



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Reportable/Not Reportable

Case no: 18176/2024

In the matter between:

BHEKA PHAMBILI TYANTSI FARMING (PTY) LTD

Applicant

and

**DEPARTMENT OF LAND REFORM
AND RURAL DEVELOPMENT**

First Respondent

**MINISTER OF LAND REFORM
AND RURAL DEVELOPMENT**

Second Respondent

**THE DISTRICT BENEFICIARY SELECTION
COMMITTEE: DEPARTMENT OF LAND
AND RURAL DEVELOPMENT**

Third Respondent

**THE PROVINCIAL TECHNICAL COMMITTEE:
DEPARTMENT OF LAND REFORM
AND RURAL DEVELOPMENT**

Fourth Respondent

**THE NATIONAL LAND ACQUISITION
AND ALLOCATION COMMITTEE:
DEPARTMENT OF LAND REFORM
AND RURAL DEVELOPMENT**

Fifth Respondent

**NUVELD FARMING EMPOWERMENT
ENTERPRISE (PTY) LTD**

Sixth Respondent

Neutral citation: *Bheka Phambili Tyantsi Farming (Pty) Ltd v Department of Land Reform and Rural Development; Minister of Land Reform and Rural Development; The District Beneficiary Selection Committee: Department of Land Reform and Rural Development; The Provincial Technical Committee: Department of Land Reform and Rural Development; The National Land Acquisition and Allocation Committee: Department of Land Reform and Rural Development; Nuvelde Farming Empowerment Enterprise (Pty) Ltd*

Coram: MANGCU-LOCKWOOD J

Heard: 04 June 2026

Delivered: 02 September 2026

ORDER

The following order is made:

1. The application is dismissed.
2. The applicant shall pay the costs of the sixth respondent, on Scale C, including the costs of senior counsel.

JUDGMENT

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an opposed application in which the applicant challenges various decisions of the first respondent (Department) concerning the allocation of a lease in respect of a group of state-owned farms collectively known as ‘the Plateau Farm’.

[2] In 2009 the applicant was awarded a lease for one of the Plateau Farms, the Rondawel Farm, as part of the Department’s land reform programme in terms of the Land Reform: Provision of Land Assistance Act 126 of 1993 (the Act). At first, the lease was for a period of three years, and it was extended for a further five years until its termination in November 2017.

[3] In November 2019 the Department decided to lease the whole Plateau Farm to a single entity for thirty years - a decision referred to in these proceedings as ‘the regime change decision’. The decision was taken by the then Chief Director: Western Cape Provincial Shared Services Centre (PSSC), Ms Fortuin. On 6 December 2019 the Department invited bids in that regard, and the applicant and the sixth respondent (Nuvelde) submitted applications.

[4] Three successive selection committees of the Department – the third, fourth and fifth respondents - considered the bids on 14 January 2020, 3 March 2020 and 21 May 2020, respectively, and recommended the appointment of Nuvelde as the successful beneficiary for award of the lease. The last of these bodies, the fifth respondent (NLAAC) referred its recommendation to the PSSC for a final decision.

[5] On 23 August 2020 the second respondent (Minister) instructed the Acting Chief Director of PSSC, Dr Mbekeni - Ms Fortuin having left - to investigate complaints received regarding alleged irregularities at the Plateau Farm. On 27 September 2020, Dr Mbekeni decided not to award the 30-year lease to Nuvelde.

[6] There were further investigations conducted after Dr Mbekeni’s decision. One was by an internal task team established on 2 December 2020 by the Department, which concluded that the farming beneficiaries such as the applicant were left worse off than they were before moving onto the farm. Another was an independent investigation by Ms Rowena Joemat, which produced a report on 7 June 2021, with similar conclusions as the internal task team investigations.

[7] On 9 February 2023 the Deputy Director General: Land Redistribution and Tenure Reform, Mr Ndove, addressed a memorandum to the Minister observing, amongst other things that the decision not to renew the expired leases and to evict the lessees was against the policy of the Department. On 21 February 2023 the Minister decided not to award the 30-year lease to Nuvelde.

B. THE RELIEF SOUGHT

[8] It was on the basis of the above summary of facts that these proceedings were launched by the applicant in August 2024, and it sought to review the following decisions as set out in the notice of motion:

- 1.1 The Department's decision 'to unilaterally change the regime for the leasing of the five farms of Plateau Farm from being leased to different entities ... and to have it leased to one entity and be farmed as a single unit' (the regime change decision);
- 1.2 the Department's decision to have the site meeting relating to the submission of bids for a 30-year lease of the Plateau Farms held at Matjieskloof farm;
- 1.3 the District Beneficiary Selection Committee's (DBSC's) 3 March 2020 decision recommending the allocation of the Plateau Farm to Nuvelde;
- 1.4 the Provincial Technical Committee's decision to support the decision of the DBSC;
- 1.5 the National Land Acquisition and Allocation Control Committee's ('NLAACC') decision to support the DBSC decision.

[9] Pursuant to a court order of 12 February 2025, the Minister and the Department delivered a record in terms of Uniform Rule 53 on 26 March 2025. The applicant neither supplemented its founding papers, nor amended its notice of motion. After the respondents delivered their answering affidavits the applicant delivered two replying affidavits deposed on 22 October 2025 - one in reply to the

State respondents, and the other, to Nuvelde. It abandoned the relief set out at paragraphs 1.2 to 1.5 above and sought to introduce a new claim, namely a challenge to the Department's decision to terminate, alternatively not to renew the applicant's five-year fixed-term lease (termination relief).

[10] The termination relief is most clearly expressed in the concluding paragraphs of the replying affidavit to Nuvelde's answering affidavit, where the applicant states that it seeks declaratory relief as follows:

- '102.1 The termination of the applicant's leasehold rights emanating from the expired five-year leases and all other beneficiaries entities in 2017 was inconsistent with the 2013 policy and unlawful.
- 102.2 The PSSC's decision to change the regime of the lease subsequent to the unlawful termination of the leasehold rights is unlawful and a nullity *ab initio*;
- 102.3 The PSSC decision is set aside *ab initio* and the applicants and other lessees' leasehold rights are reinstated on the same terms as the expired lease, subject to negotiation of new extended leases on such terms as agreed between the parties.'¹

[11] In their heads of argument dated 22 May 2026 and 25 May 2026 the respondents objected to the purported inclusion of the termination relief. They stated that the applicant was seeking to make out a new case in reply which was not foreshadowed in the founding papers.

[12] On the eve of the hearing, 3 June 2026, the applicant delivered a notice of intention to amend its notice of motion, as follows:

¹ See also replying affidavit to first and second respondents' answering affidavit, paras 7.4, 17-18, 84 and 86.

‘1 By deletion of prayers 2 to 5 in their entirety and the insertion of the following in their stead:

2. Declaring that the decisions taken by the first respondent’s unknown officials to terminate the applicant's lease without complying with the provisions of paragraph 12.4 and 12.5 of the State Land Leases and Disposal Policy, 2013 [2013 SLLDP] was *ultra vires* the delegated powers, unlawful conduct, a nullity *ab initio* and is set aside forthwith.

2 By deletion of numbers 6 to 8 and the insertion of the consequential numbering 3, 4 and 5 in their stead.’

[13] The notice was not accompanied by a substantive application, which one would have expected in the light of the respondents’ indication in their heads of arguments of their intention to object to the purported inclusion of the termination relief. Nor was there any explanation for the eleventh-hour delivery of the intended amendment.

[14] It is also evident that the amendment sought in terms of the notice of 3 June 2026 is a further iteration of the termination relief presaged in the replying affidavits. While paragraph 102.1 of the replying affidavit quoted above sought to declare an inconsistency with the 2013 SLLDP, the notice of 3 June 2026 introduced a claim based on delegated powers.

[15] Given that the effect of the amendment was to substitute the withdrawn relief with effectively a new case, it is self-evident that the respondents would require opportunity to deal with the new case. Contrary to what is argued by the applicant, the purported challenge to the termination decision is not one that may simply be ‘read in’ as ‘further and/or alternative relief’ sought in paragraph 8 of its notice of motion. The relief amounts to a new claim which was neither

foreshadowed in the founding papers, nor as a result, was it a case answered by the respondents. This is impermissible.²

[16] As pointed out by the respondents, the applicant had the benefit of at least 8 months from delivery of its replying affidavit to file, not only the notice of intention to amend but a substantive application for the amendment sought. The respondents point to the obvious prejudice they face in that they did not have opportunity to respond to the new case of a termination relief, which is not only a new cause of action but has now become a central aspect of the applicant's case.

[17] The applicant's counsel argued that the amendment was necessitated by documents discovered in the rule 53 record delivered by the Department. That, however, does not assist the applicant because the record was delivered in March 2025, and the applicant elected not to amend its notice of motion in terms of Rule 53(4), nor to file a supplementary affidavit in terms of Rule 53(4) dealing with this proposed new relief.

[18] Uniform Rule 28 deals with amendments, and it provides as follows:

- '(1) Any party desiring to amend any pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.
- (2) The notice referred to in subrule (1) shall state that unless written objection to the proposed amendment is delivered within 10 days of delivery of the notice, the amendment will be effected.
- (3) An objection to a proposed amendment shall clearly and concisely state the grounds upon which the objection is founded.

² *Somali Association of South Africa and Others v Refugee Appeal Board and Others* 2022 (3) SA 166 (SCA) para 97. *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) para 242 - 245.

- (4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend may, within 10 days, lodge an application for leave to amend.
- (5) If no objection is delivered as contemplated in subrule (4), every party who received notice of the proposed amendment shall be deemed to have consented to the amendment and the party who gave notice of the proposed amendment may, within 10 days of the expiration of the period mentioned in subrule (2), effect the amendment as contemplated in subrule (7).
- (6) Unless the court otherwise directs, an amendment authorized by an order of the court may not be effected later than 10 days after such authorization.
- (7) Unless the court otherwise directs, a party who is entitled to amend shall effect the amendment by delivering each relevant page in its amended form.
- ...
- (9) A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party.
- (10) The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment grant leave to amend any pleading or document on such other terms as to costs or other matters as it deems fit.’

[19] An observation that may be made regarding the notice delivered by the applicant on 3 June 2026 is that it makes no provision for timeframes to enable the respondents to object, if they so wish, contrary to sub-rule (2) above. Moreover, by delivering the notice of intention to amend at such a late hour, the applicant precluded the respondents from the benefit of sub-rules (3) and (4) above, despite its knowledge that they intended to object to the purported amendment. It is as if the applicant took it as a foregone conclusion that it would be granted the amendment, despite the established authorities stating that an amendment is not there for the taking and lies within the discretion of the court.³

[20] Generally, our law allows for amendments, unless the amendment sought is not one which can be cured by an appropriate order for costs, or one in which the

³ See *Moolman v Estate Moolman & another* 1927 CPD 27 at 29.

parties can be put back, for the purposes of justice, in the same position as they were when the notice of motion was filed.⁴ In this case, however, the applicant was neither willing to have the matter postponed in order to accommodate the purported amendment, nor to pay the costs occasioned by such postponement, both issues which the Court pertinently raised with the applicant's counsel. He indicated that the applicant did not seek postponement of the matter and that, if the amendment were not to be permitted, then the applicant was willing to proceed with the matter unamended because his client did not wish to delay the proceedings any further.

[21] The substance and manner in which the case is sought to be amended is prejudicial to the respondents in a way that cannot be ameliorated by an order as to costs. One example is that the 2013 SLLDP was not annexed to the applicant's papers. On the eve of the hearing the applicant forwarded to the parties and the Court a version of the document, but during the hearing yet another version was produced, which created uncertainty regarding which version of document was applicable at the time of the impugned decisions. Since none of this was placed under oath before Court, the factual and evidential basis for the applicant's claim remains unestablished. The same applies in respect of the aspect of the termination challenge which relies on compliance with delegated powers. No system of delegations was attached to the papers.

[22] All of this shows that the respondents could not have been aware of the case they were called upon to meet in regard to the termination challenge, to their prejudice. This is in addition to the fact that the termination challenge itself had

⁴ See *Media 24 (Pty) Ltd v Nhleko and Another* (109/22) [2023] ZASCA 77 (29 May 2023) para 16. *Moolman v Estate Moolman & another* 1927 CPD 27 at 29. *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 9.

evolved by the date of the hearing, as I have already observed. As the Supreme Court of Appeal (SCA) held in *Somali Association of South Africa* -

‘... it is unfair and unprecedented for a litigant to seek extensive substantive relief not foreshadowed in the notice of motion, especially when what is sought is not dealt with on affidavit, thus not providing an opponent an opportunity to deal with it.’

[23] Given that the applicant did not wish for the matter to be postponed or to tender costs for such postponement, there is no equitable manner in which the purported amendment can be dealt with, since the respondents will be precluded from responding to the new claim.

[24] Lastly, although not raised before me, I have considered the importance of having the applicant's true dispute - if that is what the termination challenge intends to introduce - ventilated by the Court. I am, however, constrained by the choices made by the applicant as the *dominus litus*, on the advice of its legal representatives. For all the reasons already discussed, it is not in the interests of justice to allow the amendment sought, and the Court exercised its discretion against granting it.⁵

C. UNREASONABLE DELAY

[25] There are other maladies afflicting the applicant's case, one of which concerns the unreasonable delay in challenging the two decisions that are now the subject of the application. In the instance of the termination decision, the challenge was raised some seven years after the decision was made, and in the case of the regime change, five years later.

⁵ *Caxton Ltd. and Others v Reeva Forman (Pty) Ltd. and Another* (393/88) [1990] ZASCA 47; 1990 (3) SA 547 (AD); [1990] 2 All SA 300 (A) (17 May 1990) at 565G.

[26] Whether the review is brought in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principle of legality, the law permits the Court to determine whether there was an unreasonable delay and, if so, whether it should be condoned, taking into account the interests of justice⁶. The reasonableness of the delay, must be assessed on the basis of (among other things) the explanation offered for it. If the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered. If there is an explanation, it must cover the entirety of the delay. Where there is no explanation, the delay will necessarily be unreasonable.⁷

[27] The periods of delay in challenging both decisions are considerable. What the applicant states in the founding papers is that it was never informed of the impugned decisions until March 2024 when it discovered the DBSC's recommendation. That, however, is contradicted by the facts set out in the founding affidavit which make it clear that the applicant was aware of both decisions by November 2019. In reply, it is stated that the applicant was not aware of the reasons for the decisions. Apart from the fact that this is a different reason, there is also no indication that the applicant has at any stage requested the reasons. In any event, it does not change the fact that the applicant was aware of the decisions by November 2019, from which it is required to account for the period of delay.

[28] The applicant states that it elected to first attempt to resolve the matter through mediation, as recommended in the investigative report compiled by Ms Joemat. But these proceedings were launched in August 2024, three years after that

⁶ *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA), para 80.

⁷ *Buffalo City*, para 52.

report was furnished. In any event, the applicant's conduct betrays this stated reason for delay because it participated in the application process for the thirty-year lease in 2019 and 2020, thus indicating it accepted the termination of its lease and the regime change decision, not that it was challenging the decisions.

[29] This conduct indicates, not only that the applicant was aware of both impugned decisions, but that it was willing to follow the decisions and processes outlined by the Department. As Nuvelde points out, the applicant is at once approbating and reprobating, contrary to the legal position that no party can take up two positions which are inconsistent with one another.⁸ This doctrine applies with equal force to an entity which bids for a contract with a government agency. Once it has elected to bid, it cannot subsequently challenge the lawfulness of the bid process.⁹

[30] Given the excessive delays incurred, the explanation furnished for the applicant's delay is inadequate and does not assist in placing the Court in a position to exercise its discretion regarding whether or not to grant the condonation. There is also no basis to conclude in the applicant's favour that it was somehow not legally presented such that it could not place the relevant facts and circumstances on affidavit. As I have indicated, the applicant has since the launch of these proceedings been legally represented, and to the extent that there was need to supplement its condonation it could have done so.

⁸ See *Rademeyer v Ferreira* 2025 (2) SA 1 (CC) para 66; *Twenty-Third Century Systems (Pty) Ltd and another v SAP Africa Region (Pty) Ltd* 2025 (6) SA 247 (SCA) para 13 fn 3.

⁹ *IN2IT Tech (Pty) Ltd v Gijima Holdings (Pty) Ltd & Others ZAGPJHC 478* paras 39 – 40; *TMT Services & Supplies (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Another* [2024] ZAWHC 93 paras 48 - 49.

[31] On other hand, the state respondents state that they have been substantially prejudiced by the delay, because Ms Fortuin has left the Department since the November 2019 regime change decision was made, and given that the review application was only launched in August 2024, it has not been possible to establish the reasons for her decision.

[32] Lastly, and in any event, I do not consider it in the interests of justice to grant the condonation in light of the poor prospects of success of the regime change challenge, an issue to which I now turn.

D. THE REGIME CHANGE DECISION

[33] Similar to the termination challenge, the applicant's case in respect of the regime change decision evolved in the pleadings. According to the founding affidavit, the review grounds in respect of that decision were procedural unfairness, the failure to consider the aim of decongesting the commonage, and the decision being taken as a result of the unauthorised dictates of the previous owner, Professor Sinclair. However, in the applicant's heads of argument the regime change case is now squarely based on the argument that the decision-maker, Ms Fortuin, acted *ultra vires* the powers delegated to her in terms of a delegation under s 15(1) of the Act, read together with the SDLLP.

[34] But even before these proceedings were launched, the Department and the Minister reached similar conclusions as those now advanced by the applicant for the regime change challenge. As already adverted, both of the investigations commissioned by the Department concluded that the regime change decision was contrary to the policy of the Department and it left the applicant and other beneficiaries in a worse position than before, leading to the Minister's decision not

to award the 30-year lease to Nuveld. The Minister's decision also endorsed a memorandum prepared by the Deputy Director General: Land Redistribution and Tenure Reform, Mr Ndove, who stated as follows after receiving Ms Joemat's report:

‘...the officials misinterpreted the land reform policies especially the State Land, Lease and Disposal Policy (SLLDP). Chapter 2, paragraph 12.5 of the SLLDP of 2013 outlines clearly that at the expiration of the initial 5-year period, the Director: Land Reform shall produce and present a report to the National Land Allocation and Recapitalisation Control Committee (NLARCC) and give reasons why the lessee shall be removed from the list of the lessees who are on probation. It is only under exceptional circumstances and as approved by NLARCC that a lease can be terminated or not renewed, but the expiry of the lease cannot be the reason to evict a lease. The Department has not provided any reasons for not renewing the leases but opted to advertise the farms thereby displacing most of the beneficiaries and defeating the initial purpose of decongesting the commonage area.

It should be noted that the intention of entering into short term leases was informed by the policies of the time, but the intention was never to terminate their leases on the expiration of the short-term leases but rather to offer them long-term leases.

This approach by the PSSC is completely opposite to the Department's approach under the State Land Allocation Project where leases that have expired more than 10 years ago are renewed. The expiry of the lease cannot be blamed on the lessee, and the burden to renew the lease is on the Department.’

[35] Other findings contained in Ms Joemat's report which were approved by the Minister were stated as follows:

‘The original purpose of and rationale for the acquisition of Plateau Farms was to decongest the Beaufort West commonage, which the farmers were using for grazing of their livestock. It has become apparent that that original purpose of the project was abandoned when BONO Farm Management decided that beneficiaries run the business as a single commercial entity.

The investigation [of Ms Joemat] further established that the decision to run the farm as a single business unit, disempowered beneficiaries in the process. As beneficiaries realized that they had less control and say over the management of the business, they wanted to return to the original business plan of five separate farms. However, this request was not recognised nor entertained by their strategic partner, BONO, nor by the department officials managing the project.’

[36] The applicant's present basis for the regime change challenge is to the same effect as the investigative conclusions above. As a result, the Department and the Minister state that they agree with the applicant that a 30-year lease in respect of the Plateau Farm should not be awarded to Nuvelde. This is why the Minister says she reversed the earlier recommendations to award the 30-year lease to Nuvelde. The respondents accordingly state that the impugned regime change decision was superseded and it no longer exists.

[37] In fact, the State respondents are currently opposing a related matter instituted by Nuvelde in this Division on 5 April 2023 for the review of Dr Mbekeni's decision of 27 September 2020 not to approve the 30-year lease as being unlawful. The relevant pleadings of the review application form part of the record in these proceedings. The applicant does not dispute the Department's assertions that it intends to enable the former beneficiaries such as the applicant to return to the Plateau Farm once Nuvelde's review application has been determined.

[38] In response to the mootness point, the applicant points to ss 15(1) and (5) of the Act which provide as follows:

‘(1) The Minister may, on such conditions as he or she may determine –

(a) delegate to any officer in the Department of Land Affairs any power conferred upon the Minister by this Act, except the power under section 14 to make regulations;

(b) authorize any such officer to perform any duty imposed upon the Minister by this Act.

...

(5) Any delegation of a power or authorization to perform a duty under this section –

(a) shall be done in writing;

- (b) shall not prevent the person who effected the delegation or granted the authorization from exercising that power of performing that duty himself or herself;
- (c) may at any time be withdrawn in writing by that person.’

[39] The applicant states that the SLLDP constitutes conditions determined by the Minister in terms of s 15(1) of the Act. It states that the regime change decision was an administrative decision taken in terms of the empowering provisions of the Act read with the policy guidelines issued by the Minister in order to control the management of the exercise of such delegated powers. It says ss (1), read with (5) precluded the Minister from reserving any powers for herself once she had delegated the decision regarding the regime change to Ms Fortuin as the PSSC, and that the Minister’s purported cancellation of that decision amounted to an unlawful and *ultra vires* appeal. On the basis of *Oudekraal*¹⁰ and *Mgijima*¹¹ the decision of Ms Fortuin stands until set aside. It is a decision which is final in effect, says the applicant, and it was implemented through the advertisement process for the 30-year lease and remains binding. This, according to the applicant, is indicated by the ongoing litigation between the State respondents and Nuvelde which is aimed at challenging that decision. The respondents, according to the applicant, were required to bring a ‘self-review’ of Ms Fortuin’s decision.

[40] The Department argues that the change of the leasing regime to a single entity for thirty years was not an absolute requirement and it could be amended in

¹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) (28 May 2004).

¹¹ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* (CCT254/16) [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (14 November 2017)

the discretion of the Department. It states that the decision of Ms Fortuin was not final in effect, and it was open to the Minister to reverse it, which she did. Nuvelde argues that the regime change decision was a policy decision which does not constitute administrative action.

[41] The difficulty in determining this aspect of the dispute arises from the evolution of the applicant's case and the resultant lack of evidence relating to the new case. The regime change challenge, as contained in the founding papers, was not aimed at challenging Ms Fortuin's decision. Nor, as I have already stated, was it based on non-compliance with delegated powers or even the SLLDP. And the decision challenged in this regard encompassed both the change from multiple leases to one lease and the award of the new 30-year lease. This is apparent from numerous paragraphs in the founding affidavit.¹²

[42] That approach partly explains why, in answer to the applicant's case, the respondents state that the decision has been superseded by the Minister. First, Dr Mbekeni, as the incumbent PSSC at the time, refused to award the 30-year lease to Nuvelde. And to the extent that there was a decision for the Minister to make regarding the award of the lease after Dr Mbekeni's decision, she made a determination that was to the same effect as Dr Mbekeni. One interpretation of this response is that Dr Mbekeni's decision not to award the lease subsumed the prior decision of the regime change because, even in the applicant's founding papers, the two decisions were part of one determination. What is not in dispute is that when Dr Mbekeni made a decision not to award the lease to Nuvelde, he was exercising

¹² See paras 59, 87 – 88, 90.1 and 119 of the founding affidavit.

delegated powers in terms of s 11, read with s 15(1) of the Act. Section 11 provides for the Minister's power to dispose of certain land, as follows:

‘The Minister may, on such terms and conditions as he or she may deem fit, for the purposes of this Act, sell, exchange, donate or lease any land designated or acquired under this act or, if the land is no longer required for the purposes of this act, for any other purpose.’

[43] The problem is that there is no copy of the applicable delegation in this regard. In court, Nuvelde's counsel produced with his heads of argument, a copy of delegations which was signed by the Minister on 23 May 2014. Given this date, and the fact that these delegations were not produced under oath, or by the State respondents who would be expected to know the true factual position, the Court remains uncertain whether they were the applicable delegations as at November 2019, when the regime change decision is said to have been made, and I am accordingly loathe to take them into account. That is especially so, given the confusion created by different versions of the delegations and the SLLDP produced in Court on the day of the hearing.

[44] What is notable though is that this version of delegations distinguishes between the ‘pure’ powers provided in s 11 and those flowing from them. The delegation of the ‘pure’ powers of s 11 is provided for at Item 29, and those powers are not delegated to the PSSC, but to, amongst others, the Deputy Director-General: Land Redistribution and Development and the Deputy Director - General: Land Tenure and Administration, such as Mr Ndove, but they ‘must be approved by the [National Land Allocation and Recapitalization Control Committee] (NLARCC) and concurred to by the ‘Minister's Co-ordinating Meeting] (MCM)’, as follows:

‘Sell, exchange, donate, lease, award or otherwise dispose of, or encumber any property contemplated in this Act, for purposes of this Act or, if the land is no longer required for the purposes of this Act, for any other purpose.’

[45] On the other hand, Item 28 provides for consequential powers, which are delegated to the PSSC with the condition that the decision ‘must be approved by NLARCC and concurred to by the MCM, as follows:

‘Determine terms and conditions for the sale, exchange, donation, lease, award, or other disposal or encumbrance of any property contemplated in this Act, for the purposes of this Act or, if the land is no longer required for the purposes of this Act, for any other purpose.’

[46] There is no record, information or evidence before this Court regarding the entity referred to as the NLARCC above. To further muddy the waters, the letter of the Minister dated 21 February 2023 referred to a similar system of delegations, but which involved the NLAACC, as follows:

‘The signing and finalisation of lease contracts is delegated to Provincial Shared Services Centre (PSSC) Chief Director subject to the approval by the National Land Acquisition and Allocation Control Committee (NLAACC)...’

[47] What the letter indicates is that, to the extent that the PSSC possessed delegated powers, its decision required the approval of the NLAACC. The Court is not seized with delegations containing such a requirement. The applicant seems to have adopted the language used in some of the documents contained in the record without making the case by referring to specific documents and attaching them.

[48] Reverting to Ms Fortuin’s decision, it is common cause that the record of her decision is no longer available, due to the time that has elapsed since it was made.

It is also common cause that the reasons for Ms Fortuin's decision are unknown to both the applicant and the State respondents. It is not possible to review a decision whose record is not before Court. What is required is a proper consideration of the nature of the decision taken by Ms Fortuin, by reference to, amongst other things, the system of delegations applicable and the record of the decision itself. There is no record of her decision, let alone a concurring decision of another entity such as the NLAACC or the NLARCC, whichever may be applicable.

[49] It is only if there was such evidence that the Court would be in a position to determine whether, in the language of the doctrine of *functus officio*, the decision was final,¹³ and resultantly, whether the decision is moot or not. The applicant has simply failed to establish its case on this score.

[50] There is also the issue of the applicable SLLDP, the other leg of the challenge, which the applicant has failed to identify. That alone is fatal because the parties do not know the case to which they are called upon to respond. But in any event, the Constitutional Court has made it clear that policy serves as a guide to decision-making and does not inflexibly bind officials and its objectives are to achieve reasonable and consistent decision-making; provide a guide and a measure of certainty to the public; and avoid fresh inquiries into every identical request or need for the exercise of public power.¹⁴

¹³ *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others* (CCT 102/22; CCT 120/22) [2023] ZACC 29; 2023 (11) BCLR 1342 (CC); 2024 (1) SACR 447 (CC) (24 August 2023) paras 42 – 49.

¹⁴ *Arun Property Development (Pty) Ltd v Cape Town City* 2015 (2) SA 584 (CC), paras 46 – 47.

[51] Another significant departure from the founding papers is that the applicant has abandoned any reliance on the provisions of the PAJA which was the main basis for its case, with legality being an alternative basis. Even though the applicant claims that the impugned conduct constitutes administrative action, it now places reliance solely based on the principle of legality instead of s 6 of the PAJA.¹⁵

[52] For all these reasons, the applicant has failed to make out a case for its relief. In rejecting the applicant's case in this regard, I also take into account that it is not disputed that the State respondents, being in agreement with the conclusions of the applicant that the 30-year lease should not be awarded, intend to facilitate the return of farmers such as the applicant to the leasehold rights. In effect, the decision sought to be reversed was halted based on the same considerations. I, however, make no determination regarding whether or not the decision is moot, because of the failure to establish the necessary evidence as discussed.

[53] As regards costs, the respondents do not seek costs against the applicant, in recognition of the *Biowatch*¹⁶ principle. I am in agreement that the principle applies in relation to the State respondents. However, *Biowatch* does not shield a losing party from paying the costs of a private litigant. Even though the applicant states it did not seek any relief against Nuvelde, the latter had a direct and substantial interest in this litigation which stood to be affected. The applicant does

¹⁵ Cf *Minister of Home Affairs and another v Public Protector of the Republic of South Africa* [2018] 2 All SA 311 (SCA) paras 27 – 28, citing *Minister of Health and another v New Clicks SA (Pty) Ltd and others (Treatment Action Campaign and Innovative Medicines SA as amici curiae)* 2006 (2) SA 311 (CC) paras 95 – 97; *State Information Technology Agency SOC v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA); paras 33– 38.

¹⁶ *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC) ; 2009 (10) BCLR 1014 (CC) (3 June 2009)

not deny the connection between the issues raised in these proceedings and those arising in the review proceedings between Nuvelo and the State respondents. There is no reason why Nuvelo should not recoup its costs.

E. ORDER

[54] In the result, the following order is made:

- a. The application is dismissed.
- b. The applicant shall pay the costs of the sixth respondent, on Scale C, including the costs of senior counsel.

N. MANGCU-LOCKWOOD
Judge of the High Court

Appearances:

For applicant :	M. Titus
Instructed by:	M. Maguga, Maguga Attorneys
For first to fifth respondents:	P. Hathorn SC
	A. Toefy
Instructed by	L. Golding, State Attorney

For sixth respondent:
Instructed by

G. Budlender SC
C. van Schalkwyk, Legal Resources Centre