

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 45235/18

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 26 March 2021

E van der Schyff

In the matter between:

REGISTRAR OF ANIMAL IMPROVEMENT
DEPARTMENT OF AGRICULTURE,
FORESTRY AND FISHERIES

FIRST APPLICANT
SECOND APPLICANT

AND

APPEAL BOARD
SOUTH AFRICAN BOERBOEL BREEDERS' SOCIETY
SOUTH AFRICAN STUD BOOK AND ANIMAL
IMPROVEMENT ASSOCIATION
JAKKIE ERASMUS
JOHAN KRUGER
JENS GUNTER

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] In this application, the applicants approached the court to (i) review and set aside a decision of the Registrar dated 10 April 2012 (the 'first decision'), (ii) review and set aside a decision of the Appeal Board dated 29 June 2017 (the 'second decision'), and (iii) declaring the registration of the South African Boerboel Breeder's Society ('SABBS') unlawful and invalid and setting aside its certificate of registration. Due to the substantial time delay between the decisions and the review application, the court is also required to determine whether condonation should be granted for the belated legality and Promotion of Administrative Justice Act, No. 3 of 2000 ('PAJA')-reviews, respectively.

Factual Background

- [2] The following chronology sets the context and factual background wherein the condonation application, and if successful, the review applications with the requested declarator are to be adjudicated:
- i. 21 November 2003: Under the regulations promulgated in terms of the Animal Improvement Act, No. 62 of 1998 (the 'AIA'), the Boerboel is legally recognised as a breed;
 - ii. 2 October 2009: The Boerboel is declared as a landrace in Table 7(a) of the regulations published under the AIA;
 - iii. 13 March 2012: A group of Boerboel breeders applied with the Registrar to be registered as an animal breeders' society, the SABBS;
 - iv. 10 April 2012: The Registrar registers the SABBS and issues a certificate to that effect;
 - v. 2 May 2012: The Registrar suspends the registration of the SABBS;
 - vi. 22 January 2013: The SABBS and two of its members launched an application in this court under case number 3152/13 seeking, amongst others, the review and setting aside of the decision by the Registrar to suspend the

registration of the SABBS and a declarator to the effect that the SABBS is legally registered as an animal breeding society;

- vii. 20 February 2014: The South African Stud Book and Animal Improvement Association ('the SASBAIA') submits a Boerboel breed standard to the Registrar in terms of section 16(3)(b) of the AIA. The Registrar does not object to the breed standard;
- viii. 10 March 2014: The opposed review application under case number 3152/13 is heard by Webster J;
- ix. 2 September 2014: Webster J sets aside the suspension of the SABBS's registration by the Registrar and declares it to be a legally registered animal breeders' society;
- x. 14 November 2014: The Registrar gives notice of the registration of the SABBS as an animal breeders' society as from 10 April 2012, in the Government Gazette;
- xi. 11 July 2015: The SABBS adopts an amended constitution which includes the breed standards for the Boerboel;
- xii. 10 August 2015: The SABBS submits the amended constitution containing breed standards to the Registrar;
- xiii. 11 September 2015: The Registrar addresses a letter to the SABBS informing it that he could not approve the amended constitution. The Registrar also decides not to authorise any export permit for black Boerboels in terms of the AIA;
- xiv. 9 November 2015: The SABBS launches an appeal against the Registrar's decision dated 11 September 2015;
- xv. 29 June 2017: The Appeal Board overturned the Registrar's decision to refuse an amendment to the constitution of the SABBS;
- xvi. 29 June 2018: The present review application is issued.

The decisions

- [3] Ponnar JA acknowledged in *Altech Radio Holdings (Pty) Ltd and Others v City of Tshwane Metropolitan Municipality* (1104/2019) [2020] ZASCA 122 (5 October 2020) in para [1], that '[s]tate self-review is a novel, but burgeoning species of

judicial review that has occupied the attention of our courts in a number of recent decisions.' In this application, the first applicant, *inter alia*, seeks that its own decision to approve the original constitution of the SABBS and to register the SABBS as an animal breeders' society in terms of the AIA be reviewed and set aside. It is established that an organ of state seeking to review its own decision must do so on the principle of legality and cannot rely on PAJA – *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) at 344B.

- [4] The novel context within which this review application is to be considered is not only that the decision to register the SABBS as an animal breeders' society was taken as long ago as 10 April 2012, but that this court issued a declarator on 2 September 2014 that the SABBS is legally registered as an animal breeders' society in terms of the AIA and that the Registrar, the current first applicant, had to comply with the provisions of s 8(7)(c) of the AIA. The judgment of this court was not appealed, and the first applicant complied with the order.

- [5] The applicants contend that the current ground for review proffered by them was not heard or considered by the court in the 2014-review application. The first applicant states that he was erroneously under the impression that the SABBS's application for registration met the statutory criteria. He only recently realised that the registration application was fatally flawed in that the constitution that was submitted did not contain the breeding standards of the SABBS. This *lacuna* was thus not brought to the review court's attention. The applicants argued that it was not an aspect that the 2014 review-court had to decide on, and on this basis, the review can now be considered.

- [6] I disagree. A court of law has declared that the SABBS is a legally registered animal breeders' association in terms of the AIA. The declarator surpassed the first applicant's initial decision to register the SABBS and its subsequent decision to suspend the SABBS's registration. Section 19(b) of the Superior Courts Act 10 Of 2013 prescribes that the Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may expressly be provided for in any

other law, receive further evidence. I accept that it would have been difficult for a deponent who stated under oath that he –

'received in his official capacity and application "... *through Dr Pierre van Rooyen of the SA Studbook, a registering authority registered in terms of the Act...*" from the applicants for the registration of the 1st applicant "... *as a Breeder's Society*", "*accompanied by the relevant documents in terms of the Act and regulations,*"

to make an about-turn to state that the constitution received in actual fact did not meet the requirements of the AIA, and request the appeal court to accept new evidence. However, the first applicant eventually made its u-turn and wants this court to review and set aside the decision, which was subsequently entrenched in a court order, almost ten years after the decision was initially taken. Webster J's declarator surpassed the first applicant's decision, and a court order replaced the administrative decision. As far as the first decision is concerned, there is no longer an administrative decision that can be reviewed, only a court order that had to be appealed. If the applicants took issue with the declarator, they had to appeal the Webster J order and apply to adduce new evidence. This court cannot sit as a court of appeal.

- [7] However, even if I am incorrect in the above approach, the Supreme Court of Appeal explained in *Gqwetha v Transkei Development Corporation Ltd and Others* 2006 (2) SA 603 (SCA) paras 22-23, that it is essential for the efficient functioning of public bodies that a challenge to the validity of their decisions for judicial review should be initiated without undue delay. Not only may the failure to bring a review application within a reasonable time cause prejudice to those who rely on the decision, but there is a strong public interest element in both certainty and finality (*Altech Radio Holdings, supra*, para [16]). Although a legality review does not have to be brought within a fixed period, it must be brought within a reasonable time. The Constitutional Court held in *Khumalo and Another v Member of the Executive Counsel for Education, KwaZulu Natal* 2014 (5) SA 579 (CC) para [44], that a

legality review must be initiated without undue delay but that courts have the power to either overlook the delay or refuse a review application in the face of an undue delay. In assessing undue delay in the context of a legality review, the court held that it must first factually be determined whether the delay is unreasonable or undue, and secondly, whether the court's discretion should nevertheless be exercised to overlook the delay. In *Valor IT v Premier, North West Province and Others* [2020] 3 All SA 397 (SCA) para 30, the Supreme Court of Appeal explained that –

'Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other.'

- [8] As for the reason for the undue delay in instituting these review proceedings, the first applicant explains that he was unhappy with the decision of the Appeal Board, a decision taken on 29 June 2017, and was 'later advised' that both his decision as the decision of the Appeal Board fell 'foul of PAJA and the Constitution' and are liable to be reviewed and set aside. The first applicant acknowledges that the unreasonable delay in bringing the review application needs to be explained. He explains that there was a delay in referring the matter to the State Law Adviser due to internal discussions that ensued and different opinions on the matter. The Appeal Board's decision was referred to legal services early in July 2017 and subsequently referred to the State Law Adviser for an opinion in September 2017. A second opinion was obtained in December 2017, and counsel was briefed in February 2018. Counsel's opinion was received on 14 March 2018. This opinion introduced a new dimension in that it concluded that the first applicant's initial decision in April 2012 was materially flawed and liable to be reviewed and set aside. In considering this explanation, I have to consider that the state's legal representatives were already privy to all the facts surrounding the basis on which

the first decision was taken, due to the review application that was decided by Webster J. No issue was taken with the validity of the second respondent's constitution at that time.

[9] Section 9(a) of the AIA determines that an animal breeders' society is a juristic person from its registration date. The second respondent informed the court that it has more than 800 members worldwide and more than 36 000 Boerboels listed on its database. It receives more than 4000 Boerboel birth notifications annually, and during the period 2016 to 2019, it concluded approximately 1,200 Boerboel appraisals and registrations. It was argued that setting aside the 'SABBS' registration will have a material negative impact on the business of the SABBS and its members. The consequences are too ghastly to contemplate'. The applicants are aware of the impact that the setting aside of the decision might have and proposed that this court devise an order that would ensure that all the decisions and actions taken by the first respondent remain intact and with legal force, despite the first respondent being deregistered as an animal breeder society.

[10] The crux of the applicants' contentions is that the decision to register the second respondent was unlawful because, when the decision was taken, the second respondent's constitution did not contain breed standards for the Boerboel. Section 11(i)(c)(ii) of the AIA determines that:

'A group of persons may be registered as an animal breeder's society if-

- (a) ...
- (b) ...
- (c) the constitution of such group of persons specifically provides –
 - i. ...
 - ii. for the determination and the application of breed standards ..."

[11] The AIA itself sets the context within which this section is to be interpreted. In section 1 of the AIA, the following definitions are relevant:

'animal breeders' society' means a group of persons promoting the breeding, the recording or registration, the genetic improvement and the use of a kind of animal or an animal of a specified breed of such kind of animal, determining and applying breed standards, recommending in its sole discretion the recording or registration of an animal or a specified breed of a kind of animal bred in or imported into the Republic, and who is registered in terms of section 8 (7) (a) (i);

"breed standards" means a written set of phenotypic or genotypic standards of excellence determined and applied in terms of the constitution of an animal breeders' society for a kind of animal.'

[12] The constitution that accompanied the second respondent's application for registration as an animal breeding society contains the following relevant clauses:

- i. Clause 9- Council ... in particular shall have the power –
 - (o) To draw up and see the maintaining of 'Minimum Breed Standards' and to lay down minimum performance, reproduction, and other standards
- ii. Bye-Laws – 1.1 Animals will only be taken up in the Stud Book of the Society after approval according to the "Minimum Breeding Standards" as stipulated by Council from time to time; 10.2 No animal, which does not comply with the 'Minimum Breeding Standards' as determined by Council, shall be eligible for registration;

[13] The second respondent's constitution provided for the determination of minimum breeding standards. It empowered the council of the society, duly elected in terms of the constitution, to draw up and lay down the minimum breeding standards. The constitution prescribed how decisions were to be taken. It set the quorum of the council and prescribed voting procedures. The second respondent's constitution sufficiently provided for the determination of breeding standards when their application for registration was accepted. The legislature did not prescribe that the 'determined' breeding standards had to be incorporated in the constitution. The

fact that the second respondent subsequently amended its constitution to incorporate the breeding standards does not detract from the fact that the constitution provided for determining and applying breeding standards prior to it being amended.

[14] In light of the above, condonation for the undue delay in instituting this review application is refused.

[15] The issue of the amended constitution underpins the second decision taken on review. The Appeal Board held, in favour of the second respondent, that it was entitled to amend its constitution to incorporate breeding standards and that the first applicant erred in declining to approve the amendment. The first applicant explains that the clause that triggered his decision not to approve the first respondent's amended constitution was the clause recognising that black Boerboels can be registered. The Registrar declined to approve the attempted amendments and reasoned that the amendment was null and void until scientific proof was provided that the colour black is a variant in the breed. However, the Appeal Board found that the determination and application of breeding standards are matters falling within an animal society's jurisdiction and that the Registrar can only decline to accept the amendment when it contravenes any provision of the AIA. The applicants did not indicate which provisions of the AIA were contravened, except for relying on their belated interpretation of the AIA that rendered the second respondent's 2012 constitution flawed. The applicants did not refer to any legislative provision indicating that any entity other than the second respondent is empowered to determine breed standards, which breed standards include the colour requirements of Boerboels.

[16] The Appeal Board provided its fully reasoned ruling on 29 June 2017. It is evident from this written ruling that the Appeal Board considered all the relevant facts and arguments and correctly interpreted and applied the relevant provisions of the AIA. The applicants do not have any prospect of success on the merits of the review. In addition, no acceptable explanation is provided for the fact that the review proceedings were then only launched in June 2018, with the notice of motion dated

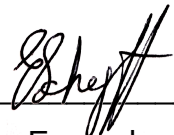
29 June 2018. In the meantime, breeder members of the second respondent suffer prejudice as they cannot export black Boerboels. As a result, condonation is refused.

- [17] As far as an appropriate costs order is concerned, it is evident that the applicants acted after they obtained legal advice. I am of the view that the facts do not necessitate any deviation from the principle that costs follow suit. Neither is a punitive costs order appropriate.

ORDER

In light of the above, the following order is granted:

1. The application is dismissed with costs.



E van der Schyff

Judge of the High Court, Gauteng, Pretoria

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 26 March 2021.

Counsel for the applicant:

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Instructed by:

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Date of the hearing:

22 February 2021

Date of judgment:

26 March 2021