



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED
19 June 2024	
.....	
DATE	SIGNATURE

Case Number: 2023-99867

MERLOG FOODS (PTY) LTD

Applicant

and

**THE MINISTER OF AGRICULTURE, LAND
REFORM AND RURAL DEVELOPMENT
and five others**

Respondents

JUDGMENT

SC VIVIAN AJ

1. The applicant seeks to review and set aside a decision of the Minister of Agriculture, Land Reform and Rural Development¹ in which she upheld a decision to reject five consignments of frozen pork imported by the applicant.
2. The applicant was granted import permits for each consignment. After the frozen pork arrived at the Port of Durban, removal permits were issued to the applicant, permitting it to remove the consignments to its premises. The removal permits each contained a condition that the seal on the containers was to be broken by an inspector.
3. The applicant broke the seal without an inspector present. It explained that its receiving team overlooked this due to the volume of containers it received.
4. A State Veterinarian then issued notices of rejection for each consignment because the conditions of removal were not adhered to.
5. The applicant asked the National Executive Officer (“the NEO”) and the Director of Animal Health (“the Director”) to reconsider this decision.
6. When that failed, the applicant lodged an appeal and objection with the Minister. The applicant’s challenge was confined to the decision uphold the decision to issue the rejection notices. The applicant did not challenge the decision to impose the conditions. The Minister refused the appeal and objection and upheld the rejection notices.
7. The applicant then approached this Court. The primary relief sought is that the Court review and set aside the decision of the Minister. The applicant then seeks

¹ For ease of reference, I abbreviate this to the Minister or the Minister of Agriculture in this judgment.

substitutionary relief. As appears below, the applicant raised several grounds on which it sought to overturn the rejection notices.

8. In my view, the applicant has not made out a case to review and set aside the decision of the Minister. It is accordingly not necessary to consider substitutionary relief.
9. There are few factual disputes in this matter. However, where there are disputes, my analysis of the facts arises from an application of the Plascon-Evans rule to the affidavits filed in this matter. Where matters are heard on motion, disputes of fact are resolved in terms of the Plascon-Evans rule², which has been explained in many judgments. Simply put, if there are factual disputes between the versions of the parties, I must accept the respondents' version unless it is "... *'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.*"³
10. The applicant cited six respondents. It cited the Minister of Agriculture, the Department of Agriculture, Land Reform and Rural Development,⁴ the NEO, the Director of Animal Health in the Department of Agriculture, the Minister of Home Affairs and the Commissioner of the Border Management Authority.
11. This is contrary to the provisions of Section 2(1) of the State Liability Act (Act 20 of 1957), which provides that in any proceedings instituted against a national or

² Deriving from the judgment of Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 to 635

³ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para 56

⁴ For ease of reference, I abbreviate this to the Department or the Department of Agriculture in this judgment.

provincial department, the executive authority of the department concerned must be cited as a nominal defendant or respondent.

12. The first to fourth respondents opposed the application. The Minister of Home Affairs and the Commissioner of the Border Management Authority did not participate in the litigation.

The legislative framework

13. The applicant's business includes importing and distributing frozen foods in and around South Africa and neighbouring countries. It particularly focuses on importing and distributing frozen meat, a range of frozen vegetables, potato products and processed meats. This matter concerns the importation of frozen pork.
14. There are two statutes that are relevant to the importation of frozen pork, namely the Meat Safety Act (Act 40 of 2000; "the MSA") and the Animal Diseases Act (Act 35 of 1984; "the ADA").
15. Section 13(1)(a), read with Section 5(a) of the MSA, requires an importer to apply for and be granted an import permit before importing a consignment of meat into South Africa. These permits are issued by the NEO. Section 13(5)(c) provides that they are generally valid for one consignment only.
16. The NEO is appointed by the Minister of Agriculture in terms of Section 2(1) of the MSA. The person appointed must be an officer of the Department of Agriculture and a veterinarian.

17. The NEO may delegate any power and assign any duty imposed on the NEO in terms of the MSA in terms of Section 3(1)(a) of the MSA. Under Section 3(2), the NEC must issue written authorisation to the person to whom the power is delegated or the duty is assigned. Section 3(2) provides that when exercising a power or performing a duty delegated or assigned the person must produce a copy of the authorisation at the request any person.

18. Section 13(6) provides:

“(6) Meat in respect of which an import permit has been issued-

- (a) may only be introduced into the Republic through the place of entry specified in the permit;*
- (b) must be introduced within the period specified in the permit;*
- (c) may only be off-loaded at the place of entry if all the conditions specified in the permit have been complied with;*
- (d) must be stored in the prescribed manner at a facility approved by the national executive officer until the prescribed veterinary procedures or other acts specified in the permit have been performed; and*
- (e) must be available for inspection, sampling and testing by the national executive officer.”*

19. Section 13(7) provides that if the NEO has knowledge of meat being brought into the Republic contrary to the provisions of the MSA or an import permit, the NEO may direct that the meat not be off-loaded without the NEO's written consent or that it may be off-loaded subject to such conditions as may be necessary.

20. Section 13(8) provides that no person may remove any meat stored in a facility contemplated in Section 13(6)(d) from that facility unless the NEC has authorised the removal thereof.
21. Section 22 of the MSA empowers the Minister of Agriculture to promulgate regulations. The relevant regulations are the Red Meat Regulations, published in GN 1072 in GG 26779 of 17 September 2004, as amended by GN R350 in GG 27464 of 15 April 2005 and GN 513 in GG 31021 of 9 May 2008.
22. Part X of the Red Meat Regulations contains the import regulations. The relevant part reads as follows:

“(2) The manner in which imported meat that has been offloaded in the Republic must be stored as contemplated in section 13(6)(d) of the Act is-

- (a) that the imported meat must be stored in such a way as to ensure-*
 - (i) that no contamination, soiling or deterioration thereof in any way may take place; and*
 - (ii) such imported meat cannot possibly contaminate other products in the cold store;*
- (b) that security measures must be in place to prevent any part of the consignment being removed before final release thereof; and*
- (c) that all documentation relevant to a consignment must be held by the owner of the cold store for inspection by the national executive officer.*

(3) The veterinary procedures to be performed while the meat is stored as contemplated in subregulation (2) are to-

- (a) *confirm a positive link between the meat and the import permit as well as all other documentation pertaining to the inspection;*
- (b) *examine the maintenance of the temperature of the meat during transportation;*
- (c) *confirm that no soiling, contamination or deterioration of the meat in any way took place during transportation prior to storage;*
- (d) *remove samples for examination;*
- (e) *examine test results pertaining to samples taken from the consignment;*
- (f) *confirm that all other conditions stated on the import permit have been complied with; and*
- (g) *conduct any other action necessary to ensure that the meat is safe and suitable for human consumption and poses no threat of transmitting a contagious animal disease."*

23. Section 18 of the MSA provides that any person dissatisfied with the decision of, *inter alia*, the NEO or an assignee may appeal against that decision to the Minister of Agriculture. Regulation 131 of the Red Meat Regulations further regulates the procedure to be adopted in such appeals. A person who wants to appeal must lodge the appeal within 30 days of being informed of the decision.

24. The applicant's counsel, Mr Mostert, submitted that the MSA was the only applicable statute. However, Mr Matebese SC, who appeared for the first to fourth respondents, submitted that both the MSA and the ADA were applicable to the importation of pork. I agree with the latter submission for reasons that will

become apparent when I analyse the facts. It is accordingly necessary to consider the structure of the ADA.

25. Section 2(1) of the ADA provides that the director of the Directorate of Animal Health in the Department of Agriculture (“the Director”) exercises the powers and performs the duties conferred or imposed on the Director in terms of the ADA. The Director must be a veterinarian.
26. Section 2(3) of the ADA provides that any power conferred or duty imposed upon the Director may be exercised by the Director personally or by an officer under a delegation of the Director. Section 2(3)(b) provides that any decision made by an officer under such delegation may be withdrawn or amended by the Director.
27. Section 6 of the ADA deals with the importation of, *inter alia*, any animal into the Republic of South Africa. The word “animal” is defined to include any mammal and the carcass of any mammal.
28. Section 6(1)(a) prohibits the importation of, *inter alia*, any animal except under the authority of a permit and in compliance with any condition in the permit.
29. Section 6(1)(b) provides that a permit is to be obtained before the animal is imported into South Africa. Section 6(1)(c) allows for the Director to issue a permit to cover consecutive consignments of animals.
30. In terms of Section 6(2)(c), any animal in respect of which a permit has been issued must be detained in the prescribed manner at the relevant place of entry and made available to the Director for the purposes of the performance of controlled veterinary acts. Sub-section (d) provides that the animal shall not,

without the written authority of the Director, or contrary to any condition in the authority referred to in Section 8(1)(a), be removed from such place.

31. Section 6(3) provides *inter alia* that if the Director knows or on reasonable grounds suspects that any animal, contrary to any provision of the ADA or any condition of a permit, forms part of a consignment which is being or has been brought or sent by any person in the Republic, the Director may direct that the animal or consignment shall not be imported into the Republic.
32. Section 8(1)(a) of the ADA provides that no person shall, without written authority of the Director or contrary to any condition imposed by the Director in granting such authority, remove any imported animal detained in terms of Section 6(2)(c).
33. Section 23(1) of the ADA provides that a person who feels aggrieved by the decision of, *inter alia*, the Director, may lodge an objection with the Minister of Agriculture. The objection must be submitted to the Director-General, who must then submit it together with the Director-General's report to the Minister for a final decision.
34. The Animal Diseases Regulations were promulgated in terms of Section 31 of the ADA in GN R2026 in GG 10469 of 26 September 1986. They have since been amended on a number of occasions. The most recent amendment was published in GN 2318 in GG 47133 of 29 July 2022.
35. Regulation 33 deals with the procedure for objections. Objections must be lodged within 90 days of the date on which such decision was given or steps taken.

The relevant facts

36. The applicant explained in its founding affidavit that it holds FSSC 22000 certification, a globally recognised food safety management system.
37. The applicant follows a standard operating procedure for receiving imported product into its cold store. This includes maintaining a shared document called the container planning report. This documents details containers and arrival dates. It is used to plan collections from the port.
38. Prior to importation of frozen meat, the applicant applies for an import permit. In this case, the applicant applied for and was issued five import permits. The import permits were for raw frozen pork. The import permits expressly record that they are issued in terms of the ADA and the MSA. They were issued by the Director: Animal Health and the NEO. Each import permit was signed "pp". The signature is not legible, but the parties both accepted the validity of the import permits.
39. A bill of entry is a legal document submitted to customs authorities by importers or customs clearing agents. It is normally submitted on or before arrival of the ship carrying the imported goods.
40. The applicant explains that once the bill of entry is released, it is submitted with other supporting documents to the Border Management Authority (BMA) to apply for a removal permit. The phrase "once the bill of entry is released" is not explained by the applicant. I assume it means the customs authorities have reviewed and approved the bill of entry.

41. The original removal permits are collected from the BMA office. In this case, the removal permits were signed by an officer who is not identified in the affidavits.
42. Each removal permit records that it is issued in terms of the ADA and is subject to the conditions in the permit. The conditions are variously recorded as:
 - 42.1. *"Detain for V.P.H. inspection #Inspector to break seal #Thermograph required"* (on two of the removal permits)
 - 42.2. *"Detain for Inspection #Inspector to break seal #Thermograph required"*
 - 42.3. *"Hold state vet inspection #unrestrited [sic] #Thermograph required #Inspector to break seal"*
 - 42.4. *"Detain for inspection by V.P.H.O #Inspector must break seal #Thermograph required"*
43. The applicant expressly refrained from challenging the validity of the removal notice, although in this Court it sought to challenge the imposition of the conditions. This is dealt with below.
44. I do not detail the procedure for collection of the containers from the port as this is not relevant to the present application. However, there are tight controls in place, which for purposes of this application I accept ensure that the container moves from the port to the applicant's premises with minimal risk of being tampered with.

45. When the container arrives at the applicant's premises, it is allocated an off-loading bay and reversed into position. Thereafter, the whole process is recorded on security cameras. The footage is recorded.
46. An employee of the applicant designated as a Receiving Supervisor uses the container planning report to filter by containers and prints the removal permit.
47. Another employee designated as a Receiving Checker matches the container number and seal number on the container to the removal permit. This is verified by the Receiving Supervisor. The seal is then broken and attached to the printed removal permit. It is filed in the cold store.
48. The product is then removed from the container and stacked on the receiving platform.
49. The applicant uses an automated system to allocate the stock to a pallet position in the frozen storage warehouse. This warehouse accommodates approximately 10 500 pallets. It is fully automated. Pallets are placed in the correct position using an automated crane that receives its instructions from a stock management application known as Wamas.
50. The product cannot be sold until it has been inspected and released by the state veterinarian. Wamas allocates all products requiring veterinary inspection to a virtual warehouse. They are not available for sale on the applicant's stock system.
51. Veterinary inspections are booked three times per week. Usually, the inspector visually inspects a sample of pallets pulled from the cold store. The inspector

may require a microbiological test, in which case samples are drawn under the inspector's supervision and retained for collection by the laboratory.

52. The inspector then completes a container release form detailing all the containers that have been inspected and released. The stock is then transferred from the virtual veterinary inspection warehouse to the wholesale stock warehouse in the Wamas system, allowing it to be picked for sale.
53. Reverting to the five consignments that are the subject matter of this application, it will be noted that the removal permits each contained a requirement to the effect that the inspector must break the seal.
54. The applicant explains that it has been importing frozen foods into South Africa for the last three decades. Special instructions on removal permits were only issued in exceptional circumstances. There was never a previous instruction from the Department imposing additional requirements to the procure of receiving and unpacking import consignments. The applicant describes the condition that the inspector must break the seal as “... *a new and novel condition, purportedly introduced, without written notice or advice of introduction by the Inspection authority, NEO or director.*”
55. However, the applicant concedes that it did receive special instructions from time to time. This increased from 1,65% of consignments in 2022 to 4,2% of consignments during the period January to August 2023.
56. The applicant contends that the official who imposed the conditions was not empowered to impose conditions. This is dealt with below. However, the

applicant does not contend that the condition imposed on these five consignments is in and of itself unlawful.

57. Instead, the applicant explains in its founding affidavit that the condition was overlooked by its employees because they were not properly informed of the purported changing removal conditions and were not looking out for the new condition in order to ensure compliance.
58. The seals were broken without an inspector being present.
59. As a result, on 30 January 2022, Dr T Pillay, a state veterinarian, issued notices of rejection/order for removal in respect of the five consignments. The notices record that the consignment described in the notice had been rejected in terms of the MSA and the ADA and that it would not be allowed entry into South Africa.
60. The reason given in each notice was that the conditionals of removal were not adhered to, the seals were broken and the contents unpacked without direct supervision of an inspector.
61. The notices recorded the right of the importer to appeal the decision within 14 days.
62. The applicant's initial response was to send a letter to the NEO requesting a reconsideration of the decision. The initial explanation was that the applicant's standard operation procedure states that the Receiving Manager must check documentation before a container is opened, An email is then sent to the SHEQ department (presumably the applicant's Safety, Health and Quality Department) for verification. Only then can a container be opened.

63. *In its letter to the NEO, the applicant explained that this step (presumably verification by the SHEQ department) had been overlooked by its receiving team “... due to the volume of containers that were received and the pressure of chasing turn in dates for the return of empty containers.”*
64. The applicant told the NEO that it had since redone training for all personnel involved in receiving and that disciplinary action had been taken. A third step had been added to internal procedures to avoid recurrence. The operations manager would now verify via email whether a seal could be broken or not.
65. The applicant explained that it had full camera footage of the containers from receipt, breaking of the seals to offloading.
66. Based on these facts, the applicant asked the Department to reconsider rejecting the containers. Reference was made to email correspondence sent to Dr Pillay, but this has not been produced in these proceedings.
67. The letter to the NEO and the request that the Department reconsider the decision show confusion between the NEO's and the Director's roles. The NEO's powers and functions are set out in the MSA, while the director's are set out in the ADA.
68. The Director rejected the request for reconsideration in a letter dated 17 February 2023. The reason given for the Director's decision was non-compliance with the conditions imposed in terms of Section 6(1)(a) of the ADA.
69. There is no explanation on the papers as to why the Director made a decision to reject the request for reconsideration that had been addressed to the NEO. In

the founding affidavit, the applicant said that the Department had upheld the rejection notices. That is not what the letter says. The letter is signed by the Director and records that the Director upholds the rejection notices.

70. On 10 March 2023, the applicant sent a letter to the Director. Again, the founding affidavit refers to this as a letter to the Department. But it is expressly addressed to the Director.
71. Significantly, the applicant conceded: *"In our request for reconsideration dated 31 January 2023, it was acknowledged that there had been an error in that the container seals had been broken (in error) and the containers and pack by our receiving personnel without the inspector present ... This was due to both the level of pressure on the receiving department to unpack a huge number of containers and return the empty containers to the shipping lines to avoid unnecessary additional demurrage costs, and more importantly that this was a new requirement being applied to import containers containing pork."*
72. The applicant again requested reconsideration of the decision.
73. In a letter dated 24 March 2024, the Director informed the applicant that the decision to uphold the rejection was maintained. The Director informed the applicant of its entitlement in terms of Section 23 of the ADA to lodge an objection against the decision. Again, the respondent refers to this as a decision made and communicated by the Department. It was not. It was a decision made by the Director. I refer to this as *"the 24 March decision"*.
74. It is noticeable that the initial reaction of the applicant was to apologise and attribute the failure to comply with the conditions to internal pressures. The

applicant, with decades of experience in the importation of pork, acknowledged that it ought to have complied with the conditions.

75. The applicant explains in the founding affidavit that this approach was before it obtained legal advice on what it now contends are the *ultra vires* nature of the removal conditions.
76. Having obtained legal advice, the applicant lodged an appeal under section 18 of the MSA and an objection under section 23 of the ADA on 23 April 2023. *Prima facie*, this was outside the 30 day period provided for in Regulation 131 of the Red Meat Regulations. However, for purposes of this judgment, I will assume that the appeal was timeously noted. The appeal and objection was against the 24 March decision.
77. On 29 August 2023, the Minister rejected the appeal and objection and upheld the rejection of the consignments.
78. The applicant caused this application to be issued on 3 October 2023. It is brought in terms of the Promotion of Administrative Justice Act (Act 3 of 2000; “PAJA”).
79. The relief sought is, first, that the Minister’s decision be reviewed and set aside. Second, the applicant seeks an order substituting this Court’s decision for that of the Minister. Third, the applicant seeks an order for inspection of the frozen pork within 10 days of the order. A fourth prayer for damages has sensibly been abandoned.

The grounds on which the appeal/objection was advanced

80. The notice of appeal and objection recorded that the applicant appealed against the decision of the Directorate: Animal Health, dated 24 March 2023, in which the Directorate is said to have upheld its decision to uphold the rejection notice issued by the Directorate: Inspection Services, Durban, issued on 30 January 2023.
81. Accordingly, the decision that was subject to the appeal and objection was the 24 March decision. The decision was made by the Director, not the Directorate. The Director has the power under Section 2(3)(b) of the ADA to reconsider a decision made by an officer.
82. The 24 March decision maintained the Director's decision of 17 February 2023. The Minister was accordingly correct that the decision to uphold the rejection notices was communicated in the letter of 17 February 2023. However, the Minister elected to deal with the substance of the appeal and objection, namely the decision to maintain Dr Pillay's decision to issue the rejection notices.
83. The Minister further noted that the appeal was outside of the 30 days prescribed in the Red Meat Regulations. However, in the interests of justice, she considered the appeal on the merits.
84. The applicant informed the Minister that it brought its appeal on three bases:
- 84.1. The decision to reject the consignments was not reasonable and rational;
- 84.2. The decision is disproportionate (and punitive) and failed to consider relevant factors that ameliorate the Department's concerns; and

84.3. The decision is *ultra vires*.

85. The Minister noted the bases of appeal and added a fourth basis, namely that the decision was not one which a reasonable decision maker could reach.
86. The Minister considered the bases of appeal. She noted that the applicant submitted in its appeal and objection that it had taken mitigating measures to ensure that the commission of the non-compliance does not recur in the future. However, she pointed out that these measures applied to the future and that, as much as they are noted and appreciated, they fall outside the scope and determination of the five rejected consignments.
87. The Minister pointed out that the integrity and security of the commodity being traded are of paramount significance. One measure to achieve this is the sealing of containers and trucks for transporting high-risk commodities. This principle applies to the international trade of products of animal origin.
88. The Minister held that removing the products from the containers in the absence of official inspectors creates a serious gap in the confirmation of a positive link between the meat and the import permit and all of the documentation pertaining to the inspection. She pointed out that it is incumbent on any trader to comply with the requirements of the permit insofar as they relate to seals.
89. The Minister further held that the measures that the applicant proposed to give the Department the required level of comfort to allow for the inspection and release of the consignment, which included inspection of CCTV footage, inspection of the pallet tracking system and packing slip information, and

performing physical inspection and on thermographs, would not completely mitigate against the possible risk of introduction of infectious agents that would compromise both human and animal health.

90. The Minister further considered the *ultra vires* basis of the appeal. I deal with this more fully below. In essence, the applicant relied on a proclamation issued by the President of the Republic of South Africa on 30 August 2020 in which the administration of and functions contained in certain defined sections of the MSA and ADA were transferred from the Minister of Agriculture to the Minister of Home Affairs. According to the applicant's notice of appeal and objection, a decision issued by the Department of Agriculture is accordingly *ultra vires*.

91. The Minister understood this as challenging her authority to determine the appeal and objection. She held that the functions transferred to the Border Management Authority did not include the handling of appeals and objections under the MSA and ADA.

92. The Minister accordingly upheld the rejection of all five consignments.

The review application

93. In this Court, the applicant initially raised two grounds of review. First, it contended that the Minister's decision was unreasonable, irrational, harsh and failed to take into account relevant considerations. Second, it submitted that the imposing of the new condition, the original decision to reject the consignment, and the Minister's decision were all *ultra vires*.

94. After the record of the Minister's decision had been produced, the applicant delivered an amended notice of motion and supplementary affidavit in terms of Rule 53(4). In the amended notice of motion, the applicant sought costs against the Minister and the Department personally and on a punitive scale. It was not explained to me how a department can pay costs personally.
95. In its supplementary affidavit, the applicant contended that the Minister's decision was taken because of the authorised and unwarranted dictates of other persons, namely the NEO and the Director. It was further contended that the decision was taken in a manner that was procedurally unfair, that it was taken in bad faith, and that it was taken for an ulterior purpose or motive.
96. There are accordingly three broad grounds of review. I deal with these in turn.
97. It is common cause that the Minister's decision is administrative decision and subject to review in terms of PAJA.
98. In considering the grounds of review, I must take into account the constitutional principle of separation of powers. The Court must be careful not to usurp the functions of the Minister under the MSA and the ADA. As O'Regan J explained in **Bato Star**:

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved

and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”⁵

99. The legislature entrusted appeals under the MSA and objections under the ADA to the Minister. The Court should not lightly interfere in the Minister’s decision, but should also not simply rubber-stamp an unreasonable decision.

100. Again, the judgment of O’Regan J in **Bato Star** gives guidance:

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

⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 45. See also para 46

identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”⁶

101. Similarly, in **Bel Porto**, Chaskalson CJ held:

“The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable.”⁷

102. In **Phambili**, Schutz JA quoted with approval the first edition of Hoexter’s Administrative Law in South Africa, where the learned author said: *“The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal.”⁸*

⁶ Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others, *supra* at para 48

⁷ Bel Porto School Governing Body and Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) at para 45

⁸ Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA) at para 52

First Ground

103. In its founding affidavit, the applicant contended that the Minister's decision was unreasonable, irrational, harsh and failed to take into account relevant considerations. The applicant relied on sections 6(2)(d), 6(2)(e)(iii) and 6(2)(e)(vi) of PAJA.

104. Section 6(2) provides for the circumstances in which a court has the power to judicially review an administrative action.

105. Section 6(2)(d) provides that a court may review an administrative action that was materially influenced by an error of law. Although the applicant refers to this subsection in her founding affidavit under the subheading "absence of rationality and reasonability", it appears from its heads of argument that the error of law contended for relates to the *ultra vires* ground. I accordingly deal with it under that subheading.

106. Section 6(2)(e)(iii) provides that a court may review an administrative action because irrelevant considerations were taken into account or relevant considerations were not considered.

107. Section 6(2)(e)(vi) provides that a court may review an administrative action that was taken arbitrarily or capriciously.

108. I deal first with Section 6(2)(e)(iii).

109. In **Dumani**, the SCA considered the parameters of material error of fact as a ground of review. Material error of fact applies under Section 6(2)(e)(iii)⁹ and Section 6(2)(i).¹⁰ Cloete JA explained:

“In our law, where the power to make findings of fact is conferred on a particular functionary — an ‘administrator’ as defined in PAJA — the material-error-of-fact ground of review does not entitle a reviewing court to reconsider the matter afresh ... The ground must be confined to the situation, ... to a fact that is established in the sense that it is uncontentious and objectively verifiable.”¹¹

110. What then are the material errors of fact that show that irrelevant considerations were taken into account or relevant considerations were not considered?

111. The applicant points out that it clearly conceded that the seals were broken and explained the circumstances in which this happened. The Minister took this into account in her reasons.

112. The applicant says that inspectors would have been able to inspect the consignments, still frozen solid, in the same packaging in which they arrived in South Africa. The only difference was that the consignments were no longer in the original shipping containers. The applicant points out that the consignments were under constant CCTV surveillance from the moment they arrived and says that it would therefore easily be established that no part of the consignments

⁹ Chairpersons' Association v Minister of Arts and Culture and Others 2007 (5) SA 236 (SCA) at para 48

¹⁰ State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman State Tender Board v Sneller Digital (Pty) Ltd and Others 2012 (2) SA 16 (SCA) at para 34

¹¹ Dumani v Nair and Another 2013 (2) SA 274 (SCA) at par 32

were added to that nothing was removed therefrom. It listed the information that it had tendered.

113. The applicant submitted that the Minister specifically failed to have regard to the fact that the measures proposed by it would have enabled the inspectors to determine whether the imported commodities were safe for consumption by the public and met the requirements of the import permits.

114. Again, the Minister did take these measures into account. She held that the measures would not completely mitigate against the possible risk of introduction of infectious agents that would compromise both human and animal health.

115. The Minister did not take into account irrelevant considerations and did not fail to consider relevant considerations. The applicant's complaint is really that the Minister took into account relevant considerations, namely its contention that the concerns about the breaking of the seal were mitigated by the information tendered by it, but failed to place sufficient weight on this. The applicant disagrees with the Minister's conclusion that the measures would not completely mitigate against the possible risk. If this is a factual error, it is not uncontentious and objectively verifiable.

116. The applicant accordingly does not make out a case under Section 6(2)(e)(iii).

117. The second basis is Section 6(2)(e)(vi). Was the Minister's decision taken arbitrarily or capriciously?

118. A decision taken without all the necessary information being available is arbitrary and capricious.¹² In **SARIPA**, Jafta J held that:

*"While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained."*¹³ (my underlining)

119. Arbitrariness accordingly focuses on the reasons given for the action and whether these justify the action. In this case, the question is whether the reasons given by the Minister justify her decision to reject the appeal and objection.

120. The applicant says that the Minister overemphasised the conditions of the removal permit. It is so that the Minister relied on the conditions. However, the conditions were on the permits, and it is justifiable to rely on the conditions. Indeed, the applicant's initial reaction to the condition was not to complain that

¹² *Lebotsa and Another v Minister of Correctional Services and Others* (6478/2009) [2009] ZAGPPHC 126; 2010 (1) SACR 379 (GNP) (29 October 2009) at para 22 – the Court used the term "prescribed information" because of the context of the matter. However, I am of the view that the same would apply even where the required information is not prescribed, but is necessary.

¹³ *Minister of Justice and Another v SA Restructuring and Insolvency Practitioners Association and Others* 2018 (5) SA 349 (CC) at para 55

the conditions were irrational or senseless. Indeed, the applicant's initial reaction was to apologise for its oversight, retrain and discipline its employees and improve its standard operating procedures. Even in the appeal and objection, the applicant did not challenge the lawfulness or rationality of the conditions.

121. The applicant says that the Minister imposed a wholly disproportionate and punitive sanction when less drastic measures could have been adopted.

122. The Minister did not impose the sanction. She upheld the decisions of the NEO and the Director not to overturn Dr Pillay's decision to reject the consignments. The statutes vested the discretion in these officials. The Minister was called upon to consider their exercise of that discretion.

123. The sanction is authorised by the statutes. It certainly has significant commercial consequences for the applicant. But against this, the officials and, ultimately, the Minister had to balance the requirement that conditions imposed in removal permits must be obeyed. The Minister explained in her answering affidavit that the sealing of a container is a measure to counter intentional hazards or contamination. A seal is an assurance from an official in the country of origin to another official in the country of destination that the product is safe and is according to the approved standards.

124. The Minister referred the Court to the purpose of the procedures as set out in Regulation 126(3) of the Red Meat Regulations. She pointed out that the removal permit may have conditions attached, and these conditions are risk-based. The Minister said that tampering with a seal is a criminal offence in terms of Section 19(1)(k) of the MSA. However, as Mr Mostert pointed out, Section 19(1)(k) only

applies to seals attached in terms of Section 16(1)(g) and is accordingly not applicable.

125. The Minister explained that the respondents do not employ pre-determined and inflexible criteria to manage and regulate the testing and granting of permission to import meat products but approach each consignment on a risk-based assessment or decision-making process. This affords the decision maker a discretion.

126. The Minister decided to uphold the decision to reject the consignments. Her reason for upholding the sanction is justified by the reasons that she gave for doing so. I do not consider that this decision was arbitrary or capricious.

127. Accordingly, the applicant has failed to demonstrate that the Minister's decision was unreasonable, irrational, harsh or failed to take into account relevant considerations.

Second Ground

128. In this Court, the applicant contended that the condition imposed in the removal conditions was *ultra vires*. This argument is raised in the founding affidavit and developed in its heads of argument.

129. As Hoexter explains, although Courts still use the term "*ultra vires*", its meaning has changed fundamentally under our Constitutional dispensation. Conduct is *ultra vires* where the actor has acted outside the law and the Constitution.¹⁴

¹⁴ Hoexter, *Administrative Law in South Africa*, 3rd Ed., page 148

130. In PAJA, this is subsumed in, at least, Section 6(a)(i) and (ii). The Court has the power to review a decision taken by an administrator who was not authorised to do so by the empowering provision or acted under a delegation of power which was not authorised by the empowering provision. The applicant also relies on Section 6(2)(e)(i), which relates an action taken for a reason not authorised by the empowering provision. That does not appear to be apposite to this ground of review. Section 6(2)(d) may be applicable, but the complaint fits more neatly in Section 6(a)(i) and (ii).

131. On 30 August 2022, the President issued Proclamation 89 of 2022 transferring administration powers or functions entrusted by legislation to certain Cabinet members in terms of section 97 of the Constitution.

132. Section 97 provides:

“The President by proclamation may transfer to a member of the Cabinet-

- (a) the administration of any legislation entrusted to another member; or*
- (b) any power or function entrusted by legislation to another member.”*

133. In terms of the Proclamation, the President transferred the administration and the powers or functions to be exercised or performed within the border enforcement area and at ports of entry, as defined in the Border Management Authority Act (Act 2 of 2020) to the Minister of Home Affairs. The details of the specific sections and statutes where the administration and the powers or functions are transferred are set out in a schedule to the Proclamation.

134. The applicant relied on the transfer of the administration, powers and functions of Section 6 of the ADA and Sections 13(1)(6), (7) and (8) of the MSA to the Minister of Home Affairs.
135. It is common cause that the Port of Durban is a port of entry.
136. The applicant submits that the removal permits were issued either in terms of Section 6 of the ADA or Section 13(6) of the MSA. Accordingly, the applicant submits that because the functions and powers under these sections were transferred to the Minister of Home Affairs, BMA officials are the only persons empowered to issue permits allowing the removal of imported meats from ports of entry. The Minister of Agriculture and the Department of Agriculture have, according to the applicant, been relieved of any power or authority to issue removal permits, impose conditions in removal permits or authorise the removal of imported meat.
137. The applicant further contends that the Border Management Authority Act has its own provisions relating the review of or appeals against decisions of its own officers. The applicant referred me to Section 29(2) of the Border Management Authority Act. The Minister's decision is, according to the applicant, a *brutum fulmen*. This argument is clearly wrong. The applicant overlooks Section 29(1). It is only a decision made by an officer in terms of Border Management Authority Act that can be reviewed or appealed in terms of Section 29(2). Where a person is aggrieved by a decision or steps taken in terms of the ADA, its remedy is to lodge an objection to the Minister of Agriculture in terms of Section 29(1) of the ADA. Where a person feels aggrieved by a decision in terms of the MSA, its remedy is to lodge an appeal to the Minister of Agriculture in terms of Section

18(1) of the MSA. Neither of these sections is referred to in the Proclamation. The argument is also self-defeating – the applicant lodged its appeal and objection with the Minister of Agriculture. If her decision is a *brutum fulmen* (an ineffective act), then there is no purpose in reviewing it.¹⁵

138. The applicant sought to bolster its case in relation to the *ultra vires* ground in a supplementary replying affidavit delivered on 28 February 2024. Mr Matabese SC noted his client's objection to the supplementary replying affidavit. The primary purpose of the affidavit was to place a letter dated 23 February 2024 before the Court. This was a letter from the Border Management Authority ("BMA") addressed to all importers. The letter refers to the decision of this Court in **Excellent Meats** and says that the BMA obliged to comply with the Court order. I do not consider this to be of any relevance. Insofar as the BMA was purporting to interpret the law or the judgment of this Court, that is a function of the Court. I agree with Mr Matabese's submission that the BMA's subjective view is irrelevant.

139. The respondent also sought to refer to a document that appears to be the Department of Agriculture's Procedural Manual for the inspection procedure for imported meat. The manual is dated 23 April 2008. The applicant offers no explanation as to why it only sought to place this before the Court days before the hearing. The introduction of the manual would constitute raising new matter in reply. The respondents have not had an opportunity to deal with this manual.

¹⁵ For the reasons set out below, the Minister's decision is administrative action and exists as a fact. It cannot be a *brutum fulmen*.

140. I accordingly decline to permit the filing of the supplementary replying affidavit. It is to be treated as being *pro non scripto*.
141. I have considered the decision in **Excellent Meats**. It is a decision of this Court and is binding on me unless I find it to be clearly wrong. In the decision, Botha AJ held that the Department was obliged to comply with the Red Meat Regulations and the MSA and “*to act accordingly as dictated by the Procedure Manual*.”¹⁶
142. Botha AJ refers to the “Procedure Manual”: Microbiological Monitoring of Imported Meat, dated 21 October 2011. The applicant refers to this document in its founding affidavit. It points out that the document does not refer to any requirement pertaining to the attendance of inspectors at the time of breaking the seals.
143. It is correct that the Procedure Manual does not refer to the breaking of seals. It also does not refer to conditions under which a removal permit is issued. These are matters outside the scope of the Procedure Manual. If this argument were to be taken to its logical conclusion, it would prohibit the imposition of any condition in a removal permit, even though removal permits are not referred to in the Procedure Manual.
144. In **Excellent Meats**, the applicant lodged appeals against the rejection of certain consignments. The appeals were attended to by officials in the Department on the basis that they were requests for reconsideration. They were not dealt with

¹⁶ *Excellent Meat International Trading (Pty) Ltd v Minister of Agriculture, Land Reform and Rural Development and Others* (27708/2021) [2023] ZAGPPHC 1989 (11 December 2023) at para 6.6

by the Minister. Botha AJ held that the MSA and its regulations do not provide for a reconsideration.

145. It appears that Botha AJ's attention was not drawn to Section 18(4). The NEO may amend or withdraw any decision made or instruction given under a delegation unless the decision has been communicated to the person in respect of which the decision applies, in which case the decision may be amended or withdrawn only if the amendment or withdrawal is to the benefit of that person or that person consents to the amendment or withdrawal. This plainly gives the NEO the power to reconsider a decision such as a rejection.

146. However, on the facts in **Excellent Meats**, the applicant had lodged appeals. Accordingly, I respectfully agree with Botha AJ that, in that case, the applicant's appeals were not adjudicated in accordance with Section 18.

147. In this case, the 24 March decision was not taken by the NEO. It was taken by the Director (as was the 17 February decision). The Director's power to reconsider a rejection notice is found in Section 2(3)(b) of the ADA.

148. Although the applicant conflates the powers of the NEO and the Director, it plainly accepted that the decision to exercise the rejection notices could be reconsidered. It asked for reconsideration, and when the Director upheld the rejection decision, it approached the Minister both under the MSA and the ADA. The Minister considered the appeal and objection. She made a decision. These facts are accordingly distinguishable from **Excellent Meats**.

149. Reverting to the case as made out in the founding affidavit and in the heads of argument, the applicant now says that the imposition of the condition in the

removal permits was *ultra vires*. It says that the official who issued the removal permits and imposed the condition was not authorised to do so.

150. In its appeal and objection, the applicant told the Minister that “*a decision issued by the Department of Agriculture ... is ultra vires, and must be remitted back to the relevant parties for consideration.*” The decision that was the subject of the appeal was the decision of 24 March 2023 to maintain the decision to uphold the rejection notices.

151. Accordingly, the applicant’s case before the Minister was that the decision that was *ultra vires* was the reconsideration decision. The applicant did not say that the original decision to issue the rejection notices was *ultra vires*. It also did not say that the decision to impose the conditions on the removal notices was *ultra vires*.

152. The removal permits were issued between 22 December 2022 and 4 January 2023.¹⁷ The applicant did not challenge the removal permits when they were issued. At the time when the rejection notices were issued, the applicant did not suggest that the officials who issued the removal permits did not have the power to do so. Even when the applicant lodged its appeal and objection, it did not say that the officials who issued the removal permits did not have the power to do so.

153. Mr Matabese submitted that the applicant does not want to argue that the decision to issue the removal permits was *ultra vires* because this would mean that the applicant unlawfully removed the frozen pork from the storage facility at

¹⁷ The applicant points out that the date stamp on the last permit erroneously has the year “2022”. This is clearly an error. The correct date is 4 January 2023.

the port. He pointed out that, if the official was not empowered to impose the condition because this function had been transferred to the BMA, then the official equally did not have the power to issue the removal permit.

154. In reply, Mr Mostert said that the permits stand until set aside. He said that the challenge to the permits was in the appeal, but that the applicant does not challenge the entire permit, it only challenges the imposition of the condition. He accepted that a BMA official could impose the condition. However, he said that a Department of Agriculture official could not do so.

155. I cannot agree that the applicant can challenge the decision to impose the condition but not the decision to issue the removal permit. The removal permits were issued in terms of Section 8(1) of the ADA. The removal permit is written authority to remove and is subject to any condition imposed by the Director or delegatee. The decision to permit removal and the decision to impose conditions are part of a single decision.

156. Having elected not to challenge the validity of the removal permits, the applicant cannot challenge only the imposition of the condition.

157. If it were possible to challenge only the decision to impose the conditions, then the applicant ought to have filed an objection in terms of Section 23 of the ADA because the conditions were imposed in terms of Section 8(1) of the ADA. The applicant has not exercised its internal remedies in respect of the conditions. Section 7(2) of PAJA prohibits the Court from reviewing administrative action where internal remedies have not been exhausted. The Court must direct that

the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

158. However, the difficulties for the applicant go further than the failure to exhaust its internal remedies. The relief it seeks in the notice of motion is focused on the Minister's decision. The Court is not asked to review the decision to impose the conditions.

159. Mr Mostert is correct that the removal permit stands until it is set aside. This is the result of the **Oudekraal** principle¹⁸ as explained by Cameron J in **Kirland**.¹⁹ Cameron J pointed out that even action not authorised by the empowering provision is administrative action under PAJA. He explained that: *"In our post-constitutional administrative law, there is no need to find that an administrator lacks jurisdiction whenever she fails to comply with the preconditions for lawfully exercising her powers. She acts, but she acts wrongly, and her decision is capable of being set aside by proper process of law."*²⁰

160. Cameron J continued:

"The essential basis of Oudekraal was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process. The court expressed it thus:

'For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. . . . But the question that arises is what

¹⁸ Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA)

¹⁹ Mec for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC)

²⁰ At para 98

*consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."*²¹

161. The decision to issue the permits with the condition exists as a fact. It has factual consequences, including that the failure to comply with the condition is a ground to issue the rejection notice.
162. The notices of rejection were issued by Dr Pillay. By then, the frozen pork was at the applicant's premises. It was no longer at the port of entry. Accordingly, the transfer of powers under the Proclamation does not apply.
163. The decision that was the subject of the appeal was the decision to uphold the notices of rejection. That decision was made by the Director. In so doing, the

²¹ Kirland, *supra* at para 101 quoting from Oudekraal, *supra* at para 26

Director was exercising a power given to him in Section 2(3) of the ADA. This power was not transferred in the Proclamation and remains vested in the Director.

164. In its appeal and objection, the applicant challenged the decision to uphold the rejection notices. The Proclamation did not transfer the Minister of Agriculture's functions and powers under either Section 23 of the ADA or Section 18 of the MSA to the Minister of Home Affairs.

165. There is accordingly no basis for the *ultra vires* ground of review.

Third Ground

166. The applicant contends that the Minister's decision was taken as a result of the unauthorised and unwarranted dictates of the NEO and the Director. It contends that the decision was procedurally unfair as contemplated in Section 6(2)(c) of PAJA, was taken in bad faith as contemplated in Section 6(2)(e)(v) of PAJA and was taken for an ulterior motive as contemplated in Section 6(2)(e)(ii) of PAJA.

167. The evidence of the alleged interference is that on 11 August 2023, the NEO circulated an internal email recording that the NEO had communicated with the applicant because there was no response coming from the Minister. The email recorded that the Minister's advisor had advised the NEO to resist communicating with the applicant as it could be misconstrued as the Director and NEO being the one considering the appeal and objection. This this was wise advice. It certainly is not evidence of interference by the NEO.

168. Two days later, the advisor circulated an internal email in which he recorded that they (presumably the office of the Minister) had had engagements with the NEO and the team. An electronic communication had been received and the office of the Minister was still in a process of carefully considering the matter. If technical input was required, the advisor would advise the colleagues accordingly. On 14 August 2024, the advisor addressed an email to, *inter alia*, the NEO and the Director. An urgent meeting was requested to clarify certain unspecified issues.

169. On 16 August 2023, the NEO sent an email to the advisor. The applicant relies heavily on this letter. It suggests that this email shows that the NEO effectively decided the appeal. The material portion of the email reads:

"Please find the draft letter to Merlog as discussed. I have tried my best to include every aspect I could think about.

Relating to the submission, I propose that the letter for the Minister in case she sets aside the decision, not contain all the background information that supports upholding of the decision, otherwise the decision might contradict the evidence as scripted in the letter. We can also not fabricate/dilute the argument for the upholding of the decision in order to validate the setting aside.

I/We I are still worried though that this matter will create precedent in that we did not enforce the law scripted in terms of the 30 days period within which to lodge an appeal. My other worry is that the setting aside of the rejections, without putting the reasons why such a decision has been set aside, would also create an impression that all the narrative in their appeal/objection are valid, and thereby

creating precedent. I can, however, not draft a letter that would negate that and invalidate reasons why we uphold the rejections.

I will leave this to you to take over.”

170. According to the applicant, it is evident from this email that the NEO, and not the Minister, drafted the Minister’s rejection of the applicant’s appeal. The applicant says that, at best for the respondents, it is clear that the NEO had a substantial say in the determination of the appeal to the Minister. Seemingly considering repetition to be the best way to make its point, the applicant repeats its quotation of the second paragraph quoted above. The applicant says that this shows that the NEO cautioned that certain information should withheld from the rejection letter.

171. The high point of this argument is that the NEO prepared at least one draft letter. But it is apparent from the paragraph repeatedly quoted by the applicant that the NEO was referring to a letter upholding the appeal and objection – the letter in case the Minister sets aside the decision.

172. The applicant further referred to a memorandum prepared by the Chief Director: Animal Production and Health and the Director General of the Department. The memorandum records its purpose as being to brief the Minister in respect of the appeal and objection and to request the Minister to make a determination and sign one of the attached response letters, depending on the decision made.

173. I have read the memorandum. It is so that, in the memorandum, it is argued that there are no grounds to submit that the decisions made by the Director and the NEO were unreasonable or irrational or that the sanction is disproportionate

relative to the non-compliance. However, the facts are set out in detail, as is the relevant legislation. The Minister is left to make her own decision. The recommendations at the end of the memorandum are first that the Minister takes notice of the briefing and second that she signs one of the response letters, depending on the decision made. Two draft letters are attached to the memorandum, one upholding the rejection notices and one overturning the rejection notices.

174. It will be noted from my recitation of the facts that, although the applicant avers that the decision was taken as a result of the interference of the NEO and the Director, the applicant can point to no alleged interference by the Director. Yet, despite the confusion in the applicant's papers, the 24 March decision was made by the Director, not the NEO.
175. The Minister deposed to the answering affidavit. She pointed out that she did not have personal knowledge of the underlying facts and had to obtain information from the officials who were privy to the matter regarding what transpired during the process. Had she not done so, her decision would have been uninformed. She said that she made the decision herself. She pointed out that Section 18(3)(a) of the MSA expressly provides that the Minister may designate one or more independent senior officers to investigate and report on the grounds of appeal. She said that this cannot be interpreted as having delegated her power to them.
176. Importantly, the Minister explained that two draft letters were prepared for her: one upholding the appeal and the other dismissing it. Depending on her decision, she had to choose to sign one of the letters. This was done for convenience and

nothing else. She said that it could not be interpreted as an attempt to influence her or dictate to her what decision to take. This is borne out by the memorandum attached to the supplementary founding affidavit.

177. The Minister denied that the NEO had a substantial say in the determination of the appeal. She pointed out that his decision was the subject of the appeal, and that she accordingly had to hear his side on the grounds of appeal before making a decision.

178. In reply, the applicant referred to a letter from the State Attorney dated 11 December 2023. The two letters referred to in the memorandum were attached to the State Attorney's letter. The applicant seeks to make much of this, contending that these letters constitute additional documents. This is surprising given that they were attached to the memorandum that was in turn attached to the supplementary founding affidavit.

179. In the letter, the State Attorney also clarified that the memorandum was sent to the Minister unsigned due to the urgency of reaching a decision.

180. In the replying affidavit, the applicant argues that the Minister repeated the content of the letters "*almost verbatim*". That is not correct. There were two draft letters. One provided for the appeal to be upheld. The Minister's letter communicating her reasons for rejecting the appeal is similar, though not identical, to the unsigned draft letter.

181. In reply, the applicant insists that the involvement of the NEO and the Director went further than merely supplying the minister with salient information. It says that the Minister failed to provide proof or confirmation that she independently

considered the matter and applied her mind thereto. The applicant asserts that the NEO clearly drafted the Minister's purported rejection of the applicant's appeal, or at very least had substantial say therein. The applicant says that the Minister's decision shows that she relied heavily on the memorandum.

182. The high point of this argument is that the NEO appears to have prepared a draft of at least one the two draft letters. This was not sent directly to the Minister, but was sent to the advisor. Two draft letters were then attached to the memorandum, which, although unsigned, purports to have been approved by the Chief Director: Animal Production and Health and by the Director-General. The Minister then signed a letter that contained minor amendments to one of the draft letters.

183. Applying the Plascon-Evans rule, I accept that the Minister did apply her mind to the matter. It is so that she obtained information from various sources, including the NEO and the Director. It is so that her letter explaining the reasons for the letter is very similar to the draft letter provided to her and may have been based on a draft prepared by the NEO and forwarded to the advisor. But that does not mean that she did not apply her mind to the matter. She was briefed on the matter and asked to make a decision, which she duly made.

184. In the applicant's heads of argument, it is submitted that the Minister breached the *audi alteram partem* rule by engaging in one-sided engagement with one of the parties whose decision was under scrutiny. Reliance is place on Section 18(3) of the MSA. Section 18(3)(a) provides that the Minister may designate one or more independent senior officers to investigate and report on the grounds of the appeal. Section 18(3)(b) provides that, *inter alia* the NEO, the assignee and

the appellant may appear or be requested to appear at an investigation in terms of Section 18(3)(a). Section 18(4) empowers the Minister, after considering the report and other documents relating to the appeal, to confirm, set aside or amend the decision or issue such order as may be fit.

185. The investigation is conducted by the senior official or officers designated by the Minister. They may question, *inter alia* the NEO, the assignee and the appellant. This does not take place in front of the Minister. It is a fact finding exercise.
186. The applicant also conflates the appeal with the objection. Section 18(3) of the MSA is applicable to the appeal. The appeal is misplaced because the decision complained of was made by the Director. The correct procedure was the objection under Section 23 of the ADA.
187. An objection under Section 23 of the ADA is required to be submitted to the Director-General. The Director-General is required to submit the objection and his representation to the Minister for a final decision.
188. Section 23(3) provides that the Director-General may appoint one or more senior officers in the Department to investigate and report on the complaint. Such officers may not be the Director or any officer involved in the decision or steps that are the subject of the complaint. The person who lodged the objection may, at their own request or at the request of the officer or officers submit oral or written representations. The applicant does not suggest that it requested an opportunity to submit further representations. It had already done so.

189. In this case, the applicant was represented by attorneys. It submitted a comprehensive appeal and objection. What needed to be obtained was the other side of the story – the version of the NEO, the Director and other officials.
190. Whether in terms of Section 18 of the MSA or Section 23 of the ADA, the process remains a fact finding exercise. The officials gathered the necessary information and put it in the memorandum. There are no material facts that were excluded. The applicant's version was before the Minister.
191. I accordingly find that the decision was not procedurally unfair as contemplated in Section 6(2)(c) of PAJA. There is also no basis to find that the decision was taken in bad faith or for an ulterior motive.

Conclusion

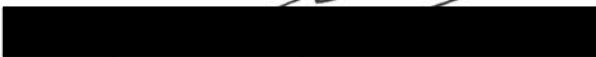
192. I find that the applicant has not made out a case for the relief sought in the notice of motion. Therefore, the application should be dismissed.
193. The first to fourth respondents seek an order for the costs of two counsel. Given the complexity of the matter, such an order is justified. It is not necessary to consider the appropriate scale of costs in terms of Rule 67A read with Rule 69. The new rules came into effect on 12 April 2024. This matter was argued before that date. In **Mashavha**, Wilson J held that the amendments operate prospectively.²² I agree.

²² *Mashavha v Enaex Africa (Pty) Ltd* (2022/18404) [2024] ZAGPJHC 387 (22 April 2024) at para 12

194. I accordingly order as follows:

194.1. The application is dismissed.

194.2. The applicant is to pay the first to fourth respondents' costs, including the costs of two advocates where so employed.



Vivian, AJ
Acting Judge of the Gauteng Division
of the High Court of South Africa

APPEARANCES:

For the Applicant:	ZZ Matebese SC and B J Nodada
For the Respondents:	M Mostert
Date of hearing:	5 March 2024
Date Delivered:	19 June 2024