



REPORTABLE

CASE NO: SA 70/2018

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF AGRICULTURE, WATER & FORESTRY

First Appellant

MARTHA NAMUNDJEBO-TILAHUN

Second Appellant

RONALD LEONARD KUBAS

Third Appellant

ISRAEL ITAMUNUA NGANGANE

Fourth Appellant

SOPHIA KASHEETA

Fifth Appellant

STEPHANUS OOSTHUIZEN

Sixth Appellant

MUSHOKOBANJI MWILIMA

Seventh Appellant

INGO SCHNEIDER

Eighth Appellant

THE MEAT CORPORATION OF NAMIBIA

Ninth Appellant

and

AMON NGAVETENE

First Respondent

ELIA FASA KANDJII

Second Respondent

PETER KAZONGOMINJA

Third Respondent

GOTTFRIEDT TSUSEB

Fourth

Respondent

TJAKAZAPI JANSON MGUNGUHA

Fifth Respondent

MINISTER OF PUBLIC ENTERPRISES

Sixth Respondent

Coram: DAMASEB DCJ, SMUTS JA and HOFF JA

Heard: 22 October 2020

Delivered: 8 December 2020

Summary: This is an appeal against a judgment and order of the High Court: (a) declaring as unlawful and *ultra vires* s 5 of the Meat Corporation of Namibia Act 1 of 2001 ('the Meatco Act'), the relevant provisions of the State-owned Enterprises Governance Act 2 of 2006 (SOEGA) and Art 18 of the Namibian Constitution, the appointment by the first appellant ('the Minister') of the second to eighth appellants as directors of Meatco – a state owned enterprise. The appointment of the directors was challenged by the first to fifth respondents who, as livestock producers, are members of Meatco.

On appeal to the Supreme Court, the appellants conceded that the Minister acted *ultra vires* his powers in appointing second to eighth appellants as directors of the board of Meatco. The appellants, however, persist on appeal that the first to fifth respondents unreasonably delayed seeking the review and setting aside of the Minister's decision; the review relief having been sought close to seven months after the Minister appointed the impugned board of directors.

The respondents justified the delay on the basis that they were reluctant to litigate against a board of directors on which they are, as producers, dependent for the marketing of livestock; and made attempts to resolve the matter 'amicably' and only approached court when those endeavours failed.

Held per Damaseb DCJ:

That the explanation offered by the respondent livestock producers for the delay was not satisfactory as the pre-litigation steps they rely on to avoid review were not only misdirected but also not shown to be necessary, reasonable or viable as they were directed at a party who was not the decision maker.

Having found the delay unreasonable, court refusing to condone it because of the deleterious consequences on ninth appellant if the decision were reviewed and set aside and because the matter had become academic as a new board had since replaced the board whose appointment was the subject of the review proceedings.

Held per Smuts JA (Hoff JA concurring):

That the court *a quo* did not misdirect itself in its factual finding that there had not been unreasonable delay in bringing the review application and if the question of condonation were to arise, it would not accord with interests of justice for their review application to be dismissed as is proposed by the main judgment. The interests of justice, strongly underpinned by the rule of law impel this court to find that the delay was reasonable and grant condonation. It is in the interest of justice for this court to pronounce itself on the unlawfulness of the impugned decision in accordance with constitutional principles of transparent, accountable and coherent governance.

APPEAL JUDGMENT

DAMASEB DCJ

Introduction

[1] Section 2 of the Meat Corporation of Namibia Act 1 of 2001 ('the Meatco Act') creates the Meat Corporation of Namibia ('Meatco' or 'Corporation'), a meat processing and marketing state-owned corporation representing the interests of Namibia's communal and commercial livestock producers.

[2] Section 5 of the Meatco Act establishes a board of directors for the Corporation and empowers the Minister of Agriculture, Water and Forestry ('the Minister') to appoint directors to the board. Section 5(1)-(4) of the Meatco Act states:

- '(1) The Corporation shall have a Board of directors, which shall be constituted, and the members of which, including the chairperson and the vice-chairperson of the Board, shall be appointed, in accordance with, and for a period as determined under, sections 14 and 15 of the State-owned Enterprises Governance Act, 2006, but the membership of the Board must include –

- (a) One employee of the Corporation selected by the Minister from amongst persons nominated by the employees of the Corporation to represent their interests;
 - (b) one person selected by the Minister from amongst persons nominated by the members of the Corporation to represent the interests of communal farmers;
 - (c) one person selected by the Minister from amongst persons nominated by the members of the Corporation to represent the interests of commercial farmers;
 - (d) two persons selected by the Minister from amongst persons nominated by the members of the Corporation from persons possessing in their opinion expertise in the management of abattoirs, the trading of livestock and livestock products, or any other business or financial sphere, so as to achieve a varied representation on the Board to best serve the interests of the producers of livestock.
- (2)
- (3) When a nomination is to be made in terms of paragraph (a), (b), (c) or (d) of subsection (1), the Minister shall in writing request the chairperson of the Board, or any other person determined by the Minister, to convene a meeting of the interest group concerned to nominate within a specified period the required number of persons.
- (4) If a nomination is not received by the Minister within the specified period from the interest group concerned, the Minister may appoint such person as the Minister reasonably believes would represent the relevant interests and a person appointed in accordance with this subsection shall hold office as if he or she were nominated as required by subsection (3).'

[3] The first to fifth respondents ('the aggrieved producers') are all registered livestock producers in terms of s 17 of the Meatco Act and are, by virtue of the provisions of s 13, members of Meatco.

[4] On 16 February 2017, the Minister appointed second to eighth appellants (‘the disputed directors’) as directors of the Meatco Board. That was after an earlier attempt which he has on appeal) conceded was unlawful and was set aside by the High Court after it was challenged and the Minister conceded that he acted *ultra vires* his powers under the relevant legislation which I will refer to presently.

[5] The aggrieved producers were dissatisfied with the subsequent appointment and challenged it in the High Court. They sought orders (a) declaring the appointment of the disputed directors to be in conflict with and *ultra vires* s 5 of the Meatco Act, read with the relevant provisions of the Public Enterprises Governance Act 2 of 2006¹ and in violation of Art 18 of the Constitution; and (b) reviewing and setting aside the appointment of the disputed directors.

[6] The Minister and the disputed directors opposed the court challenge, including on the ground that the aggrieved producers lacked *locus standi* and that the challenge was unreasonably delayed. They also sought to justify the appointment on the merits and denied that the Minister acted *ultra vires*, as alleged.

[7] The High Court was satisfied that the aggrieved producers had the necessary legal standing and that the challenge was not unreasonably delayed. The court then proceeded to consider the review application on the merits and made an order declaring the Minister’s appointment of the disputed directors *ultra vires* the provisions of the Meatco Act, the SOEGA and Art 18 of the Constitution. The High Court consequently set aside the Minister’s appointment of the disputed directors.

¹ Since repealed by the Public Enterprise Governance Act 1 of 2019.

[8] The present appeal lies against the High Court's judgment and order. The appeal is not opposed but we have to be satisfied that the High Court's judgment and order are wrong before we can set it aside.

[9] Although the appellants raised several grounds of appeal, during the hearing of the appeal their counsel conceded that the Minister acted unlawfully in the manner he appointed the disputed directors.

[10] The appellants therefore only persisted with two grounds of appeal. In the first place, it was submitted by Mr Barnard for the Minister that the High Court misdirected itself in holding that there was no unreasonable delay. The second ground is that, granted that the Minister's decision was unlawful, the High Court should not, in the exercise of its discretion, have set it aside because of the deleterious consequences for Meatco of doing so.

[11] According to Mr Barnard, by the time the High Court made its order, the disputed directors had occupied office for a period of 21 months and took decisions affecting third parties which would all be null and void and possibly result in a host of legal challenges - a consideration that should have led the High Court not to set aside the appointment.

[12] Mr Kutzner for second to ninth appellants made common cause with the Minister's submissions.

[13] The only surviving *in limine* objection to the review relief pursued on appeal is that of unreasonable delay. If we find that there was unreasonable delay and that it cannot be condoned, the review relief is liable to be dismissed.

[14] As Hoexter writes, at common law, reviewing, correcting and setting aside an administrative decision is a discretionary remedy that may be refused if the applicant unreasonably delays challenging it. The learned author correctly states that the result of unreasonable delay is, in effect, ‘a validation’ of what might otherwise be invalid administrative action.² Finality is important not only because delay may cause prejudice to the decision maker but also because of the public interest in certainty. The discretionary nature of the review remedy therefore helps to ensure that, in an appropriate case, finality is achieved in matters of public administration.

[15] That unreasonable delay is potentially harmful to the general public interest is recognised in the principle that a court may, with notice to the parties, raise the issue *mero motu*.³

[16] As this court recognised in *Keya v Chief of the Defence Force & others*⁴:

‘The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in

² Hoexter C. (2007) *Administrative law in South Africa* Juta: Cape Town at p. 475; See also: *Chico/Octagon Joint Venture v Roads Authority & others* (SA 81/2016) NASC (21 August 2017) para 46.

³ Hoexter at p. 476.

⁴ 2013 (3) NR 770 (SC) para 22.

challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the Court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

The High Court proceedings

[17] I will briefly recount the contentions of the parties on affidavit in respect of the timing of the review application. The first respondent, Mr Amon Ngavetene, deposed to the main affidavit on behalf of himself and second to fifth aggrieved producers who made common cause with him.

Events post 16 February 2017

[18] According to Mr Ngavetene, the aggrieved producers became aware of the Minister's decision 'in late February or early March 2017.' During March 2017, certain livestock producers representing the Namibian National Farmers Union held a meeting with the Minister to protest about the appointment. After the meeting, the Minister allegedly 'failed to take this matter up or to take any corrective action'. However, in order to 'avoid unnecessary conflict, members resolved informally to rather take up the issue internally with MEATCO' at an annual general meeting (AGM) which they wanted to be held in June 2017.

[19] A motion was prepared, apparently to be adopted at the proposed AGM, stating that 'this board is illegal and is therefore of no force and effect. Members have lost confidence in the entire Board of Directors and that they must resign in dignity. We request the Ministry of Public Enterprises to handover the outcome of this motion to H.E. the President with the following expectations: The President should restore normality in Meatco by instructing the Attorney-General to bring an urgent amendment to both the Meatco Act and the SOE Governance Act to enable Minister Jooste to appoint a new board.'

[20] It is alleged that the disputed directors did not look favourably upon the draft motion. According to Mr Ngavetene, it was then 'resolved' that 'another meeting . . . be convened within 21 days . . . to look into the legality or otherwise' of the appointment of the disputed directors.

[21] It is not clear who 'resolved' and who was to attend the meeting at which the 'legality or otherwise' of the appointment was to be considered. What is apparent from the explanation though is that the disputed directors questioned the propriety of the AGM which was to take place in June as there was, according to the directors, no written request for a meeting supported by at least fifty members. Therefore, on 20 July 2017, the disputed directors in a public statement made clear that:

'[T]he members did not have the power to decide whether the appointment of directors was valid in law as this would be a matter for the courts to determine.'

[22] According to Mr Ngavetene, that led them to the conclusion that the matter could not be resolved 'amicably'. Therefore, in 'late July' they approached their legal practitioners for advice on 'what steps could be taken in the matter'. He then alleges:

'In the last week of July, a consultation took place with instructed counsel to obtain advice in the matter. Documents were requested by counsel and a follow-up consultation took place on 7 August 2017. At that consultation further advice was furnished, and thereafter draft papers were prepared by junior counsel. In drafting junior counsel realised that further instructions and documentation were required on several issues, whereafter these were obtained and the draft completed on 16 August 2017. Senior counsel was only available to settle the papers from 23 August, whereafter the papers were settled and should be signed and filed by early September 2017.'

The Minister's answer

[23] The Minister maintained that the aggrieved producers offered no valid reason for the delay up to September 2017. He also denied having any meeting with the aggrieved producers at which they protested to him about the appointment of the disputed directors. According to the Minister, he had a meeting with representatives of Namibian National Farmers Union on 28 April 2017 but on an unrelated matter not concerning the appointment of the disputed directors.

[24] The Minister also denied that the aggrieved producers were in law entitled to call for an AGM for the removal of the disputed directors. He stated that the aggrieved producers had therefore not established a sufficient factual basis to justify condonation for the late prosecution of the review.

[25] In an affidavit deposed to by the third appellant on behalf of all the disputed directors and the Corporation, the disputed directors made common cause with the Minister both on the facts and the legal contentions.

[26] In the reply, the aggrieved producers do not take issue with the Minister's denial that a meeting was held with him to protest the appointment of the disputed directors. The aggrieved producers denied that they unreasonably delayed the review application and that even if that were the case, the delay ought to be condoned.

[27] Such is the backdrop against which the High Court had to decide whether or not there was unreasonable delay on the part of the aggrieved producers.

The High Court's approach

[28] The High Court was unpersuaded by the appellants' complaint of unreasonable delay and rejected the objection based on that ground. The court reminded itself that when considering what a reasonable time is to launch review proceedings, regard must be had to a reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. The High Court was satisfied that the steps taken by the aggrieved producers were reasonable and necessary. In the view of the court *a quo*, the aggrieved producers' explanation for not launching a review as soon as the decision was taken but pursuing alternatives to litigation (including meeting with the Minister to persuade him to reverse the appointment) is reasonable and was satisfactorily explained. Having found so, the court proceeded to grant the relief sought by the aggrieved producers.

The appeal: unreasonable delay

[29] The Minister, with whom the second to ninth appellants make common cause, complains that the High Court erred in finding that there was no unreasonable delay in the institution of the review application and that the aggrieved producers' steps ostensibly to avoid litigation were not reasonable in the circumstances. The appellants maintain that the High Court misdirected itself in finding that the aggrieved producers met with the Minister to protest against the appointment and to persuade him to reverse it.

The law

[30] It is trite that an application for review must be brought within a reasonable time. What is reasonable depends on the circumstances. Where the delay is found to be unreasonable, the court may nevertheless condone it if the applicant can give a satisfactory explanation for it; if the merits are overwhelming in favour of the applicant or if it is in the public interest to enforce legality. The court will also take into account the presence or absence of prejudice to a party affected by the decision.

[31] An applicant for review need not rush to court upon his or her cause of action arising as he or she is entitled to first ascertain the terms and effect of the offending decision; to ascertain the reasons for the decision if they are not self-evident; to seek legal counsel and expert advice where necessary; to endeavour to find an amicable solution if that is possible; to obtain relevant documents if he or she has good reason to think they exist and they are necessary to support the relief

desired; consult with persons who may depose to affidavits in support of the review; and then to consult with counsel, prepare and lodge the launching papers. The list of possible preparatory steps and measures is not exhaustive; but in each case where they are undertaken they should be shown to have been necessary and reasonable. In some cases, it may be required of the applicant, as part of the preparatory steps, to identify and warn potential respondents that a review application is contemplated. Failure to so warn a potential respondent may lead to an inference of unreasonable delay.⁵

Appellants' main submission

[32] In respect of unreasonable delay, the Minister's case is that the review application was unreasonably delayed for close to seven months. According to the Minister, if the decision is reviewed and set aside it would operate retrospectively and have far reaching legal consequences for the Corporation. Setting aside the appointment of the disputed directors would have a bearing on rights and obligations of third parties and potentially lead to third party claims against Meatco.

Analysis

[33] The aggrieved producers cannot be faulted for making attempts to amicably resolve the matter or taking steps preparatory to launching the review. The question rather is whether those steps were necessary and reasonable in the circumstances.

[34] The essence of the aggrieved producers' case is that, although unhappy with the Minister's unlawful appointment of the disputed directors, they were reluctant to

⁵ Dicta approved in *South African Poultry Association & others v Minister of Trade & others* 2018 (1) NR 1 (SC) para 18. See also: *China State Engineering Construction Corporation v Namibia Airports Company Ltd* (SA 28/2019) [2020] (7 May 2020) para 24.

enter into litigation with Meatco given their dependence on it for the marketing of their livestock. Their preferred strategy was to have the disputed directors vacate office voluntarily or be removed as such by the members of Meatco. That they sought to do by having the matter debated at the AGM of the Corporation which they demanded to be held. It was when they failed in that endeavour that they sought legal advice and instituted the review proceedings. The alleged amicable endeavours took place between March and July. The legal practitioners were first consulted in July and the application was launched in September.

[35] It will be recalled that the Minister denied having a meeting with the aggrieved producers whereat they protested to him against the appointment of the disputed directors. That denial was not contested in reply. It must therefore be accepted⁶ that the aggrieved producers did not protest to the Minister as decision-maker after the appointment of the disputed directors on 16 February 2017.

[36] It is clear from Mr Ngavetene's explanation under oath that the Minister was never put on notice that the decision was going to be challenged. In my view, this is a case where a prospective applicant for review should have done so. It seems to me pointless to put pressure on people who did not make the decision when the actual decision-maker is unaware of the efforts being made to reverse his decision and to alert him that a legal challenge is being contemplated.

[37] The aggrieved producers' endeavour was devoted to pressuring the disputed directors to resign. That attempt was rebuffed as soon as it was initiated. What they

⁶ On the test applicable to fact-finding in motion proceedings: *Mostert v Minister of Justice* 2003 NR 11 (SC) at 21G-I.

reasonably wanted to achieve in the absence of some hope that the Minister would relent (assuming he could since he had become *functus officio*) is not satisfactorily explained on affidavit.

[38] Even the delay between when the disputed directors refused to cooperate (which was in early July according to Mr Ngavetene) and when the challengers sought legal advice in 'late July', is not satisfactorily explained. That the legal practitioners would take about two months to prepare an uncomplicated application of the nature that served before the High Court is not reasonable in my view. As the authorities make plain, every step taken must be both necessary and reasonable.

Disposal

[39] The cases make clear that each preparatory step undertaken by the delaying party must be shown to have been necessary and reasonable.⁷

[40] I find it unreasonable for the aggrieved producers to have expected a board to resign when it was quite apparent that the appointing authority had no intention of reversing the decision. Even assuming that they were successful in moving a motion declaring the board illegal, I do not see how that was a viable strategy because the decision would stand until set aside by a court of law on the *Oude Kraal* principle.⁸

[41] The caution expressed in *Keya* resonates with the facts of this case, highlighting the importance of a speedy challenge to an administrative decision.

⁷ See *Keya v Chief of the Defence Force & others* (SC) para 28; *South African Poultry Association* (SC) para 18.

⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 6.

[42] The Minister pertinently raised the consequences of the late prosecution of the review. He made clear that if the review were granted, it would operate retrospectively with serious consequences. It would, for example, affect third parties and potentially lead to claims and disputes arising from the illegality of the board and status of decisions taken by it.

[43] A period of about three months had lapsed after the aggrieved producers first sought legal advice to challenge the decision. In *China State Engineering Construction Corporation*, this court was not persuaded by a similar argument. In that case, a substantial period of time had lapsed during which the challenger was engaged in consultation with legal practitioners and preparations by the legal practitioners when it was clear that there was sufficient material available to launch a review without delay.

[44] Legal practitioners must not drag their feet in launching review proceedings once instructed, especially when it is clear that there is no prospect of an amicable resolution of the matter and all the material for launching a review is at hand. In this case, the averments relating to the actions taken by the legal practitioners (both instructing and instructed) are so vague and evasive and there is no satisfactory explanation for why the instructing counsel took as long as they did and why there was such a long delay before the senior counsel could settle what otherwise are uncomplicated pleadings of which the main affidavit comprises 24 pages dealing with factual matter which is largely common cause.

[45] For all of the above reasons I am satisfied that the aggrieved producers unreasonably delayed in bringing the review application. The High Court therefore misdirected itself in holding otherwise.

Should the delay be condoned?

[46] This court held in *South African Poultry Association and others v Minister of Trade and Industry and others*⁹ that, in deciding whether or not to grant condonation after finding that a delay is unreasonable, the criterion to be applied under common law is the interests of justice. Factors to be considered include the nature of the impugned decision, the merits of the challenge, prejudice to the respective parties, the extent and cause of the delay and the importance of the issue raised. Public interest is generally served by bringing certainty and finality to administrative action. The court also held that the merits are a fundamental factor to be considered in such an enquiry.

[47] The merits of the challenge are not a weighty consideration in this case because the matter had become entirely moot since the disputed directors had already vacated office and a new board of directors was appointed for the Corporation.

[48] Condonation of unreasonable delay is unlikely to be granted where doing so would deleteriously affect the interests of public administration and there is no demonstrable case for the court to enforce legality in the public interest.¹⁰

⁹ 2018 (1) NR 1 (SC).

¹⁰ Compare: *China State Engineering Construction Corporation v Namibia Airports Company Ltd* (SA 28/2019) [2020] (7 May 2020) paras 67-69.

[49] Since their appointment, the disputed directors assumed office and performed duties as directors in furtherance of the Corporation's powers in terms of s 4 of the Meatco Act. If the appointment is set aside it would operate retroactively and the board would have had no directors for more than three years. The resultant decisions would potentially be illegal if the unreasonable delay is allowed and the review is granted. Besides, the issue has become of academic interest only because the board no longer holds office and a new board has since been appointed.

[50] I would therefore not grant condonation for the delay.

[51] As far as costs are concerned, the appellants submitted that they will not seek costs. I assumed that to mean both *a quo* and in the appeal. Even if the High Court should have dismissed the review on the basis of unreasonable delay, it would still have been entitled to deny costs to the appellants in view of the clear unlawful conduct of the Minister. An appropriate order would therefore be that each party bear its own costs.

The order

[52] I would therefore propose the following order:

- (a) The appeal succeeds and the judgment and order of the High Court are set aside and substituted with the following order:
 - 'i. It is declared that the applicants unreasonably delayed in bringing the review application.

ii. The application is dismissed and there shall be no order as to costs.’

(b) There is no order of costs in the appeal.

DAMASEB DCJ

SMUTS JA (HOFF JA concurring):

[53] I have had the distinct benefit of reading the judgment prepared by my colleague, the Deputy Chief Justice (the main judgment). I gratefully adopt the exposition of the factual background and statutory context relevant to this appeal, including setting out the relevant statutory provision (section 5 of the Meatco Act). I am however unable to agree that the respondents unduly delayed in bringing the review application. I am further of the view that, even if such a finding were to be made, this would be a case where the interests of justice would require that the delay be condoned. I would however be inclined to grant an order largely along the lines proposed by the appellants that the appointment of Meatco’s board not be set aside in view of the consequences of confirming the order of the High Court setting aside the appointment of the board. What follows are my reasons for reaching these conclusions.

[54] This appeal raises important questions concerning corporate governance of public enterprises and the enforcement of the rule of law.

Statutory context

[55] The legislature, with sound corporate governance in mind, enacted s 5 with a view to ensuring that stakeholders are duly represented on Meatco's board. Whilst the Minister is the appointing power, s 5 provides peremptory safeguards regarding the board's composition to ensure such representativity and accountability.

[56] This not only furthers sound governance, but also the values embedded in our Constitution of accountability and transparency as well as ethical supervision of parastatal enterprises contemplated in Art 40. For these reasons, the Minister is enjoined to appoint:

- an employee of Meatco by selecting a board member from persons nominated by the employees to represent their interests;
- a person selected from persons nominated by members of Meatco to represent the interests of communal farmers;
- a person selected from persons nominated by members to represent the interests of commercial farmers;
- two persons selected from persons nominated by members with expertise in abattoirs, trading in livestock and livestock products or in any other business or financial sphere so as to achieve a varied representation on the board to best serve the interests of livestock producers.

[57] The Minister is to request the board chairperson to convene meetings of the identified interest groups to nominate persons for selection purposes. A specific period is to be designated for this purpose. But, if the Minister does not receive nomination(s) within that period, the Minister may then appoint persons whom the Minister reasonably believes would serve the identified interest groups in the subparagraphs in question.

[58] This is the statutory and governance framework within which board appointments are to be made by the Minister. I refer to this context in some detail because of the developments which preceded the disputed appointments of the Minister on 16 February 2017. Those facts – for the large part uncontested – are of importance in addressing the legality question which is at the heart of the review and in considering the question of delay and the related issue of condonation. The contentious history preceding the review is briefly referred to, given its relevance to this governance context.

Further factual background which preceded the impugned decision

[59] The previous board (although comprising the same members except for one who was subsequently co-opted in the place of a board member who had resigned) had been appointed by the Minister on 4 October 2013 for a three year term. On 5 April 2016, the board chairperson alerted the Minister to the expiry of their term on 3 October 2016 so that the process of meetings resulting in nominations contemplated by s 5 could proceed. Meatco's annual general meeting (AGM) took place on 24 June 2016. The Minister addressed it and outlined the selection procedure. He

followed this up by requesting the board chairperson on 4 July 2016 to convene a meeting of members to nominate the requisite candidates.

[60] The board chairperson gave notice to members of a meeting to be held on 12 August 2016 for the purpose of nominating candidates. On the day before the meeting, the chairperson precipitously gave notice that the meeting would be postponed by resolution of the board. This despite members were already traveling by then from their farms – some a considerable distance from Windhoek – for the meeting. Notwithstanding the board resolution, members who had assembled on 12 August 2016 held a meeting and elected nominated candidates for appointment. The member who chaired the meeting addressed a letter to the Minister and to the Minister of Public Enterprises on 16 August 2016 apprising them of the names of nominees elected for consideration of appointment. The Minister considered that the meeting had not been convened in terms of the Act and declined to consider them, holding the view that stakeholder nominations must be conveyed through the board chairperson. Inexplicably, the board chairperson failed to convene another meeting for this purpose, despite the clear statutory duty to do so.

[61] In the meantime on 16 August 2016, Meatco's chief executive officer (CEO) by letter informed the Minister of the employees' nominations for their representative. But the Minister also disregarded these nominations as he considered it improper to be approached by the CEO instead of the board chairperson.

[62] Given this hiatus, the Minister extended the terms of existing board members by three months to 4 January 2017. The board chairperson inexplicably again failed

in her duty to convene meeting(s) required by s 5. On 21 December 2016 the Minister announced the appointment for six months of a temporary board, purporting to act under s 16 of the Public Enterprises Governance Act 2 of 2006¹¹ (PEGA).

[63] Following this appointment, Meatco and some of its producer members approached the High Court as a matter of urgency seeking a declaratory order that the temporary appointments were outside the Minister's powers (*ultra vires*) under the Act. This application was settled on 17 February 2017 by the Minister conceding that the appointments were *ultra vires* and unlawful. The day before this settlement, the Minister on 16 February 2017 purported to appoint the second to eighth appellants – the disputed directors – to the board by invoking his power to do so under s 5(4) of the Meatco Act, the default position empowering the Minister to make appointments where he had not received nominations from the interest groups within the specified period. This is the decision which the respondents (as members of Meatco) succeeded in setting aside on review to the High Court and which is the subject of this appeal. (The settlement in the urgent application in terms of whereof the appointments were set aside was however only made an order of court on 15 March 2017.)

[64] Two preliminary points were taken by appellants. The standing of the respondents was challenged and was rightly swiftly brushed aside and understandably not raised in this appeal. The appellants also contended that the respondents had unduly delayed in bringing their review application and should be dismissed for that reason. The Deputy Judge President found that the challenge was not unreasonably delayed. The court proceeded to consider the review grounds and

¹¹ Applicable then, but since repealed by the Public Enterprises Governance Act 1 of 2019.

found that the Minister's decision was invalid on several of the review grounds raised. Of relevance for present purposes is the finding that the Minister acted *ultra vires* seeking to appoint a board on 16 February 2017 at a time before the prior appointment of the temporary board was set aside by the court pursuant to the settlement agreement which was made an order of court on 15 March 2017.

[65] The High Court correctly found that the principle of legality required the Minister to act within the four corners of his statutory powers under the Meatco Act and PEGA. The court held that the Minister's invalid decision to appoint the temporary board still stood until it was set aside by the court on 15 March 2017. The Minister was thus found to be *functus officio* and could not validly appoint a board on 16 February 2017.

[66] The appellants appealed against this finding as well as those in respect of the other review grounds upheld by the High Court. The appellants also appealed against the finding that the respondents had not unduly delayed in bringing the review. The respondents initially gave notice to oppose the appeal but subsequently withdrew that notice and did not participate in the appeal.

[67] When the appeal was heard, the appellants at the outset correctly conceded that the appointments were invalid on the grounds of being *ultra vires* in that the Minister was precluded from making the appointments on 16 February 2017 until the temporary appointments had been set aside by court and was thus *functus officio*.

[68] In the course of their oral argument, the appellants however contended that this court should ameliorate the consequence of invalidity by exercising its discretion not to set aside the appointments by reason of the prejudice to Meatco if the board's appointment were to be set aside. It was pointed out that the board's term had at the time of the hearing of the appeal already expired and that an order setting aside those appointments would be academic but would have the consequence that board decisions would be rendered invalid and have further prejudicial consequences for Meatco.

[69] To this end, a draft order was provided to this court to alter the order of the High Court to the effect that, although finding the Minister's decision would be declared invalid on grounds of *functus officio*, the appointments should not be set aside. No order of costs was sought against the respondents in both this court and the High Court. Counsel for the first appellant however conceded that the respondents, having been vindicated on the invalidity of the decision, should be entitled to their costs in the High Court. That was the essential thrust of the appellant's approach at the hearing.

[70] Upon enquiry, the appellants confirmed that they persisted with their appeal against the finding that there had not been an unreasonable delay. This was one of the listed grounds of appeal and some written argument had also been directed at that finding.

[71] I have set out the background to the review and the principal attack upon the decision making in some detail because of its relevance to a determination of the

issue as to whether the delay was unreasonable and, if so, whether it should be condoned and finally as to the appropriate order to be given by this court.

The delay issue

[72] Despite the concession on the illegality of the impugned decision making, the main judgment has found that the respondents unreasonably delayed and that their review application should have been dismissed by the High Court for that reason because condonation should not be given. The first question to be determined by this court is whether the court *a quo* misdirected itself in concluding that the respondents had not unduly and had not reasonably delayed in launching the application for review.¹² The court's conclusion is to be considered on the basis of what served before that court when it heard the matter.

[73] Before turning to the facts relevant to the assessment of undue delay, I first refer to the well-established principles concerning delays in review proceedings succinctly summarised by this court in *Keya v Chief of the Defence Force & others*¹³ quoted in the main judgment. In short, the assessment is two staged. It firstly entails a factual enquiry involving a value judgment as to whether the delay is unreasonable or undue in the light of the relevant circumstances; and secondly, if so, whether a court should exercise its discretion to overlook the delay and proceed to entertain the review application.¹⁴

¹² *Madikizela-Mandela v Executors, Estate Late Mandela & others* 2018 (4) SA 86 (SCA) para 11.

¹³ 2013 (3) NR 770 (SC) para 22 (*Keya SC*).

¹⁴ *Keya SC* para 22; *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) para 74.

[74] The rationale for the rule against unduly delaying the launching of review applications, stressed by *Keya*,¹⁵ is self-evident. Whilst a court would be reluctant to allow procedural obstacles to prevent it from determining challenges to the legality of the exercise of public power and thereby vindicate the rule of law, that same foundational constitutional principle requires that challenges unduly delayed should not be tolerated.¹⁶ As is correctly stressed in the main judgment and by this court in *Keya*, there is a compelling public interest in certainty and in the finality of decisions made by those exercising state power.

[75] In considering the factual enquiry as to whether there was an unreasonable delay, this court¹⁷ endorsed the approach set out by the Judge President in the High Court decision in *Keya*¹⁸ in taking into account the steps which would precede a review application:

'It is now judicially accepted that an applicant for review need not rush to Court upon his cause of action arising as he is entitled to first ascertain the terms and effect of the offending decision; to ascertain the reasons for the decision if they are not self-evident; to seek legal counsel and expert advice where necessary; to endeavour to find an amicable solution if that is possible; to obtain relevant documents if he has good reason to think they exist and they are necessary to support the relief desired; consult with persons who may depose to affidavits in support of the review; and then to consult with counsel, prepare and lodge the launching papers. The list of possible preparatory steps and measures is not exhaustive; but in each case where they are undertaken they should be shown to have been necessary and reasonable. In some cases it may be required of the applicant, as part of the preparatory steps, to identify and

¹⁵ *Id* para 22.

¹⁶ *Keya* SC para 22; *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 160.

¹⁷ In *South African Poultry Association & others v Minister of Trade and Industry & others* 2018 (1) NR 1 (SC) para 18, (*SAPA*).

¹⁸ *Keya v Chief of the Defence Force and others* (A29/2007) [2009] NAHC 10 (20 February 2009) (Unreported) 17.

warn potential respondents that a review application is contemplated. Failure to so warn a potential respondent may lead to an inference of unreasonably delay.¹⁹

Facts relevant to the delay question

[76] Turning to the facts relevant to the first question as to whether the delay was unreasonable, the respondents are members of Meatco and fall within an identified interest group (as livestock producers) contemplated by s 5 where provision is made for their representation on the board. Their main deponent attests to becoming aware of the Minister's decision (of 16 February 2017) to make the impugned appointment 'in late February or early March 2017'. The appointments were then discussed (amongst the respondents) and dissatisfaction was once again rife – at the purported invocation of s 5(4) of the Meatco Act instead of following the primary and principal route of appointing from nominations elected from interest groups, particularly given the fact that the board chairperson had failed to facilitate meetings for those elections. They say they approached the Minister in a meeting to express their dissatisfaction but the Minister denies this, stating that, at his meeting with producers in April 2017, they did not raise this issue. The respondents did not take issue with this in reply.

[77] The respondents resolved to place the matter before Meatco's AGM scheduled for late June 2017. They submitted a resolution to the effect that the board's appointment was illegal and calling upon board members to resign. The board chairperson declined to place the proposal on the agenda and advised the members to apply to convene a special general meeting for that purpose. The members sought to convene such a meeting for 21 July 2017. But on the very eve of

¹⁹ See also *Radebe v Government of the Republic of South Africa & others* 1995 (3) SA 787 (N) at 798 – 799.

that scheduled meeting, Meatco issued a press statement on 20 July 2017 that the Meatco constitution had not been complied with in that the meeting had not been convened at the request of at least 50 members. Significantly, the media release stated that it was not for members to decide upon the legality of board appointments and that this was a matter for the courts to decide.

[78] The respondents state that they then resolved 'in late July' to approach their legal practitioners for advice. A consultation took place in the last week of July with instructed counsel. Documents were requested and a follow-up consultation was held on 7 August 2017. Draft papers were then prepared by junior counsel. When doing so, he realised that he needed further instructions and documentation and called for them. A draft was completed on 16 August 2017. Senior counsel was however only available to settle papers from 23 August. Papers were finally settled and deposited to and served in early September 2017 – more than six and a half months after becoming aware of the Minister's decision and some six weeks after approaching their legal practitioner.

The approach of the High Court

[79] The High Court found that this was not an unreasonable delay, bearing in mind that the respondents were reluctant to plunge into litigation against Meatco, given their reliance upon it in marketing and selling their livestock. The Deputy Judge President noted their attempt to resolve the dispute without recourse to the courts by seeking to place a resolution before Meatco's AGM. The court further found the explanation as to the steps which occurred after approaching their legal practitioner

was reasonable and sufficiently explained, and finally found that the period of nearly seven months before launching the application was thus not unreasonable.

Analysis of the facts in determining whether there was an undue delay

[80] The main judgment rightly criticises components of the respondents' explanation. The reference to some dates lacked specificity and was in some respects vague. The strategy of seeking to put pressure on the board to resign was also described as hardly being viable. It may well have been over optimistic but the draft resolution emphasises the importance of representivity and accountability in the statutory purpose of selecting nominees from those who had in turn been elected by their interest group. This initiative is also to be viewed in the context of the prior temporary appointments which were conceded to be unlawful and the events in 2016 and the failure on the part of the board chairperson to arrange meetings to ensure that nominees were elected despite an ample period available for that purpose. Ideally, the respondents should have taken legal advice simultaneously with this initiative so that a review could proceed straightaway if it were to fail.

[81] Whilst the respondents' strategy can thus be faulted on the grounds that the decision would remain in place until set aside, was it unreasonable in the circumstances? In my view not. The strategy may well have succeeded, resulting in the board resigning if members of Meatco voted overwhelmingly to support the resolution at a special general meeting. Their position would become untenable in losing the confidence of those whose interests they represent. It is in my view understandable and acceptable for members of a company to first seek recourse within the structures of a company such as at board level or at an AGM or special

AGM before seeking recourse in court. That is after all how governance of those structures is designed to work.

[82] The respondents are criticised for taking three months before taking legal advice (following becoming aware of the impugned decision).

[83] But this is not an instance where they sat back idly and did nothing. They endeavoured to use the company structures to achieve a resolution of their dispute. It was only after this failed that legal advice was sought. And then it was sought without delay.

[84] The period of some six weeks taken after seeking advice to the launching of the application can also be criticised and could have been explained with more precision. But it was not in my view of such a nature as to constitute an unreasonable delay, taking into account the factors set out by the court *a quo* in *Keya* quoted above. They had first sought to find an amicable resolution. Thereafter when this failed, they sought legal advice within a week or so and the application was launched six weeks after that. It is explained that junior counsel was first consulted, later needed further instructions and documentation. This was not unreasonable in view of the history which preceded the Minister's decision which is highly relevant in the context of compliance with statutory prescriptions directed at promoting sound corporate governance and accountability.

[85] It is not surprising to me in this factual and legal context that further documents were sought after drafting had commenced (and the statutory requirements had been further considered, given the relevance of preceding events

to certain of the review grounds.) In this instance, it was not an unreasonable precaution to engage the services of senior counsel. There was a week's delay before senior counsel was able to consider the draft prepared by junior counsel. The papers were finalised and filed in less than two weeks after that.

[86] Although the appellants correctly conceded the *functus officio* point, which is a relatively straightforward issue, other review grounds were raised with reference to the statutory context and prior factual developments and they were less than straightforward. It was a reasonable precaution to raise those further grounds and brief senior counsel. The High Court in fact dealt with them and found in favour of the respondents in respect of them and, in its discretion, considered the matter warranted the engagement of two instructed counsel in granting a cost order to that effect.

[87] Whilst it was correct that the appellants were not given notice of the intention to bring the review, the failure to do so would not take on such importance on the facts of this case. This is because of the purpose in giving such notice so that a decisionmaker is not prejudiced in defending the review in terms of collecting evidence and having witnesses available to depose to affidavits and the like. The second to ninth appellants (the board members and Meatco) had already received notice in June 2017 that the respondents regarded their board appointments as unlawful. So too would the Minister have been apprised of this view when Meatco's press release was issued on 21 July 2017 where the issue is expressly dealt with and where the statement is made that it is for the courts to decide upon the legality of the appointments.

[88] Not only was this a public media release, but corporate governance would have required that the Minister as appointing authority should have been apprised of this by Meatco's board.

[89] None of the appellants state that they would have taken remedial steps to address review grounds or that they were prejudiced in their defence of the application by the failure to have given notice of it. Meatco opposed the review. In his brief answering affidavit on its behalf, the then vice chairperson of the board does not refer to any prejudice of any nature to Meatco by reason of the delay. Nor does the Minister in his detailed affidavit. The failure on the part of the respondents to refer to any prejudice is expressly raised in reply. Even after this was pointed out in reply, none of the appellants sought to adduce a fourth set of affidavits to address that issue.

[90] The failure to raise prejudice (except in argument and not relating to the failure to give notice and in defending the application) and refer to the nature of it was conceded by Mr Barnard for the first appellant in oral argument. It was also correctly accepted that it was incumbent upon the appellants to spell out the nature of the prejudice. Mr Barnard argued with reference to an appropriate remedy that this court could assume prejudice if the board's appointment was set aside and board decisions rendered invalid. I return to that aspect in addressing the appropriate order for this court to make.

[91] Relevant for present purposes is that the review application was launched less than seven months into the three year term of the board. The appellants were at the very least then on notice that those appointments were at risk of being set aside.

[92] They elected to oppose the application and not rectify the position even though this option was referred to in the Minister's answering affidavit and the point of *functus officio* being relatively straightforward. They cannot be heard to complain about further prejudice (after the application was launched) within the context of the enquiry as to whether the delay in bringing this review was unreasonable.

[93] The fact that the respondents first attempted to press their resolution and only after that took advice and an application was only forthcoming six weeks later meant that they were almost certainly precluded from approaching the High Court on an urgent basis seeking interim relief pending the determination of the review. Being precluded from seeking urgent interim relief did not however in my view non suit them in their review on the grounds of undue delay in launching the review, given the obvious difference between urgency and an unreasonable delay in bringing the application. The respondents can thus not in this context be blamed for the matter only serving before the court some 21 months later.

[94] I am accordingly of the view that the court below did not misdirect itself in its value judgment upon the factual findings made by it that the delay in the circumstances was not unreasonable. On the contrary, I find that its conclusion on the first leg of the enquiry was beyond reproach. There was thus no need for it to move to the second leg of condonation.

Condonation

[95] Even if the High Court misdirected itself in its value judgment on the factual question of delay, which I do not think occurred, I also differ from the main judgment which would refuse condonation. On the contrary, I consider that if that question were to arise, condonation would be granted in this case. In my view, the interests of justice would impel that outcome.

[96] The test for granting condonation in matters of this nature was recently summarised by this court in *SAPA* in these terms:²⁰

[58] In deciding whether or not to grant condonation after finding that a delay is unreasonable, the criterion to be applied under the common law is the interests of justice, as was recently reiterated by the South African Supreme Court of Appeal (SCA) in *South African National Roads Agency v Cape Town City*. In determining this question, the SCA reaffirmed that regard should be had to all the facts and circumstances.

[59] The SCA also referred to the decision of the Constitutional Court in *Khumalo and another v MEC of Education, Kwa-Zulu-Natal* where the latter court stated:

“An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision within the legal challenge made against it and considering the merits of that challenge.”

[60] The SCA in *SANRAL* further found that, although the delay issue in reviews should first be dealt with before the merits of the review are entertained, this

²⁰ In paras 58-61.

“cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interest of justice dictate that the delay should be condoned”

[61] Further factors would include the prejudice suffered by the administrative functionary – in this case the Minister – and the need for certainty, particularly in respect of a trade measure of the kind in question, the extent and cause of the delay, the reasonableness of the explanation for it, the effect on the administration of justice, the importance of the issue raised and the prospects of success. A further factor could be whether the failure to launch the application within a reasonable time was in good faith.’

[97] Whilst prejudice is an important factor, it was stressed in *SAPA* that other factors also require consideration in this weighing up process,²¹ including the extent of the delay, the public interest and the merits of the challenge.

[98] In this case, the delay was by no means egregious – being less than seven months in the context of a three year term of appointment. The respondents furthermore did not display an attitude of indifference in the period after becoming aware of the impugned decision. They made it clear by June 2017 that they regarded the appointments as unlawful. Nor were they supine. They sought to raise the issue, albeit not effectively, within the company structure. When this did not yield the desired outcome, there was a resort to legal recourse within a week or so.

[99] I have referred to the question of prejudice which was not even obliquely referred to in the Minister’s answering affidavit and was singularly absent from the

²¹ *SAPA* para 64-65.

affidavit on behalf of Meatco. The latter would have been alive to this issue as its temporary board (comprising the same members) had held office for more than two months until those temporary appointments were undone by order of court.

[100] It was in any event open to the appellants to seek an expedited hearing of the review application but there is no evidence in the record to suggest that they did so, despite the consequences of the board appointments being set aside.

[101] The main judgment does not consider that the merits were weighty because by the time of the hearing of this appeal, the term of office of the directors had expired. But the relevant period of time to have elapsed for a court to consider in a condonation application in this context, is afterall, when the application is launched. Condonation was sought for bringing the review nearly seven months after the decision has been made. That is the crucial period for which condonation is sought if it were to arise. If the issue becomes moot by the time an appeal is heard, that may affect the relief to be granted (as was argued by the appellants and accepted in this instance) but is by no means at all dispositive of the enquiry as to whether the court *a quo* should have granted condonation or not for bringing the review nearly seven months after becoming aware of it. Subsequent events can hardly result in a High Court misdirecting itself if it granted or refused condonation. The question remains, should condonation be granted or not (to the respondents) for launching their application when they did so. The length of the term of office would have been a factor to be considered in this context, as may arise in a tender of short duration.

[102] The merits in this matter were overwhelmingly in favour of the respondents, as is reflected in the carefully reasoned judgment of the High Court and confirmed by the fact that the main basis of the challenge has correctly been conceded on appeal. There would also appear to be merit in some of the other review grounds raised.

[103] I have referred to factors relevant to the exercise of discretion. They must also be informed by the values of the Constitution²² as the review of the exercise of public power is a constitutional issue.²³ As was stressed by the full court in *Rally for Democracy and Progress & others v Electoral Commission of Namibia & others*:²⁴

‘The rule of law is one of the foundational principles of our State. One of the incidents that follows logically and naturally from this principle is the doctrine of legality. In our country, under a Constitution as its “Supreme Law”, it demands that the exercise of any public power should be authorised by law – either by the Constitution itself or by any other law recognised by or made under the Constitution. “The exercise of public power is only legitimate where lawful”. If public functionaries purports to exercise powers or perform functions outside the parameters of their legal authority they, in effect, usurp powers of State constitutionally entrusted to legislative authorities and other public functionaries. The doctrine, as a means to determine legality of administrative conduct, is therefore fundamental in controlling – and where necessary, in constraining – the exercise of public powers and functions in our constitutional democracy.’

[104] The context of the decision making is also of importance. The challenge followed a failure of corporate governance in respect of a public enterprise. The legislature provided for a board, specifically structured to ensure representation of different stakeholders in that enterprise. All that was required by the Minister was to put in motion a process for the election of nominees of those groups and then select

²² See *Khumalo & another v MEC of Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) para 44.

²³ See *Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the RSA & others* 2000 (2) SA 674 (CC).

²⁴ 2010 (2) NR 487 (SC) para 23. Referred to by this court in the context of a review challenging the legality of the exercise of public power in *Pamo Trading Enterprises CC & another v Chairperson of the Tender Board of Namibia & others* 2019 (3) NR 834 (SC) para 31.

the board from those nominees. Despite there being more than adequate time for this, the board chairperson failed to ensure this straightforward task was executed. The existing board was inexplicably less than forthcoming and indeed gravely remiss in facilitating those steps except for the initial approach in April 2016 alerting the Minister to the steps to be taken.

[105] There was thus a failure of corporate governance of this public enterprise in this regard which preceded the bringing of this review. The respondents, as producers, are members of Meatco and were entitled to compel the Minister (and the board) to act in accordance with Meatco's empowering legislation. There is after all a compelling public interest in ensuring that the governance of public enterprises is accountable and transparent and occurs in accordance with empowering legislation. The rule of law, a foundational value of our Constitution, requires no less.

[106] The respondents were vindicating not only the rule of law but also the principles of sound corporate governance, accountability and transparency in bringing their review application. They were comprehensively vindicated, as was conceded on appeal, given the patent illegality which occurred. This court has stressed in the context of a review that, as a matter of constitutional principle, the exercise of public power in conflict with the law and thus invalid should be corrected or reversed in accordance with the principle of legality and the rule of law.²⁵

[107] It would not accord with interests of justice for their review application to be dismissed as is proposed by the main judgment. On the contrary, the interests of

²⁵ *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC) para 61 (*Anhui*).

justice, strongly underpinned by the rule of law, in my view impel the opposite outcome. It is in the interests of justice for this court to pronounce itself on the unlawfulness of the impugned decision in accordance with constitutional principles of transparent, accountable and coherent governance.

Appropriate order

[108] The thrust of appellants' counsels' argument on appeal was that the board appointments, although invalid, should not be set aside.

[109] Although, as I have said, it was conceded that no material had been placed before the court on prejudice, counsel urged this court to accept that, as an actively trading parastatal, the setting aside of the board's appointments would affect the legality of board decisions for a period of three years.

[110] We can accept that, although the appellants should at least have properly ventilated the extent of the impact and consequences of invalidity in their answering affidavits, there would be the potential of adverse consequences, given the statutory purpose and activities of Meatco.

[111] As was held by this court in *Anhui*, the default position in successful reviews is setting aside an invalid act which can and should be deviated from in the exercise of this court's discretion as may occur when the public interest is better served by refusing that remedy or ameliorating it.²⁶ This approach was recently reaffirmed by

²⁶ *Anhui* para 63. See also *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) paras 25 – 29.

this court in *Namibia Airports Co Ltd v Fire Tech Systems CC & another*²⁷ in these terms:

[50] The procedure where a litigant seeks the reviewing and setting aside of an alleged unlawful administrative act, is twofold. Firstly, a court is required to make a finding of validity or of invalidity. Where a declaration of invalidity is made, the court may proceed to the second stage, where the court considers the effect of the declaration of invalidity on the parties and other stakeholders. It is at this second stage that a court enjoys a discretionary power and must make an order which is just and equitable in the circumstances.'

And concluding this aspect thus:

[52] Courts therefore have a discretion not to set aside administrative acts where doing so will achieve no practical purpose. This approach was confirmed by Scott JA, in *Chairperson, Standing Tender Committee and others v JFE Sapela Electronics (Pty) Ltd and others* 2008 (2) SA 638 (SCA) ([2005] 4 All SA 487) para 28 quoting Brand JA,²⁸ who stated that "there is a public interest element in the finality of administrative decisions and the exercise of administrative functions". To this, Scott JA added, "considerations of pragmatism and practicality".'

[112] In *Fire Tech*, it was held that, if the tender in question were to be set aside, it would not only be 'disruptive' but 'totally impractical', given that performance had occurred.²⁹ Similar considerations in my view arise in this matter.

²⁷ 2019 (2) NR 541 (SC) para 50 and 52 (*Fire Tech*).

²⁸ In *Associated Institutions Pension Fund & others v Van Zyl & others* 2005 (2) SA 302 (SCA) para 46.

²⁹ *Id* para 54.

[113] As is pointed out in the main judgment, the board's term of office has by now expired. It would appear to be disruptive to set aside the board's appointment and may have adverse consequences for Meatco and possibly third parties, but would have little practical benefit or impact for the respondents. That may account for them no longer opposing the appeal.

[114] A just and equitable order would, in my view, be to declare that the Minister was *functus officio* when making his decision of 16 February 2017 to appoint the board, but to decline to set that decision aside. To that very limited extent, I would uphold the appeal, but I would confirm the High Court's decision dismissing the points in *limine* and replace its order in paragraph 2 with a declaratory order confirming invalidity of the Minister's decision on grounds of him being *functus officio* but declining to set it aside.

[115] As for costs, the cost order in the High Court should stand, as was correctly conceded in oral argument by the appellants, given the fact that the respondents were vindicated in the outcome of the review application. As far as the costs of the appeal are concerned, the appellants rightly sought no order as to costs and I agree with the order set out in the main judgment reflecting that in respect of the costs of the appeal.

[116] It follows that I would make the following order:

- (i) The appeal succeeds in part.

- (ii) Paragraph 2 of the High Court order is set aside and replaced with the following:

‘The decision by the Minister of Agriculture, Water and Forestry made on 16 February 2017, is declared to be irregular and unlawful by reason that the Minister was *functus officio* when he made it but this court, in the exercise of its discretion declines to set it aside.’

- (iii) Paragraphs 1 and 3 of the order of the High Court are confirmed.
- (iv) There is no order of costs in the appeal.

SMUTS JA

HOFF JA

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