairy products into Namibia.

[106] According to the Memorandum, the objectives for the submission to Cabinet were three-fold. First, 'to inform Cabinet of the serious challenges being faced by the Namibian dairy industry due to imports of dairy products into the country'. Second, 'to seek and obtain the approval of Cabinet for the Ministry of Trade and Industry to institute restrictions on the quantities of fresh, Extended Shelf Life (ESL), Ultra High Temperature (UHT) milk, etc'. And lastly, 'to seek Cabinet's approval for the imposition of import permit requirements' for imports of the above dairy products. The Memorandum proceeded to give background information to the proposed measures - including the measures taken by Namibia in the past in line with its obligations under the SACU agreement - to protect its dairy industry and the impact the importation of dairy products had had to the local dairy producers. Also, 'the factors contributing to the inability of the Namibian dairy

industry to effectively compete with the South African dairy industry, the main origin of the adverse imports' were addressed. The memorandum then set out the reason why Cabinet was approached and concluded on this aspect as follows:

'Given the severity of the impact of imports on the local milk cattle farming and dairy industry, which is also already under distress from the drought, the Ministry of Trade and Industry *hereby approaches Cabinet for permission* to evoke [should have read 'invoke'] the relevant provisions of the Import and Export Control Act No 30 of 1994 (sections 2(1)(b) and 3), which empowers the Minister of Trade and Industry, whenever it is found necessary or expedient in the public interest, to prohibit or limit the quantity or value of imports into or exports from Namibia of any goods, through a notice in the Gazette.' (Added emphasis.)

[107] The Memorandum proceeded to give the justification for the proposed intervention in the market by pointing out that while the role of governments ordinarily was limited to creating an enabling environment for businesses to thrive:

'market failures and the negative impacts of certain actions of private sector operators on employment and broad national development aspirations have seen increased calls and justifications for certain more direct interventions by Government in order to safe guard public interest and pursue broad national socio-economic development objectives. It is the view of this Ministry that the current adverse situation facing the local dairy industry is one such instance where Government intervention is required and justified.'

[108] The Minister went on to emphasise in the Memorandum the strategic importance of the dairy industry to the country and concluded as follows:

'In this connection, this Ministry hereby *seeks the concurrence* of Cabinet for the imposition of a measure to lessen the negative impact of imports of fresh,

Extended Shelf Life (ESL), Ultra High Temperature (UHT) milk, butter milk, cuddled, yoghurt and other fermented milk being imported into Namibia.’ (Emphasis is mine).

[109] The Minister continued to explain that the proposed measures were not intended to serve as a total ban on imports, but that they were meant to control and limit the quantity of the imports. He reasoned that the continuation of imports would ensure that there was still competition in the market, which in turn would guarantee the availability of competitive prices for consumers. It would also enable Government to effectively monitor and take corrective action against import surges in the domestic market. The Memorandum concluded in this segment with the following refrain:

‘With the *in principle approval of Cabinet*, this Ministry proposes to put in place a feasible quantitative import restriction measure the format of which will be determined and agreed upon through a process of consultation with relevant stakeholders, namely the Ministry of Agriculture, Water & Forestry, Office of the Attorney-General and the Meat Board.’ (Added emphasis.)

[110] In its recommendation section, the Memorandum made the following recommendations:

‘It is hereby recommended that Cabinet considers the content of this submission and *grants an in principle approval*:

1. To the Ministry of Trade and Industry to proceed to institute interim quantitative restrictions on imports of fresh, extended shelf life (ESL), ultra-high temperature (UHT) milk, buttermilk, curdled, yoghurt and other fermented milk through the introduction of an import permit system to be administered by the Meat Board of Namibia, and

2. For the implementation of the quantitative restriction measures referred to above to be proceeded [probably meant 'preceded'] by consultations with stakeholders as stated in 2.16 and 3 herein.' (Added emphasis).

[111] In response to the Minister's submission, Cabinet resolved on 2 July 2013, as follows:

- '1. The Cabinet direct [sic] the Ministry of Trade and Industry to institute interim quantitative restrictions on imports of fresh, extended shelf life (ESL), ultra-high temperature (UHT) milk, buttermilk, curdled, yoghurt and other fermented milk through the introduction of an import permit system to be administered by the Meat Board of Namibia; and
2. The Cabinet approved the implementation of quantitative restrictions measures referred to above to be preceded by consultations with stakeholders.'

ADDITIONAL RESOLUTIONS:

1. Cabinet direct the Ministry of Trade and Industry to monitor the prices of the products of the local suppliers in order to protect the consumers, and in case of non-compliance, the restrictions should be lifted; and
2. Cabinet direct the Office of the Prime Minister (Directorate Disaster Risk Management) to purchase locally produced dairy products such as milk for distribution to malnourished children in the country, through the Emergency Relief Fund.'

[112] The appellants denied the allegation that the Minister had abdicated his functions to Cabinet. They contended that the Minister was in law empowered to consult all interested parties, including Cabinet before taking a decision. They argued that when the Minister submitted the Memorandum to Cabinet, he merely sought an in principle approval to impose quantitative restrictions on the importation of certain dairy products. They further emphasised that apart from

giving an 'in principle policy approval', Cabinet played no role in the decision-making process.

The role of Cabinet in the formulation of policy

[113] Article 27(2) of the Namibian Constitution vests the executive power of the Namibian State in the President and the Cabinet. Article 40 lists the duties and functions of Cabinet. Among the many powers conferred on the members of the Cabinet is the function 'to direct, co-ordinate and supervise the activities of Ministries and government departments. . .'³⁵ and the power 'to issue notices, instructions and directives to facilitate the implementation and administration of laws administered by the Executive, subject to the Constitution or any other law.'

Article 41 provides that:

'All Ministers shall be accountable individually for the administration of their own Ministries and collectively for the administration of the work of the Cabinet both to the President and to Parliament.'

[114] As earlier noted, when a power is assigned to a functionary, such as the Minister in this case, such functionary is responsible for its exercise. However, as Ian Currie and Johan de Waal rightly point out,³⁶ such principle is subject to a constitutional notion of individual and collective responsibility of members of the Cabinet. A Minister may refer any decision he or she is required to take to Cabinet³⁷ as part of collective responsibility to Parliament. The learned authors

³⁵ Article 40(a) of the Namibian Constitution.

³⁶ In their book with Pierre de Vos, Karthy Govender and Heinz Klug *The New Constitutional and Administrative Law* Vol 1 2001 Juta & Co at p256.

³⁷ *Ibid.*

Currie and De Waal,³⁸ relying on the views of J Klaaren and M Chaskalson³⁹, opine that 'although this is a grey area, it is generally accepted that individual Ministers must refer important policy decisions to Cabinet.' There can be no doubt that the decision whether or not to impose quantitative restrictions on dairy imports into the country is an important policy decision.

[115] While the legislation has conferred the powers on the Minister to impose quantitative import restrictions on specific dairy products, the Minister is entitled to consult Cabinet in the crafting of a policy as part of Cabinet collective responsibility. A Minister who develops an important policy matter without prior Cabinet support or approval does so at his or her own peril, because such an approach may well not conduce to the principle of collective responsibility. Collective Cabinet responsibility or Cabinet solidarity does not dictate a decision making process.⁴⁰ On the contrary, it recognises a constitutional imperative that members of the Cabinet are responsible individually and collectively to Parliament.

[116] As I have endeavoured to demonstrate above, the submission to Cabinet sought Cabinet's concurrence in the policy the Minister had proposed to introduce.

³⁸ *Ibid.*

³⁹ In Matthew Chaskalson, Janet Kentridge, Jonathan Klaaren, Gilbert Marcus, Derek Spitz, Stuart Woolman (eds.) *Constitutional Law of South Africa* Revision Service 5, 1999, Juta & Co. at 3-33. In footnote 6 the authors quote Jain's *Indian Constitutional Law* 4th ed at 101 where Jain states with reference to the Indian Constitutional law as follows: 'A Minister may himself dispose of routine matters without reference to the Cabinet, but in all matters of major policy or real political importance Minister seeks guidance from the Cabinet. The Cabinet is the central directing instrument of government in legislation as well as administration. It coordinates administrative action and sanctions legislative proposals.' These principles are the same in respect of the Namibian constitutional law.

⁴⁰ Christina Murray & Richard Stacey in Woolman & Bishop (eds.) *Constitutional Law of South Africa* Vol 1 (2 ed Revision Service 6, 2014), Juta & Co at 18-35. The authors also reference Elizabeth Mclay's article 'Buckle, Board, Team or Network? Understanding Cabinet' (2006) 4 *NZJ PIL* 37 that gives an insightful account of the ways in which Cabinets in the Westminster model of government work.

The Minister did not request Cabinet to impose the restrictions. On the contrary, he unequivocally sought an 'in principle approval' by Cabinet or its 'concurrence;' or 'permission' to invoke the relevant provisions of the law. The Import and Export Control Act prescribes how the decision to invoke the provisions of the Act may be made. Section 2 provides that the Minister's decision should be executed by way of a notice published in the *Government Gazette*. It cannot be disputed that the Notice in the *Gazette* was published under the authority of the Minister. It expressly says so. A reading of the Cabinet Memorandum in context clearly shows that what the Minister had sought from Cabinet was an in principle approval of a policy proposal.

[117] The use of the word 'direct' in the Cabinet's resolution is unfortunate, but it may well have been influenced by the language in Art 40(a) that provides, as earlier noted, that one of the Cabinet's functions is to 'direct' the activities of Ministries. The Permanent Secretary's letter of 20 September 2013 addressed to the Chairperson of the Meat Board informing him that Cabinet 'by its decision number 10th/02/07 directed' the Ministry to institute quantitative restrictions on the importation of certain dairy products must also be understood in this context.

[118] To contend that the decision was made by Cabinet, it would appear, merely because of the use of the word 'direct' in the Cabinet resolution amounts to reading the Memorandum and the Cabinet's response thereto in isolation, and I may add, out of context. Such an approach also amounts to placing form before substance.

[119] I am persuaded that although the Minister did not depose to an affidavit in the review applications, the evidence of the Permanent Secretary who acted for and on behalf of the Minister during the public consultation process that the decision was made by the Minister has been confirmed by, amongst others, objective evidence such as the comprehensive Memorandum to Cabinet and its response thereto as well as the content of the Notice itself. Evidently, the decision was made by the Minister and not by Cabinet. The next aspect of the appeal is the question whether there was failure on the part of the Minister to apply his mind.

Was there failure to apply the mind?

[120] On this issue, it will be recalled that this court has found the impugned decision to be an executive action. In light of this finding, the standard of review is whether the decision maker made a lawful and rational decision. Therefore, the question whether the decision maker properly applied his or her mind will only be relevant in the context of the rationality test.

[121] The attack regarding the proper application of the mind was made by Clover. It appears Clover has taken the approach that, whoever this court finds to have made the impugned decision, there was no proper application of the mind because certain factors which Clover avers to be important considerations were not taken into account, and certain inaccurate considerations were made. These issues are outlined in their heads of argument. The review record shows that the process of the introduction of the measure and policy started during 2012. Contained in the record is a final report compiled by the Namibia Agricultural Trade Forum and the Namibia Trade Forum during August 2012 on the competitiveness of the Namibian dairy

sector. The report recommended that the Minister should use the Import and Export Control Act to intervene in the short-term to prevent the dairy industry from collapse.

[122] Amongst the stakeholders consulted during the compilation of the report were a number of importers of dairy products. In or about May 2013, the Minister published a call for comments from interested parties on the planned introduction of the measures. The interested parties, including Matador and Clover made comprehensive representations after the Minister had granted them an extension of time within which to do so. Following receipt of the representations, the Minister formulated the Cabinet Memorandum. It is evident from the comprehensive Memorandum that the Minister considered various factors and circumstances before finally deciding on the policy.

[123] Following the Minister obtaining the 'in-principle approval' from Cabinet, interested parties were again consulted on 18 July 2013. They made additional comprehensive submissions. After the consultation of interested parties, including Matador and Clover on 18 July 2013, the Minister made his decision on 28 August 2019, which decision was published by way of the Notice in the *Government Gazette* as provided for under s 2 of the Import and Export Control Act. The review record is replete with the objective facts that informed the Minister's decision. Given the facts and circumstances taken into account - some of which have been referred to in the paragraphs above dealing with the question of who made the decision to impose the measures - I am not persuaded that the Minister did not apply his mind in deciding to impose the restrictions. On the contrary, the review record reveals a proper application of the mind to the relevant issues. It follows that this ground of review

should also fail. It remains to deal with the constitutional question.

The cross-appeal

The constitutional validity of section 2 of the Import and Export Control Act and the impugned decision

[124] Both Clover and Matador made an attack on the constitutional validity of ss 2 and 3 of the Import and Export Control Act as well as the Notice which as previously observed, notified the public of the decision to impose the quantitative import restrictions. In dealing with this type of challenge, this court in *Kauesa v Minister of Home Affairs & others*⁴¹ was persuaded by the decision of the Supreme Court of India in *MM Pathak v Union* (1978) 3 SCR 334 where the court held that a court should decide no more than what is absolutely necessary for the decision of a case. We reaffirm that principle. The question therefore, is whether it is absolutely necessary for this court to deal with the constitutionality of ss 2 and 3 of the Import and Export Control Act in order to dispose of this matter? This court takes a similar view as that of the court *a quo* that the dispute about the validity of the notice which triggered the constitutional challenge has been resolved by applying the relevant legislation and therefore, it is not necessary to consider the constitutional validity question.

[125] I am further persuaded not to decide the constitutional question because if we do so, this court will be doing so as the court of first and final instance. In *Kauesa* and in *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd & others*⁴² this court cautioned that constitutional law has to be developed cautiously,

⁴¹ 1995 NR 175 (SC) at 184A.

⁴² 2011 (2) NR 469 (SC) para 16.

judicially and pragmatically if it has to withstand the test of time. Therefore, as a general rule this court should avoid acting as the court of first and last instance on matters, especially those that involve constitutional validity of legislation. This court will only depart from this general rule where peculiar circumstances exist and it is in the interest of justice to do so. This is the jurisprudential tradition followed in comparative jurisdictions as well. For instance, the Constitutional Court of South Africa at para 8 in *Bruce v Fleecytex Johannesburg* CC 1998 (2) SA 1143 (CC) held that:

'It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances, the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.'

[126] The above approach was also adopted in a relatively recent judgment of this court in *Teek v President of the Republic of Namibia & others*⁴³ where the court expressed similar sentiments. For all these reasons, therefore, the court declines to decide the constitutional challenge. The cross-appeal by Matador and Clover falls to be dismissed.

[127] Although not much turns on it, it is worth mentioning that the appellants conceded, during the oral hearing, that additional dairy products, referred to in paragraph (c) of the Notice had not been included in the application of the DPA made available to interested parties and upon which their views were sought. The

⁴³ 2015 (1) 58 (SC).

appellants take no issue that these items are set aside. Therefore, these additional dairy products are to be expunged from the list of the dairy products in the Notice.

Costs

[128] The general rule concerning costs is that costs follow the event, subject to the overriding principle that a court has discretion in awarding costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. The appellants have prayed for a costs order should the appeal be upheld. In the same vein, the respondents urged the court to make a costs order in their favour should the appeal be dismissed and their cross-appeal upheld. There is no good reason why costs should not follow the result.

Order

[129] In the event, the following order is made:

(a) The appeal is upheld with costs, such costs to include the costs of one instructing legal practitioner and two instructed legal practitioners where employed.

(b) The order of the High Court is set aside and is substituted for the following order:

‘The applications of both Matador and Clover are dismissed with costs, such costs to include the costs of one instructing legal practitioner and two instructed legal practitioners (where employed).’

(c) The cross-appeal by Matador and Clover is dismissed with costs such costs to include the costs of one instructed legal practitioner and two instructing legal practitioner.

(d) Paragraph (c) to the Notice No 245 concerning the Prohibition of Importation of Dairy Products into Namibia issued on 28 August 2013 and published in *Government Gazette* No 5285 of 16 September 2013 is expunged from the said Notice.

SHIVUTE CJ

(Partially dissenting):

MAINGA JA partially dissenting (HOFF JA concurring):

[130] I have had the privilege of reading the judgment of the Chief Justice in this matter. I agree with the conclusions reached in the majority of the issues he raised for determination in this matter and the bulk of his reasoning. I respectfully disagree with the order he proposes in para 126 (a), (b) and (d) including the order in para 126 (e) (which I would have concurred in but for the conclusion I arrive at it has become unnecessary) and the conclusions and reasoning, particularly on two issues, namely:

- (a) whether the Minister took the decision or he unlawfully abdicated from the responsibility to take the decision.

- (b) whether the Minister applied his mind when the decision was taken to impose the quantitative restrictions.

[131] My dissent in the area of these two issues is in this form. I accept reluctantly though, that the Minister sought an 'in-principle approval' from Cabinet to impose restrictions on the quantities of fresh, ESL, UHT milk, buttermilk, curdled, yoghurt and other fermented milk through the introduction of an import permit system to be administered by the Meat Board of Namibia.

[132] Reluctantly because, the question I keep on asking myself is, once Cabinet had directed the Minister or the Ministry to institute interim quantitative restrictions as sought or suggested by the Ministry, what else was there for the Minister to decide on except to execute the directive? At what point, before the publication of the restrictions in the Government Gazette on 16 September 2013 if the Minister made the decision, did he do so? Before or after he approached the Cabinet? There is no evidence on record or on affidavit to suggest that the Minister himself had taken the decision to impose the quantitative restrictions. This is compounded by the letter of the permanent secretary (PS) of the Ministry of Trade and Industry (the Ministry) of 20 September 2013 to the chairperson of the Meat Board of Namibia who referred to the directive of Cabinet as the 'decision'. The letter reads, 'Cabinet by its decision no. 10th /02. 07. 13/004 directed that the Ministry of Trade and Industry institute to (sic) interim quantitative restrictions . . . through the introduction of an import permit system to be administered by the Meat Board of

Namibia. In light of the above you are hereby informed to administer the implementation of the quantitative restrictions on the import of dairy products.'

[133] In my opinion, the context of the PS' letter, the Cabinet directive became a decision, the source of authority. Nothing could have stopped the PS to attribute the making of the decision to the Minister, if he made the decision. After all, the Cabinet directive, the very first paragraph, is a repetition of the first recommendation of the memorandum to Cabinet by the Minister. The penultimate paragraph of the memorandum headed 'Communication Strategy' reads: 'The decision of Cabinet will be communicated through the normal communication channels'. The ultimate paragraph reads: 'The Ministry of Trade and Industry will also notify the public about the imposition of the quantitative import restriction measures through a Government Gazette Notice'. That is exactly what the Minister did, publication of the restrictions in the Government Gazette. In light of the penultimate and ultimate paragraphs of the memorandum and the PS's letter, there can be no doubt that the Ministry viewed the Cabinet directive as the decision on the point in discussion and the court *a quo* was justified to find that Cabinet and not the Minister made the decision.

[134] However, there can be no doubt that prohibitions of imports into and exports out of Namibia is a policy undertaking that requires a collective Cabinet responsibility or an 'in-principle approval' by Cabinet as the Minister had requested in the memorandum. There is a very thin line drawn as to who would have made the decision. More especially, that the memorandum contained the categories of milk products to be covered by the proposed measures, which was the main

subject matter of the memorandum. In other words, what was presented to Cabinet was the brainchild of the Minister. Once the approval was obtained, the Minister complied with the relevant provisions (ss 2 and 3) of the Import and Export Control Act. It is on that basis I reluctantly attribute the making of the decision to the Minister. Perhaps the use of the word 'direct' by Cabinet in reply to the memorandum was unfortunate as found by the Chief Justice, so is the use of the word 'decision' referring to the Cabinet approval by the Minister and his PS. However, all this was unnecessary if the Minister had attested to an affidavit explaining how policy decisions of this nature are taken by the individual Minister and collectively by Cabinet. When asked for the reasons of his decision by the respondents, he failed to respond and they were referred to the Attorney-General.

[135] Whether the Minister applied his mind when he took the decision to impose quantitative restrictions on certain dairy products is the next question I turn to. The Chief Justice found at para 121 above that, 'it is evident from the comprehensive memorandum that the Minister considered various factors and circumstances before finally deciding on the policy' and that 'the review record is replete with the objective facts that informed the Minister's decision'. He was therefore not persuaded that the Minister did not apply his mind in deciding to impose the restrictions. On the contrary, the review record reveals a proper application of his mind to the relevant issues, the Chief Justice went on to find.

[136] I disagree. The Chief Justice relies among other things on his findings in paras 97-99 of his judgment. Those paragraphs read:

[97] While I do not accept the contention that the entire consultative process was flawed, I agree with the court *a quo*'s characterisation of the second round of consultation as a charade because the Minister failed to disclose to the respondents that the decision to impose quantitative restrictions had already been made. The failure to disclose such important information gravely violated the *audi alteram partem* rule. The essence of the *audi* rule is that the person to be affected by the decision ought to be given sufficient and accurate information against which he or she must prepare their defence. The respondents should have been told that the decision to impose the restrictions had already been made. Should the decision be deemed invalid because the Minister failed to properly honour the *audi alteram partem* rule at this particular meeting and by failing to conduct the second meeting as the Permanent Secretary had promised?

[98] It has already been found that the impugned decision is an executive conduct. Therefore, this Court will only invalidate this decision if it finds that it was irrationally taken. The impugned decision may be irrational if it was made without accurate and sufficient information for the Minister to establish if indeed it was necessary in the public interest to impose these restrictions. The record placed before this court shows that this decision was made before the contested consultative meeting of 18 July 2013. It was made when the Minister received the response to his Memorandum from Cabinet on 2 July 2013.

[99] The record placed before this court shows that by the time the Minister received the response from Cabinet, he had received a detailed application from the Dairies Producers Association (the DPA) outlining the reasons why the quantitative restrictions must be imposed. The Minister also received written submissions from the respondents, counter-arguing why the restrictions should not be imposed. The Permanent Secretary also avers that Government had conducted an independent inquiry to obtain information on the same subject. This averment was not contested by the respondents. Therefore, I accept it. In view of these efforts by the Minister to obtain information, there is no reason for this court to doubt that by the time he sent the Memorandum to Cabinet, he had obtained accurate and sufficient information to make a rational decision. Therefore, although there is no doubt in my mind that the second round of the consultations was palpably flawed, the impugned decision had already been made on the basis

of information gathered by 2 July 2013. Therefore, the flawed nature of the meeting of 18 July 2013 could not have had a bearing on the decision.'

[137] In the letters of 10 October 2013 to Messrs Koep & Partners and LorentzAngula Inc for *Matador and Clover* respectively, the Minister relies on the public consultation held by the Ministry of Trade and Industry on 18 July 2013, which was intended to provide an opportunity to raise any issues concerning the application of the DPA. That meeting has been characterised as a charade by the court *a quo* and the Chief Justice. At the time it was held, the decision to restrict certain dairy products had been taken. Indeed, it was a charade. The Cabinet gave its approval to the Minister's Memorandum on 2 July 2013 and the consultative meeting was held 16 days later. In both letters, the Minister went on to say in his decision he considered the written papers handed over at the public consultation by the representatives of *Clover and Matador*. That is an admission that he could not have received the papers of Clover and Matador at the time the Chief Justice finds he made the decision. That being the case, it follows necessarily that he made the decision before hearing Clover and Matador.

[138] In the letter to Messrs Koep and Partners, the Minister went on to say:

'It was explained at the public consultation that that opportunity should be used to give all inputs and correct whatever information may have been perceived as flawed. I note that no information was provided as such on the current level of imports by your client or how the application for partial restriction of imports could affect it.

Although we have no specific information from your client about its level of imports under the different tariff headings, I have allowed for a significant level of imports

to continue to avoid impacts on end user prices through the absence of competition as well as the interests of the importers. This was done in the interest of reducing the impact on any one operator while addressing the problem in total.' (The underlining is mine).

[139] The underlined sentences is an acknowledgement by the Minister that he had no information on how the restrictions would affect the business of Matador. So was the situation in the case of Clover, when in response to the letter from its representatives, the Minister said: 'Your client had ample opportunity to provide specific information on the level of imports in this regard, but declined to present the written submission or provide clarification on any specific concerns at the public consultation'.

[140] In the letter to LorentzAngula Inc, among other things, the Minister said:

'The article in the Namibian of 7 August 2013 followed from a consultation that I made with Cabinet in order to inform Cabinet of the situation, outlined potential options in response, and to obtain a mandate to hold the public consultation. As the Permanent Secretary indicated at the public consultation, thereafter the Minister would be briefed and make his decision based on all inputs received. I wish to confirm that this is what took place. In my decision I also considered the written paper handed over by Clover at the public consultation and noted the interventions made by Clover representatives. Thus, in my view, opportunities were given to your client to make its inputs.'

The extract above suggests the Minister made his decision after the consultative meeting of 18 July 2013. Besides the 18 July 2013 public consultation, which has been characterised as a charade, no other consultation was held. Both representatives of Matador and Clover in their written submissions indicated that it

was not possible to put everything on paper and cried out loud to be heard in person. That was denied or it never happened. At the end of the consultative meeting of 18 July 2013, the attendees including representatives of Matador and Clover were informed that there would be a follow-up consultative meeting. That never took place. While the attendees of that meeting were waiting for a follow-up consultation, the restrictions on dairy products surfaced in the Government Notice on 16 September 2013.

[141] On 24 September 2013, Koep & Partners representing Matador addressed a letter to the PS and that letter reads:

'Dear Sir

RE: INTRODUCTION OF QUANTITATIVE RESTRICTION ON THE IMPORTATION OF DAIRY PRODUCTS

We refer you to the representation made on behalf of Matador Enterprises (Pty) Limited at the public consultation held on the 15th of July 2013.

We also refer you to Government Notice No. 245 of *Government Gazette* 5285 of 16 September 2013 in which you introduce quantitative restrictions on the importation of dairy products into Namibia with effect from 16 October 2013.

Kindly take note that we are of the opinion that this Notice was introduced prematurely for the following reasons:

1. The introduction of quantitative restrictions is a matter which must be dealt with in consultation with the Southern African Customs Union in terms of the SACU Agreement of 2002. As far as we are aware, the SACU has not yet made any determination or otherwise voiced their opinion on this issue.

2. The consultation process in respect of the quantitative restrictions has not yet been completed. At the stakeholder meeting held on 18 July 2013 all stakeholders present were informed that they will be provided with a discussion document after the meeting. Participants were asked to provide their written comments, which were to be taken into account in this discussion document. To date, we have not yet been provided with this document, despite requests from our side.
3. On the 8th of August 2013 you confirmed that the consultation process has not been concluded.
4. We presume that the consultative process was and remains a serious effort to obtain input from all stakeholders, in order, to enable the Honourable Minister of Trade and Industry to make an informed decision. We note that none of the issues raised by us at the aforementioned meeting appear to have been addressed.

In the light of the above, we urge you to withdraw Notice No. 245 until the consultation process has been finalised and the terms agreed upon in the SACU Agreements have been complied with.'

[142] The letter of 23 September 2013 on behalf of Clover Namibia addressed to the Minister was more or less in the same tone, particularly they wanted to be informed on what grounds the Minister was imposing the restrictions, and particularly in respect of the dairy products set out in the schedule to the Notice.

[143] Indeed on 18 August 2013 in reply to a letter from Koep & Partners of 21 May 2013, the PS states that, 'I wish to assure you that the process is not concluded. We are preparing the record of the consultations - which has taken longer than anticipated due to other obligations - and as I mentioned at the meeting (18 July 2013) we will thereafter brief our Minister. I will in the meantime

ask that the presentation(s) made at the meeting be circulated right away'. This letter was copied to the Minister and five others in the Ministry.

[144] The scenario I have sketched above, shows very clearly that as regards Clover and Matador they were meant to believe falsely that the consultations were still continuing. Even the stakeholders the Minister envisaged in his memorandum, only the Minister of Agriculture, Water and Forestry (MAWF) then made a presentation at the consultative workshop of 18 July 2013. Whether the Attorney-General and the Meat Board were consulted, is not apparent from the record.

[145] The failure to consult the respondents is visible from the memorandum to Cabinet which contains only the contents of the DPA application. In fact, that memorandum is a transposition of the DPA application. The DPA dictated what should be contained in the restrictions and the way forward. It is not surprising that the whole process was done with such a deliberate speed. From 27 June 2013, when the Minister approached Cabinet and approval obtained on 2 July 2013, by August the Minister had signed for the restrictions and during September the restrictions were published. From the tone of letters from the DPA to the Ministry, DPA dictated the pace as well. It is clear from the tone of the letters that the Minister was put under pressure to act with speed. Every letter including the DPA application are headed 'urgent interim measures . . .'. Not a single word from the written interventions made by Matador and Clover. Cabinet was informed of the one version of the DPA. Unfair competition due to the favourable conditions, the South African Dairy industry operates under and low prices are given as reasons why the local dairy industry could not compete with the dairy products from South

Africa. The products from that country are labelled as surpluses on the Namibian market. With that single monotonous version Cabinet was tempted to agree without much ado.

[146] The memorandum to Cabinet omits to reveal the weaknesses of the Namibian dairy industry. The DPA by their own admission in the first draft report of 1 November 2011 on its letterhead prepared by Mr J Hoffmann, the following appears:

'The Namibian dairy sector is most of the time not competitive if measured against the South African or even the European dairy sectors. There are a variety of reasons, one being the small size of the market that is also fully integrated into the much larger South African market. Furthermore, the huge distances in Namibia and the relatively small herd size have a negative influence on productivity, while the equipment used must be up to international standards. While the Namibian market is only about 1% of the South African market and not being competitive, it is in a very difficult position although it has been declared a strategic industry by the Namibian Government with all its preferences.'

[147] On page 3 of the report, paragraph 5, Mr Hoffmann, states:

'Furthermore, the primary dairy sector is due to its own statement not competitive against other SACU or international dairy sectors, with or without subsidies.'

[148] On page 4, paragraph 9 he continued:

'The formal milk producers are concerned about the state of affairs in the sector Also, the price structure for local primary producers is not satisfactory and it does not encourage the establishment of new milk producers. Seen in a

national context, the dairy sector in its present state is dependent on outside influences and is not fully in the hands of Namibian industry. In the longer term, this is unacceptable for a National staple food indispensable for the health and welfare of the Namibian nation.'

[149] Despite the findings above, Mr Hoffmann on page 11, paras 26 and 28 states:

'G: Pricing

26. The cost of milk and dairy products sold in the formal sector of Namibia is marginally higher than in developed and some developing countries. This is mostly attributable to lower economics of scale, lack of (up to now) Government support in any form, and no market support programs. Furthermore the price level is also higher because of the pan-territorial pricing system that is accepted and supported by most retailers and consumers, because it caters for a national price that absorbs all distribution costs.

H: Policy Framework for Monitoring

28 In the medium to long term protection measures, Government may consider a low permanent duty structure, control of the import of milk and dairy products but especially UHT milk, or a quota system for milk and dairy sector. This will ensure that the relatively small producers of milk and dairy products will not be at the mercy of market diversion tactics of foreign companies. It will also support the development of a dairy and furthermore also of a manufacturing sector that can maintain and generate growth in the availability of milk and dairy products for improved food security, price stability and support to the nutritional objectives of the Namibian Government as set out in Vision 2030.'

[150] It must be remembered that the report of Mr Hoffmann was compiled at the time when the DPA was still under the protection of the IIP (a 12 year period) or

when it was about to expire. No questions were asked why the DPA or its NamDairies were not successful during that period. As soon as no more protection was afforded (which was extended for four years after the first eight years), it sought another protection. The extracts from Mr Hoffman's report above raises issues of inefficiency of the dairy industry and exorbitant prices. Matador and Clover raised the issue whether the DPA was efficient. The court *a quo* in para 62 of its judgment referred to the interventions of Matador, where it stated:

'Matador queried whether the first respondent [the Minister] had applied his mind as to whether Namibia Dairies was an efficient enterprise, particularly given the fact that the record revealed that a staff member of the Ministry had referred to Namibia Dairies being granted IIP for 8 years which had been "used to bleed the consumers to the bone for their own profit motives without reinvesting in the competitiveness of the industry which created a short lived lucrative but albeit inefficient dairy enterprise".'

[151] It is very clear from the record that in these 'protection after protection' demands *ad nauseam*, the ultimate victim exposed to exorbitant prices on milk is the consumer in the name of 'growth at home'. Mr Steve Gericke in his open letter of 11 August 2008 to the Ministers of MAWF and Trade and Industry had this to say on the DPA and I refer to the entire letter:

'Lesersbriewe: Die Republikein
Maandag, 11 Augustus 2008

An Open Letter to:

Die Suiwelprodusentevereniging,
The Honourable Minister of Agriculture,

The Honourable Minister of Trade and Industry,

In response to press reports on statements by representatives of the dairy farming industry at their recent annual general meeting:

The hypocritical piousness with which the Dairy Producers Association (DPA) or (Suiwelprodusentevereniging), by word of its executive, suddenly pleads for the scrapping of VAT on milk, is mind boggling if not unbelievably opportunistic.

The fact of the matter is that the DPA's constant complaining about their inset costs, moaning about competition from South Africa and it's lobbying the government for protection, led to the government slapping a 40% import duty on milk from other sources.

Before the introduction of the 40% import duty long life milk was retailing in Namibia, on average at N\$6-00 per litre. As soon as the protection legislation was enacted the price skyrocketed to the current N\$13-00 or more per litre!

And just for the record, long life milk in South Africa is currently retailing in super markets at under R6-00 per litre, and there is an excess available on that market!

At the recent AGM of the DPA Dr. Koos Coetzee of the South African Dairy Producers Association diplomatically encouraged Namibian dairy farmers to face the reality of their situation. He said "Dairy farmers must look at the exploitation of alternative sources of income."

In other words farm in Namibia with that, which is best, or better, suited to the environment and regard dairy farming as a subsidiary or incidental activity.

The dairy industry, an industry which, by their own admission, is an economic dead duck and will quite possibly never ever be viable, is being kept afloat through government intervention in the market place.

This is all happening at a horrendous cost to consumers whom the DPA, now all of a sudden, profess to want to protect, or help, whichever!

For the foreseeable future, the consumer will be at the mercy of the DPA and its government protected industry as is clear from the following:

At the annual general meeting the week before last the DPA chairman warned that the dairy producers must be looked after (“daar moet omgesien word na die produsent”) or else Perhaps the threat is a hint at even more protection to come, but whatever the outcome, it does not bode well for the long suffering Namibian consumer.

Given that the dairy producer’s interest will in all probability “properly be looked after” the consumer will quite possibly and fairly soon be paying N\$30-00 per litre for milk.

It is no longer possible for the DPA to pull wool over the eyes of long suffering Namibian consumers, but sadly consumers are left without recourse because of the absence of an effective consumer interest association.

Steve Gericke
Swakopmund
Cell: 081 263 0083.’

[152] Matador in its interventions had this to say:

[5] From the outset it should be noted that the Submissions offer no reasonable explanation why NamDairies, who has enjoyed protection under Infant Industry Protection (“IIP”) at the expense of other companies involved in the importation of dairy products. No reasons are offered why the IIP granted to NamDairies has not been successful, if it was successful or partially successful, why further protection is required. There is a lack of explanation in the Submissions on the operations of NamDairies during the IIP-period.

[6] The Submissions also do not explain why NamDairies have not been able to ensure during the period it had IIP that, once IIP is lifted, it is in a position to compete with companies importing dairy products from South

Africa. The purpose of the IIP was to promote the establishment of the Namibian dairy industry. From the Submission, it is unclear where the Namibian dairy industry stands and what contribution IIP made to establishing the Namibian dairy industry.

- [7] Furthermore, the Submissions mainly refer to the benefit of the recommendations (including the imposition of quantitative restrictions) for the DPA and NamDairies, but do not consider the impact of the recommendations on the consumer or on other companies in Namibia that import dairy products. From the Submissions, therefore, there is no indication that the quantitative restrictions will be in the public interest. The Submissions are unclear as to whether or not the public will be better served by the imposition of the quantitative restrictions or that the public interest will outweigh the lessening competition.
- [8] Aside from the above, the Submissions also contain no indication that, once the recommendations made are imposed, the measures taken will be successful. This is especially important in the light of the fact that even after a number of years of IIP, NamDairies (and by extension the DPA) requires further protection. There are no information provided explaining why the situation is different now from when it was when IIP was granted to NamDairies.
- [9] The restrictions may have as effect the promotion of one single entity (NamDairies) at the expense of various others and at the expense of consumers. The Submissions make no reference to the effect it will have on competition. It also does not make reference to the fact that these restrictions will result in a situation where the largest market share is vested in one entity, which will then be able to control the market. It is submitted that the competition aspect is an important one that should be addressed, preferable by an independent study.
- [10] The issues raised above are explored in more detail in Annexure A to the document. It is submitted, however, that the Minister cannot exercise his discretion based on the Submissions as they currently stand. Any decision taken by the Minister to impose quantitative restrictions on certain dairy

products will be premature. There is not enough information provided by NamDairies and the DPA in the Submissions to justify such a decision and to prove that it is in the public interest.

[11] Furthermore, a decision in favour of the DPA and NamDairies will be in contravention of the Competition Act, as it will defeat the purpose of the Act and will promote an abuse of dominant position by NamDairies.

[12] We suggest that an independent report be compiled which should investigate the reasons why NamDairies and the DPA require further protection, the potential effect thereof on the market and on competition on the possible consequences for consumers.'

[153] The Chief Justice holds that the impugned decision is an executive conduct and that this court will only invalidate the decision if it finds that it was irrationally taken. He goes on to say that the impugned decision may be irrational if it was made without accurate and sufficient information for the Minister to establish if indeed it was necessary in the public interest to impose restrictions. He goes on to say that the record placed before this court shows that the Minister's decision was made before the contested consultative meeting of 18 July 2013 and that the decision was made when the Minister received the response to his memorandum from Cabinet on 2 July 2013.

[154] Without the Minister's affidavit, this court is left to speculate as to when or at what point he made the decision. I agree with the Chief Justice that it was made immediately after he received a response from Cabinet and before the meeting of 18 July 2013. That being the case, on the Minister's own admission in the letters to Koep & Partners and LorentzAngula Inc for Matador and Clover respectively, he makes it very clear that he received the respondents' interventions after the

meeting of 18 July 2013. That being the case *cadit quaestio*, the *audi alteram partem* was denied. In its approval of the restrictions, Cabinet envisaged consultations with other stakeholders, which did not happen given the fact that the meeting of 18 July 2013 was not only a charade but also a false facade. Even the stakeholders, the Minister contemplated in his memorandum, only the Minister of MAWF made a contribution to the consultation.

[155] As already stated, it was not apparent from the record that the Attorney-General and the Meat Board were consulted. On 27 September 2013, Koep & Partners addressed a letter to the PS informing him that in the meeting of that day they attended with the Meat Board in which the implementation of GN No. 245 in GG 5285 of 16 September 2013 was discussed, the members of the Meat Board were under the impression that the consultative workshop had been concluded and the Notice would take effect as from 16 October 2013 and yet that was the institution which had to implement the restrictions and its Act were to be amended to accommodate permanent restrictions. The Attorney-General does not feature anywhere in the record, except when the respondents threatened to sue, is when he was consulted. There is no evidence that SACU and WTO were consulted.

[156] The consumers as Mr Gericke correctly observed were left at the mercy of the DPA, be it on the prices, the quality and/or supply and demand of the products. Despite knowledge of the high prices of the local dairy products, the Minister in the memorandum stated that the beneficiary producers would be required to make undertakings to refrain from instituting any price increases without prior notification and justification to Government.

[157] It is very clear from the record that the restrictions were not in the best interest of the public - the restrictions were meant to protect a few farmers to pursue their profit driven agenda. In summary, the Minister abysmally failed to consult other stakeholders, particularly the respondents, denying them a hearing. Even if I were to accept that he considered their papers, he by his own admission states that he had no information on the current level of imports and how it could affect Matador and Clover. How the restrictions would affect the respondents is the most basic information the Minister should have secured before taking a decision. If they did not provide it, he should have in the consultations extracted it from them.

[158] The right to be heard requires no repetition, it is sacred, one of the main pillars of Art 12 of the Constitution of the Republic.⁴⁴ The authors *Wade & Forsyth*,⁴⁵ refers to *R v University of Cambridge*⁴⁶ and goes on to say:

‘According to one picturesque judicial dictum, the first hearing in human history was given in the Garden of Eden:

‘I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. ‘Adam, says God, where art thou? Hast thou not eaten the tree, whereof I commanded thee thou shouldst not eat?’ And the same question was put to Eve also.’”

⁴⁴ *Prosecutor-General v Atlantic Ocean Management Proprietary & another*, unreported judgment of the Supreme Court of Namibia, delivered on 9 October 2019, para 21(111).

⁴⁵ *Administrative Law*, 8 ed, Oxford University Press, at p 470.

⁴⁶ (1723) 1 STV. 557 (Fortescue J).

[159] Prohibition of imports into and exports out of one's territory is such a crucial undertaking that cannot be taken lightly. As a people we are who we are because of other nations. Namibia identifies itself with SACU on numerous issues, including imports and exports and our agreements with that institution ought to be respected, failing which, it could have dire consequences for this young nation. So is our relationship with the WTO. The Minister had the legal authority to determine a question affecting the rights of Matador and Clover. He was therefore required to observe the principles of natural justice when exercising the authority. Here where he made a decision without all the information necessary for the decision, the decision was irrational and it was correctly set aside.

[160] After the protection which spanned over a period of 12 years and shortly after its expiry, another one was sought, the Ministry should have conducted a thorough investigation, wide ranged consultation to establish the difficulties of the DPA. Continuous restrictions that has no basis, was not in the best interest of the consumer, SACU and our international relationship at large. The Minister claims, he, among other things, wanted a mandate, from Cabinet to do consultations and when granted the mandate he failed to do so.

[161] The Minister failed in my opinion to give audience to Matador and Clover. As the court *a quo* correctly observed his decision lacked transparency and adversely impacted upon the right to be heard. The interventions by Matador and Clover if considered the Ministry would have got to the bottom of the problems bedevilling the DPA. In the circumstances of this case, it cannot be said that his decision was expedient in the public interest. In my opinion, the whole process

leading up to the publication of the Notice was flawed and therefore the decision of the Minister was irrational and Government Notice 245 of Government Gazette 5285 of 16 September 2013 was correctly set aside by the court *a quo*.

[162] In my view the appeal should be and it is dismissed with costs. The costs to include costs occasioned by the employment of two instructing and four instructed legal practitioners.

MAINGA JA

I agree

HOFF JA

APPEARANCES

FIRST and SECOND APPELLANTS: I V Maleka, SC (with him S Namandje and T
(In the *Clover* matter) Chibwana)

Instructed by the Government Attorney

FIRST and FOURTH APPELLANTS: T C Phatela (with him Mr T Chibwana)
(In the *Matador* matter)

Instructed by the Government Attorney

FIRST and SECOND RESPONDENTS: T J Frank, SC (with him N Bassingthwaighte)
(In the *Clover* matter)

Instructed by the Ensafrica Namibia

(Incorporated as LorentzAngula Inc.)

FIRST RESPONDENT:

(In the *Matador* matter)

R Heathcote, (with him D Obbes)

Instructed by Koep & Partners