REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-CRT-2017/00316

In the matter between:

AMON NGAVETENE	**FIRST APPLICANT**
ELIA FASA KANDJII	**SECOND APPLICANT**
PETER KAZONGOMINJA	**THIRD APPLICANT**
GOTTFRIEDT TSUSEB	**FOURTH APPLICANT**
TJAKAZAPI JANSON MBUNGUHA	**FIFTH RESPONDENT**

and

MINISTER OF AGRICULTURE, WATER AND FORESTRY	**FIRST RESPONDENT**
MINISTER OF PUBLIC ENTERPRISES	**SECOND RESPONDENT**
MARTHA NAMUNDJEMBO-TILAHUN	**THIRD RESPONDENT**
RONALD LEONARD KUBAS	**FOURTH RESPONDENT**
ISRAEL ITAMUNUA NGANGANE	**FIFTH RESPONDENT**
SOPHIA KASHEETA	**SIXTH RESPONDENT**
STEPHANUS OOSTHUIZEN	**SEVENTH RESPONDENT**
MUSHOKOBANJI MWILIMA	**EIGHTH RESPONDENT**
INGO SCHNEIDER	**NINTH RESPONDENT**
THE MEAT CORPORATION OF NAMIBIA	**TENTH RESPONDENT**

Neutral citation: *Ngavetene v Minister of Agriculture, Water and Forestry* (HC-MD-CIV-MOT-CRT-2017/00316) [2018] NAHCMD 387 (26 November 2018)

Coram: ANGULA DJP
Heard: **3 July 2018**
Delivered: **26 November 2018**

Flynote: Civil Practice – Administrative Law - Review of Administrative actions – Setting aside a decision by the Minister of Agriculture, Water and Forestry, to appoint the third to eight respondents to the board of directors of Meatco – Declaring such decision *ultra vires* the relevant provision of the Meatco Act, 2001 and in violation of Article 18 of the Namibian Constitution and the common law – Decision by Minister declared in conflict and ultra vires the provisions of enabling Act and is set aside.

Summary: The applicants brought an application before court to declare a decision by the Minister of Agriculture, Water and Forestry, made on 16 February 2017 to appoint the third to eight respondents to the board of directors of Meatco to be in conflict with and *ultra vires* the provisions of s 5 of the Meatco Act read with the relevant provisions of the Public Enterprises Governance Act, 2006 and to be in violation of Article 18 of the Namibian Constitution.

The application is opposed by the respondents, the Minister contending that he acted in terms of s 5(4) of the Meatco Act and therefore his decision was compliant with the Act. Further the respondents raised two points in law *in limine*, namely; applicants' lack of *locus standi* and that this application was launched unreasonably late.

Court held: The applicants, as members of Meatco are entitled to exercise their rights as such and in doing so to approach the courts if they are of the view that a decision taken by the Minister with regard to Meatco is *ultra vires*. If in the end the applicants were to be proved to be incorrect, then they would have obtained legal clarity on what they might have perceived to be their legal entitlement.

Court held further: When considering what a reasonable time is to launch proceedings, the court has to have regard to a reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. In this matter, the applicants' explanation how they arrived at the decision to ultimately resorting to litigation is reasonable and acceptable. They explained in thorough detail

the steps they took, the number of consultations held with their legal practitioners, thereafter with their junior counsel, the availability of the senior counsel and ultimately the settling of papers by senior counsel and finally the filing of the application. Therefore, the events as described by the applicants and the seven months it took the applicants to launch the application was not unreasonable in the circumstances. The delay, if any, has been fully and satisfactory explained.

Held further: On the merits – Considering the Rule of Law, Ministers and public officers at all levels must exercise the power conferred on them in good faith, fairly and for the purpose for which the powers were conferred, without exceeding the limits of such powers. Any limitations on the exercise of power which have been prescribed by a statute must be observed.

Held further: The *ultra vires* doctrine is based on the assumption that a person or a public body who or which owes its legal existence to and derives its power from a statute, or an agreement or the common law, can do no valid act unless thereto authorised by such enabling legislation or instrument. Court found that the Minister acted outside the power vested upon him by the enabling legislation when he purported to appoint the current directors of Meatco and that such appointment cannot be considered to be overly formalistic as contended by the Minister.

Held further: *Audi* - There are no signs to indicate that when the Minister purported to act in terms of s 5(4) he never gave a hearing to the interest groups whose rights vested (in them) by ss 3 were about to be adversely affected by his decision. By not doing so, the Minister failed to comply with the *audi* principle and further did not act fairly nor transparently.

Held further: The Minister failed to apply his mind to the relevant issues in accordance with the directives of the statute. In fact, the Minister was more concerned with form than with substance. Court found that the Minister was *functus officio* when he purported to appoint the current board whilst his illegal decision was still standing; furthermore that the Minister acted *ultra vires* the provisions of s 5 (3) and (4) when he purported to appoint the current directors of Meatco. He further failed to act fairly and reasonably as required by Article 18 of the Constitution, and his decision therefor is liable to be reviewed and set aside.

ORDER

1. The two points *in limine* regarding the applicants' lack of *locus standi* and the applicants undue delayed in bringing the application, are dismissed.

2. The decision by the Minister of Agriculture, Water and Forestry, made on 16 February 2017 to appoint the third to ninth respondents to the board of Meatco is declared to be in conflict with and *ultra vires* the provisions of section 5 of the Meatco Act, 2001 read, with the relevant provisions of the Public Enterprises Governance Act, 2006 and to be in violation of Article 18 of the Namibian Constitution. The decision is hereby reviewed and set aside.

3. The respondents who opposed the application are to pay the applicants' costs, jointly and severally, the one paying the other to be absolved. Such costs are to include the costs of two instructed counsel and one instructing counsel.

4. The matter is removed from the roll: The case is finalised.

JUDGMENT

ANGULA DJP:

Introduction

[1] This is an application in which the applicants seek a declaratory order that the decision taken by the first respondent, the Minister of Agriculture, Water Forestry ('the Minister') on 16 February 2017, appointing third to ninth respondents as directors of the tenth respondent, the Meat Corporation of Namibia (Meatco) – ('the decision'), is in conflict with and *ultra vires* the provisions of s 5 of the Meat Corporation Act, No. 1 of 2001 ('the Act'), read with the relevant provisions of the Public Enterprises Governance Act, No. 2 of 2006 and in violation of Article 18 of the Namibian Constitution and the common law. The applicants further seek an order to review and to set aside the Minister's decision.

[2] The issue for determination is whether the decision to appoint the third to the ninth respondents for the period October 2016 to September 2019 was in compliance with the provisions of s 5 of the Act. The applicants contend that the decision was *ultra vires*. The Minister on the other hand contends to the contrary.

[3] The application is opposed by the respondents. The Minister deposed to the main opposing affidavit whilst the other respondents filed confirmatory affidavits.

The parties

[4] The applicants are all registered producers of livestock in terms of s 17 of the Act and by virtue of the provisions of s 13 they are members of Meatco.[1]

[5] The Minister is the Minister of Agriculture, Water and Forestry. He has been appointed by the President of this Republic, and was responsible for the affairs of the Meat Corporation of Namibia (Meatco), at the time when the facts which gave rise to the cause of action of this application arose.

[6] The second respondent is the Minister responsible for Public Enterprises in terms of the Public Enterprises Governance Act, 2006. Since the launching of this application, the responsibility of Meatco has been transferred to the second respondent.

[7] The third to the ninth respondents are all current members of the board of directors of Meatco. It is the Minister's decision made on 16 February 2016 to appoint them as such which is sought to be declared *ultra vires* and be reviewed and set aside.

[8] The tenth respondent, Meatco, is a registered legal person, established as such under the provisions of the Act. It is a meat processing and marketing corporation, which sells its products locally and internationally. Its aims and objects

[1] Section 13(1) – All persons registered under section 17 as producers of livestock shall be members of the Corporation.

are *inter alia,* to serve, promote and co-ordinate the interests of livestock producers in Namibia.

Factual background

[9] As mentioned earlier, this application concerns the lawfulness or otherwise of the Minister's decision to appoint third to ninth respondents as directors of the board of Meatco. The board was appointed by the Minister, during October 2013 for a period of three years, which terminated on 3 October 2016. On 5 April 2016, the third respondent in her capacity as chairperson of the board, addressed a letter to the Minister alerting him to the fact that the term of the board would expire on 3 October 2016 and that Minister should request the chairperson to convene a meeting of interest groups at which they would nominate persons as candidates from which the Minister would select persons suitable for appointment as directors.

[10] Following the aforementioned letter from the chairperson, a number of activities took place. First, an annual general meeting of the members of Meatco took place on 24 June 2016 at which the Minister delivered his 'policy statement' and further outlined the procedure to be followed in terms of the Act in nominating and appointing directors of Meatco.

[11] Thereafter, on 4 July 2016, the Minister, in writing requested the chairperson of the Meatco board to convene a members meeting for the purpose of nominating candidates from which the Minister would select suitable persons for appointment as new directors.

[12] On 16 August 2016, the Chief Executive Officer of Meatco wrote a letter to the Minister attaching the nomination by the employees of their representative to the board as required by the Act.

[13] The chairperson convened a meeting of interest groups which was scheduled to take place on 12 August 2016 for the purpose of nominating candidates for board appointment as required by the Act. However, a day before the said meeting, the meeting was postponed by a resolution of the board of directors.

[14] Notwithstanding the directors' resolution postponing the meeting, the members met and held a meeting at which they nominated candidates for appointment as required by the Act.

[15] On 16 August 2016 Mr Metzger, one of the members nominated as a candidate for appointment, addressed a letter to the Minister and the Minister of Public Enterprises communicating the names of the nominees for consideration for appointment by the Minister as required by the Act. The Minister took the view that the meeting was not convened in terms of the provisions of the Act and that, only properly nominated persons by the 'interest groups concerned' must reach his office through the board's chairperson.

[16] Thereafter on 27 September 2016, the Minister in writing, extended the period of office of the board members for a period of three months from 4 October 2016 to 4 January 2017.

[17] On 21 December 2016, the Minister issued a media release announcing that he had appointed a temporary board of Meatco. He purported to have acted in terms of s 16 of the Public Enterprises Governance Act. The six persons so appointed were the third to ninth respondents. The appointment was for a period of six months effective from 4 January 2017.

[18] Subsequent thereto, Meatco, together with some livestock producers brought an urgent application against the Minister in which they sought a declaratory relief to the effect that the appointment of the temporary board was *ultra vires* the provisions of the Act, read with the Public Enterprises Governance. However, the urgent application was settled between the parties on 17 February 2017.

[19] The settlement agreement was only made an order of court on 15 March 2017. On 16 February 2017 a day before the settlement being reached between the parties the following day that is 17 February 2017, the Minister had already taken the decision appointing the third to ninth respondents as members of the board of directors of Meatco purporting to act in terms of s 5(4) of the Act. It is that decision which is sought to be declared *ultra vires* and accordingly be reviewed and set aside.

Points *in limine*

[20] The respondents raised two points of law *in limine*: first that the applicants lack *locus standi* to bring this application; and second that the applicants unduly delayed in bringing the application for review. I deal first with the *locus standi* point below.

Applicants' *locus standi*

[21] The applicants allege that they are registered members of Meatco in terms s 17 of the Act as producers of livestock in Namibia. Accordingly, in terms of s 13(1) of the Act they are members of Meatco and for that reason alone they have the standing to bring the application.

[22] Mr Barnard who appeared for the respondents submitted that the mere fact the applicants are registered members of Meatco, does not confer upon them *locus standi* because no case has been made out that their rights have been infringed, which infringement would entitle them to approach this court for the relief. The mere fact that the Minister is alleged to have acted wrongly, is not enough to cloth them with standing.

[23] Counsel further argued that it is not the applicants' case that they had expectations to be nominated as candidates for appointment as directors by the Minister or that they were in fact nominated at the informal meeting when the annual general meeting did not proceed.

[24] Mr Corbettt assisted by Mr Rukoro, for the applicants, referred the court to what was stated by Strydom JP (as he then was) in the *Kerry McNamara*[2] matter namely that: In review proceedings 'the authorities are clear that for the purpose of deciding *locus standi* the court must assume that the administration action *was* a nullity'.

[2] *Kerry MacNamara Architects v Minister of Works, Transport and Communication and Others* 2000 NR 1 at 4A-B.

[25] To buttress his submission that the applicants have the requisite *locus standi*, Mr Corbett further referred the court to what was stated by the Supreme Court in the *Trustco*[3] matter with regard to standing:

'In a constitutional State, citizens are entitled to exercise their rights and they are entitled to approach courts, where there is uncertainty as to the law, to determine their rights.'

[26] On the authority of the *Kerry McNamara's* case, this court assumes that Minister's decision is a *nullity*. In addition, this court prefers a wider interpretation to the issue of standing which gives the right to citizens to approach courts to assert their rights or demand redress where they consider they have been wronged or their rights or interests have been infringed. In my view, the benevolent approach to the issue of *locus standi* is in line with the Supreme Court's approach to the issue of standing where the court recently had occasion in the *Brink*[4] matter to consider the issue of standing by a legatee as opposed to the rule that only an executor may institute proceedings on behalf of the estate. The court pointed out (at para 38) that: 'Public policy requires principles of law to be applied in the manner that does not result in injustice and thereby failing to serve their ultimate purpose'.

And further at para 39 the Supreme Court reasoned thus:

'Access to justice is one of the rights guaranteed by our Constitution as a means for people to protect and enforce their rights. To close the doors of justice to a widow with legitimate interest in the subject matter of the litigation and who combines forces with executrix would fly in the face of her constitutional right to be heard by an impartial and independent court, particularly in a dispute involving land which is of paramount importance to the citizens of Namibia.'

[27] In my view, the approach by the respondents to standing is too narrow and restrictive of the constitutional right of access to justice. Courts should bear in mind that the antithesis of access to court or justice is self-help. In other words persons who have been turned away from accessing the courts might feel helpless and as a result of which they might view it to be a denial to justice and resort to taking the law into their own hands. The modern approach as propounded by the Supreme Court in

[3] *Trustco Ltd v Deeds Registries Regulations Board, 2011 (2) NR 726 (SC) at para 18.*
[4] *Elizabeth J Brink NO & Another v Erongo All Sure Insurance CC*, Case No. SA 46/2016, delivered on 22 June 2018.

in the *Tructco* matter and lately in the *Brink* matter resonates well with the fundamental rights enshrined in our Constitution and is to be preferred. Indeed this court is bound to follow the Supreme Court's approach. Following the Supreme Court's approach and applying the principles to the facts of the present matter, I am of the view that the applicants, on the basis of their rights as registered members of Meatco and their right to nominate members for consideration for appointment by the Minister as directors of Meatco have a legitimate interest to ensure that the affairs of Meatco are conducted in accordance with the dictates of the enabling legislation. In addition the applicants, as members, have the right and interest to ensure that those who are appointed as directors represent the members' interest; and that they possess the required expertise as stipulated by the Act.

[28] I am of the considered view, that the applicants as members of Meatco are entitled to exercise their rights as such and in doing so may approach the courts if they are of the view that a step or a decision taken by the Minister with regard to Meatco is *ultra vires* and ask the court to review and set aside such decision. If in the end the applicants are to be proved to be incorrect, as it was stated by the Supreme Court in the *Trustco* matter, then they would have obtained legal clarity on what they might have perceived to be their legal entitlement.

[29] The conclusion, I have therefore arrived at, with regard to the point *in limine of* lack of *lucus standi*, is that the applicants have the necessary *locus standi* to bring this application. The point in *limine* stands to fail. I next move to consider the second point in *limine,* namely that the applicants unreasonably delayed in bringing this application.

The respondents contend that the applicants unreasonably delay in launching the application

[30] As regards this point *in limine,* the Minister points out that the appointment of the board members was done on 16 February 2017; that from the founding affidavit it appears that by the end of March 2017, the applicant should have launched the application, yet the application was only launched and served on 12 September 2017 almost 7 months later.

[31] The Minister therefore argues in his opposing affidavit that the delay in instituting these proceedings, was unreasonable; that if the order prayed for is granted it will operate retrospectively and the appointment of the directors with all its consequences will be set aside and such order will have far reaching effects: affecting third parties and leading to claims and disputes and to undo what has been done will be most complicated, costly and time-consuming implementation.

[32] In response, the applicants state that they only became aware of the Minister's decision in late February or early March 2017. They explain their reasons for the delay. According to the applicants, they were reluctant to enter into litigation with their own corporation, i.e. Meatco; that they did not consider it to be a healthy situation for members to be in conflict with the directors of their corporation, especially given the fact that as livestock producers they are heavily reliant on Meatco for the marketing and selling of their livestock.

[33] The applicants continue to explain that after they realised that their approach to the Minister did not achieve the desired result and to avoid unnecessary conflict, they tried to resolve the issue internally with Meatco at the annual general meeting when the members prepared a draft resolution for adoption at the annual general meeting (the AGM) which was due to be held on 21 July 2017. The draft resolution was to declare that the board was illegal and that the directors should resign. The tabling of the motion was rejected by the directors citing some alleged non-compliance with certain formalities.

[34] The applicants went on to explain that, having realised that their attempts to resolve the matter amicably was futile, they approached their legal practitioners in late July for advice. In the last week of July 2017, a consultation took place with the instructed counsel. Another consultation with their junior counsel and instructing legal practitioner took place on 7 August 2017. Thereafter papers were drafted by junior counsel and their papers were only prepared around 16 August 2017 and senior counsel was only able to settle the papers by 23 August 2017, whereafter the application was launched in early September 2017.

[35] Based on the foregoing explanation, the applicants submit that the delay in launching the application was not unreasonable. The applicants pray in the alternative that should the court hold otherwise, the court should condone the delay.

[36] The proper approach by the court to the question whether there has been an unreasonable delay by a litigant before institution of the proceedings has been authoritatively laid down by the Supreme Court, in *Keya v Chief of Defence Force*[5], as follows:

'Proper approach to the question of unreasonable delay:

[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the high court has held that each case must be judged on its own facts and circumstances so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.

[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[5] 2013 (3) NR 770 (SC).

[37] The above approach has been followed by our courts in cases that followed after the *Keya* matter.[6]

[38] I have earlier in this judgment set out in detail the events which preceded the launching of this application as narrated by the applicants, constituting their explanation. I do not propose to repeat their explanation in detail. In applying the approach and the principles expounded in case law referred above to the facts in the present matter, I am satisfied that the applicants did not unreasonably delay to institute these proceedings.

[39] In his complaint that the applicants unreasonably delayed to launch the application, the Minister appears to attach much premium to the fact that it took the applicants almost seven months to launch this application from the date the decision sought to be set aside was taken. It is common cause that the impugned decision was taken on 16 February 2017. The applicants state that the decision came to their knowledge latest in early March 2017. This is not disputed by the respondents. In this connection it has been held that there is no prescribed time limit; the length of time that has passed between the cause of action arising and the launching of the review is not a decisive factor although important; that each case has to be considered on its own facts.[7]

[40] The leading case on considering whether or not there has been an unreasonable delay to launch proceedings is *Radebe v Government of the Republic of South Africa and Other*[8] which was referred with approval in *Petroneft International & Another v Minister of Mines and Energy and Others*[9]. The court in the *Radebe* matter expressed itself as follows:

‘When considering what a reasonable time is to launch proceedings, one has to have regard to the reasonable time required to take all reasonable steps prior to and in order to initiate those review proceedings. Such steps include steps taken to ascertain the terms and effect of the decision sought to be reviewed; to ascertain the reasons for the decision; to consider

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[6] See: *The Chairperson, Council of the Municipality of Windhoek and Others v Roland* 2014 (1) NR 247 (SC); *Kleynhans v Chairperson of the Council of the Municipality of Walvis Bay*.
[7] *Kleynhans* at para 41-44.
[8] 1995 (3) SA 787 at 799B-F.
[9] (A 24/2011) [2011] NAHCMD (28 April 2011).

and take advice from lawyers and other experts where it is reasonable to do so; to make representations where it is reasonable to do so; to attempt to negotiate an acceptable compromise before resorting to litigation (*Scott and Others v Hanekom and Others* 1980 (3) SA 1182 (C) at 1192); to obtain copies of relevant documents; to consult with possible deponents and to obtain affidavits from them; to obtain real evidence where applicable; to obtain and place the attorney in funds; to prepare the necessary papers and to lodge and serve those papers.

When considering whether the time taken to prepare the necessary papers was reasonable or unreasonable, allowances have to be made for the differences in skill and ability between various attorneys and advocates.

It must furthermore be borne in mind that no time has in fact been laid down for the institution of such proceedings and it cannot be expected of a litigant or his legal representatives that they should act in an overhasty manner, particularly where the opposing party or parties have been notified timeously of the fact that review proceedings were in the offing.'

[41] I accept it as a relevant consideration and a reasonable explanation, the fact that the applicants were reluctant to plunge into litigation right from the moment they learned of the Minister's decision. In my view their reluctance was justified, as they explain, given the fact that they are reliant on Meatco and thus on the directors, albeit unlawful appointed, for the marketing and selling of their livestock.

[42] I also find the applicants' explanation reasonable and acceptable when they say that they tried to avoid unnecessary conflict and decided to resort to use internal remedies in the form of drafting a resolution, try to pass it at the scheduled annual general meeting. In these efforts and during that time, they have to deal with the directors which they considered were unlawfully appointed. It does not surprise me that their efforts to resolve the dispute amicably were frustrated and blocked by the directors. I gained the distinct impression from the papers before me that the atmosphere between the parties was frosty and tense. In any event, I am of the view that the applicants conduct is in line with what the court advocated in the *Kleynhans* matter (Footnote 16 *supra)* at para 41 that:

‘An applicant seeking review is not expected to rush to Court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavor to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.’

[43] Finally, in my view, the applicants’ explanation how they arrived at the decision to ultimately resort to litigation is reasonable and acceptable. They explained in painstaking detail the steps they took; the number of consultations held with their legal practitioners, thereafter with their junior counsel, the availability of the senior counsel and ultimately the settling of papers by senior counsel and finally the filing of the application. In my view, the events as narrated by the applicants’ accord well with the court’s view referred to in the immediately preceding paragraph.

[44] Having considered the applicants’ explanation and further taking in account the foregoing facts into consideration against the legal principles referred to in case law, I am satisfied that the explanation advanced by the applicants is reasonable and acceptable. I have therefore arrived at the conclusion that the almost seven months it took the applicants to launch the application was not unreasonable in the circumstances of the present matter. The delay, if any, has been fully and satisfactory explained. I next proceed to consider the merit of the application.

Applicants’ grounds of review

[45] The applicants challenged the Minister’s decision on three grounds. Those are:

1. The decision is *ultra vires* the Minister’s powers in terms of the empowering legislation;

2. That the Minister failed to comply with the principles of *audi alteram partem* – i.e hear the other side – envisaged in s 5(3) of the Act; and

3. That the Minister failed to apply his mind to all relevant and material information placed before him.

[46] I will consider each ground separately but simultaneously with the Minister's response or opposition to such ground.

Minister's decision ultra vires?

[47] It is the applicants' case that the Minister acted *ultra vires* the provisions of the Act read with the Public Enterprises Governance Act, 2006, when he on 21 December 2016, purported to appoint a temporary board for a period of six months, effective from 4 January 2017 and that such decision stood in law until it was set aside by a competent court. Furthermore, even though there was an agreement by the Minister to have the decision set aside by the court, the decision was only set aside by the court on 15 March 2017. It follows therefore, so the argument goes, that by 16 February 2017 when the Minister purported to appoint a new board, in law there was still an existing board in office. Accordingly, the Minister's purported appointment of a new board on 16 February 2016 was *ultra vires* the provisions of the aforesaid statutory provisions.

[48] In opposition to the allegation that he acted *ultra vires* the provisions of s 5 of the Act, the Minister states that upon receiving legal advice following the service upon him of the urgent application on 15 February 2017, he conceded that the appointment of the temporary board had been unlawful. He then instructed that the urgent application be settled and proceeded to appoint the board with the same board members who had illegally been appointed two months earlier. The Minister claims to have acted in terms of s 5(4) of the Act. The Minister argues that the applicants' contention that the appointment of the directors is invalid because it was done a day before the settlement of the urgent application and a month before the settlement was made an order of court 'is overly formalistic'.

[49] Mr Corbett, for applicants, relying on *Baxter*[10] submits that an administrative decision although invalid and not authorised by statute, stands until such time it is set aside by a competent court; and that a public authority is *functus officio* in the event of an invalid decision.

[10] Baxter L. 1984. *Administrative Law*. Cape Town: Juta & Co Ltd, p. 379.

[50] Mr Barnard, for the respondents, submits contra-wise. He argues that 'ideally' the Minister 'should have waited until the settlement had been made an order of court'. Counsel submits further that the objection to the appointment before the settlement was made an order of court 'is of a highly technical nature and does not justify the relief sought'. He points out that the directors appointed are exactly the same persons the Minister attempted to appoint in terms of s 16 of the Public Enterprises Governance Act.

[51] I do not agree with Mr Barnard's argument with regard to the effect or legal consequence of Minister's action. My reasons will soon become apparent.

[52] Ours is a constitutional democracy based on the rule of law.[11] This means, among other things, that Ministers and public officers at all levels must exercise the power conferred on them in good faith, fairly and for the purpose for which the powers were conferred, without exceeding the limits of such powers. They must not act unreasonably.[12]

[53] In this connection Mr Corbett correctly, in my view, submits that the *ultra vires* doctrine is based on the assumption that a person or a public body which owes its legal existence and derives its power from a statute, or an agreement or the common law can do no valid act unless thereto authorised by such enabling legislation or instrument. Any limitations on the exercise of power which are prescribed by a statute must be observed.[13]

[54] It is in the interest of justice and the rule of law that courts ensure that invalid decisions by Ministers and public officers do not stand. By doing so the courts will enforce compliance with the principle of legality and the interest of justice would be advanced.

[55] In this matter, the Minister has been shown to have disregarded the provisions of the Act. The principle of legality is at the heart of this matter. It is of utmost importance that Ministers and public officers comply with statutory provisions which Parliament entrusted to them in good faith. They should realise that they are

[11] Article 1(1) of the Constitution.
[12] **Tom** Bingham. (2010). *The Rule of Law*. London: Allen Lane, p. 60.
[13] *Immanuel v Minister of Home Affairs and Others* 2006 (2) NR 687 at 701H-J.

not free agents to do as they want. In this connection it has been held by the South African Supreme Court of Appeal[14], which decision this court fully endorses, that the importance of statutory compliance namely that the administration of an Act of Parliament by a Minister or a public officer affects a wide range of rights and interest of a broad section of the national community and therefore the statutory provisions must be lawfully administered and implemented in faithful compliance with the principle of legality.

[56] In this matter, it is rather alarming, for a public official, as did the Minister in the present matter, to suggest that the criticism of his non-compliance with the statutory provisions entrust to him by Parliament 'is overly formalistic'. It would appear that the Minister lost sight of the fact that he may only exercise such powers as are conferred upon him by the Act and the Public Enterprises Governance Act and has no other powers outside the confines of those statutes with regard to the appointment of the directors of Meatco. The Minister is not a free agent to do what he thinks fit. His power is confined to the four corners of the enabling legislation. He does not exercise any discretion in applying the provisions of the enabling legislations. The Minister is further more constrained to follow the procedure prescribed by the enabling legislation. I will elaborate more on this aspect later in this judgment when I consider the question whether the Minister acted in terms of S 5(4) when he appointed the board.

[57] Having considered the facts and the arguments advanced on behalf of the parties on this point, my conclusion is that the Minister, was *functus officio* when he purported to appoint the board. His invalid decision to appoint a temporary board ostensibly in terms of s 6 of the Public Enterprises Governance Act, still stood when he took the decision to appoint the new board on 17 February 2017. There was thus a board, until 15 March 2017, when the settlement agreement was made an order of court. The Minister acted outside the power vested upon him by the enabling legislation when he purported to appoint the current directors of Meatco and that such appointment cannot be considered to be overly formalistic. For that reason alone, the appointment of the directors is liable to be set aside as unlawful and invalid. I proceed to consider the next ground of review advanced by the applicants why the Minister's decision is liable to be reviewed and set aside.

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[14] *South African National Road Agency Ltd v Cape Town City*, 2017 (1) SA 468 (SCA) at para [59].

The Minister's failure to comply with the principle of audi alteram partem envisaged by section 5(3) of the Act

[58] The applicants' second ground of review is this: Even if the Minister was entitled to appoint a new board of directors as he purported to have done on 16 February 2017, he was required to comply with provisions of s 5(3) of the Act by calling for nominations from the interest groups through the procedure stipulated by ss 5(1) of the Act. In this connection the applicants allege that the appointment of the current directors was done without the Minister having taken into account the principle of *audi altera partem* – the right to heard as contemplated by s 5(3) of the Act and entrenched in Article 18 of the Constitution.

[59] In response, the Minister contends that the applicants misunderstand the provisions of s 5(4). He asserts that since he did not receive nominations from the interest groups that he had requested pursuant to the provisions s 5(3) he proceeded in terms of s 5(4) to appoint the current directors.

[60] The provisions of s 5(3) and (4) are central the dispute between the parties. It is therefore necessary to quote them in full, in order to place the parties' arguments in perspective.

[61] Subsection (3) of the Act provides as follows:

'(3) When a nomination is to be made in terms of paragraph (a), (b), (c) or (d) of subsection (1), the Minister shall in writing request the chairperson of the Board, or any other person determined by the Minister, to convene a meeting of the interest group concerned to nominate within a specified period the required number of persons.

[62] Subsection (4) of the Act provides as follows:

'(4) If a nomination is not received by the Minister within the specified period from the interest group concerned, the Minister may appoint such person as the Minister reasonably believes would represent the relevant interests and a person appointed in accordance with this subsection shall hold office as if he or she were nominated as required by section (3).'

[63] It is clear from the reading of the provisions of subsection (3) that it stipulates that the Minister is required, before appointing the directors, to first request, in writing, the chairperson of the board to convene a meeting of interest groups consisting of: the employees of Meatco and the members of Meatco to nominate persons to represent the interest of the employees of Meatco, the communal farmers, the commercial farmers and experts in the management of abattoirs, the trading of livestock and livestock products or any business or financial sphere to best serve the interest of the producers of livestock. The submission is that the Minister did not comply with this statutory requirement and thus failed to give *audi* to the interest group.

[64] Mr Corbett referred the court to Article 18 of Constitution[15] as well as to a number of cases[16] to make the point that the Minister failed to meet the required constitutional standard stipulated by Article 18 and as entrenched in s 5 of the Act.

[65] As regards to Article 18, our Supreme Court has interpreted it to mean that its object is to ensure that acts and decisions of administrative bodies and officials are lawful, fair and reasonable; and that the Article seeks to regulate the acts and decisions of administrative bodies and officials[17]. The thread of the case law cited by Mr Corbett for the applicants, is *inter alia* that the public officials are expected to act fairly and reasonably in accordance the common law to the extent the common law is not in conflict with the provisions of Article 18.

[66] Mr Barnard submits on behalf the respondents that the Minister complied with the provisions of s 5(3). He sent out a letter to the chairperson on 4 July 2016 setting out the steps to be taken in obtaining nominations. Counsel submits that the provisions of s 5(3) are peremptory. The Minister did not receive nominations therefore he proceeded to make the appointment in terms of s 5(4).

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[15] Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

[16] *Minister of Health and Social Services v Lisses* 2006 (2) NR 739 (SC);*Mostert v The Minister of Justice* 2003 NR 11 (SC); *Mafongosi and Others v United Democratic Movement and Others* 2002 (5) SA 567 at 575A-E; *Aonin Fishing (Pty) Ltd and Another v Minister of Fisheries and Marine Resources* 1998 NR 147 at 15F-H; *Kersten t/a Witvlei Transport Commission and Another* 1991 NR 234 HC at 239G; *Attorney-General of Hong Kong v Ng Yuen Shiu*, [1983] 2 All ER 346 at 351; and *Merafong Democratic Forum and Others v President of the Republic of South Africa and Others* 2008 (10) BCLR 969 (CC).

[17] Petroneft (Footnote 9).

[67] In an effort, to determine whether the Minister complied with the *audi* principle as required by Article 18 and entrenched in s 5 of the Act, the sequence of events is important. I will therefore set out how they unfolded.

[68] It is common cause on 4 July 2016 the Minister addressed a letter to the chairperson of the board to convene meetings of interest groups so that they could nominate persons from whom the Minister would appoint persons as directors. It is to be noted that by doing so the Minister complied with the first part of subsection 3.

[69] Subsequent thereto a dispute arose between the CEO and the chairperson in relation to the holding of the members' meetings. This dispute appears to have derailed the process initially started by the Minister.

[70] On or about 27 September 2016, instead of appointing a new board the Minister decided to extend the terms of office of the exiting board effective from 4 October to 4 January 2017. The extension was made in terms of s 7 which provides that a director shall, upon expiry of his or her tenure of office, hold office for a period not exceeding three months until his or her successor has been appointed.

[71] Thereafter faced by the imminent expiry of the terms of office of the board on 4 January 2017, the Minister decided on 21 December 2016, to appoint a temporary board for a period of six months effective from 5 January 2017. It is no longer in dispute that this decision was wrong. As a result of the urgent application brought by the livestock producers to have the decision to appoint a temporary board set aside, the Minister conceded and agreed to the relief prayed for in the notice of motion.

[72] On 16 February 2017, Minister took the decision to appoint the current board. It is the Minister's stance that in doing so he acted in terms of s 5(4) of the Act.

[73] Mr Corbett submits in his heads of argument that when the Minister took the decision on 16 February 2017, he did not comply with s 5(3) by requesting the chairperson to convene meetings of interest group to nominate persons for consideration for appointment as director by the Minister. In other words the Minister ought to have started the process afresh.

[74] Mr Barnard submits contra-wise on behalf of the Minister, namely that the original period of appointment to extend for three months, expired on 4 January 2017, and the appointment in terms of s 5(4) was made on 16 February 2017. It was still the same process; it was not a new process requiring compliance with s 5(3).

[75] I do not agree with the submission that this was not a new process by the Minister to appoint a new board. I say so for the reason that the meeting of the members at which the nomination would have taken place, was convened but was postponed a day or so before it was due to take place. It was postponed by a resolution of the board who decided to 'accept the advice of the Minister'. If this argument was correct, I would have expected the Minister to have given instruction to the chairperson to resume the process by reconvening meetings of the interest groups. He does not say he gave such instructions neither does the chairperson depose to any step she might have taken to reconvene the meeting.

[76] It is to be noted that the terms of office of the directors was extended for a further period of three months. One would have expected that the reason for the extension was to enable the chairperson and the Minister to comply with subsection 3. There is no evidence to indicate that any step was taken to finalise the process.

[77] In my view, the fact that the Minister did not request the chairperson to reconvene the meetings of the interest groups, he cannot be heard to say that it was the same process. After all, the meeting was postponed on his advice. In my view it would have been a different case altogether, if a request was sent out convening the meetings of the interest groups and after such request the interest groups failed and/or refused to attend the meetings or to make nominations. In such event there would be merit in the Minister's argument and he would have been perfectly entitled to proceed to act in terms of subsection (4). The Minister was aware that the members' meeting convened to take place on 12 August 2016, did not take place and that it was postponed on his advice. The Minister is charged with the administration of the Act for that reason. It was incumbent upon him to demand that the chairperson complies with his request and instructions to submit the nomination 'by or on 31 August 2016'. In this regard it is to be remembered that in his written request to the chairperson dated 4 July 2016, the Minister in terms of section 5(3)

determined 31 August 2016 as the date on or before which he should receive nominations from the chairperson.

[78] It would appear to me that the only reasonable inference to be drawn from those facts and events is that the Minister had realised that it was impossible for him to adhere to his original time line given the fact that the term of office of the directors then in office would expire on 3 October 2016. He aborted process and resorted to other measures, including the extension of the board's term of office and the illegal appointment of a temporary board.

[79] In my considered view, the extension of the term of the board as well as the appointment of a temporary board each constituted a separate process on its own. The submission that it was the same process cannot be sustained and is rejected.

[80] I should mention that whilst on that hand, the Minister is justifying his action based on the provisions of s 5(4), he appears on the other hand to justify his action on grounds of expediency and good corporate governance. In this regard the Minister says that Meatco did not have a legally appointed board as from 4 January 2017. It is submitted on behalf of the Minister that there was a pressing need for the appointment of directors as the term of office of the previous appointment had lapsed. Furthermore, it is argued that it was prudent and reasonable not to cause a further delay by following the procedure for nominations in terms of s 5(3) but to appoint in terms of s 5(4).

[81] The Minister cannot approbate and reprobate at the same time. Either he acted in terms of s 5(4) or he failed to comply with the provisions of s 5(3). As pointed earlier in this judgment not only is the Minister required to act fairly and reasonably, but Article 18 also demands of the Minister that he does so transparently.[18] It has been held that a body which or an official who is required to act fairly and reasonably can in most instances only do so if those affected by its or his decision are apprised in a rational manner as to why the body or official has made the decision in question.[19] In the present matter, there is no indication that when the Minster purported to act in terms of s 5(4) he ever contacted the interest

[18] *Aonin Fishing* (supra).
[19] Baxter, p 228.

groups whose rights vested in them by subsection 3 were about to be adversely affected by his decision. By not doing so, the Minister failed to comply with the *audi* principle and further did not act fairly nor transparently.

[82] I find the court statement by the Privy Council held in *Attorney-General of Hong Kong v Ng Yuen Shiu (Footnote 16)* so appropriate and fitting to facts of the present matter. It states:

'When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and implement its promise, so long as implementation does not interfere with its duty. The principle is justified by the further consideration that, when the promise was made, the authority must have considered that it would be assisted in discharging its duty fairly and any representations from interested parties and as a general rule that is correct.'

[83] In the present matter, not only are the rights of the interest groups as entrenched in ss 3, in the form of the right to be heard to make nominations, but the Minister is duty bound under Article 18 to act fairly, reasonably and transparently. The Minister caused the chairperson to convene meetings whereat interested groups could make their nominations. He abandoned the process without giving the interest group his reason for his decision. The Minister clearly failed to comply with the *audi* principle. I proceed to consider whether the Minister did apply his mind in making his decision.

Did the Minister apply his mind?

[84] It is submitted on behalf of the applicants that the Minister did not take all relevant material into consideration in coming to his decision to appoint the board. In this regard Mr Corbett refer the court to the matter of *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*[20] where the court states that:

'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the behests of the statute and the tenets of natural justice. . . Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence

[20] 1988 (3) SA 132, at 152 A-E.

to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.'

[85] In my view what has been stated by the court in the above quotation fits hand in glove with what had happened in the present matter. It would appear the Minister was more concerned with form than with substance. This is demonstrated by the issue relating to the employees nomination. It is to be recalled that the employees interest group held elections and their nomination was forwarded to the Minister by the CEO of Meatco as well as to the Chairperson. Instead of acknowledging receipt of the nomination, the Minister sent a note to the CEO questioning 'under what legal provisions is the CEO directly writing to the Minister'. In his answering affidavit, the Minister explained that he could not accept the nomination report because the report did not come from the chairperson.

[86] As regards the Meatco members' interest group, a meeting of members was held on 12 August 2016, following the postponement of the members meeting by resolution of the board. At that meeting members were nominated and the names were forwarded to the Minister and the chairperson. Again the Minister did not formally acknowledge the nominations but simply made the following remarks on the document:

'1. On 4 July 2016 I issued a letter to the Meatco Board Chairperson in which I elaborated in detail the legal process to be followed in terms of the Act to have persons nominated by interest groups, eventually appointed by the Minister.

(a) The current Board's term of office will only expire early October 2016. There is no vacancy now!

(b) Any properly nominated persons by the interest group concern must reach the Minister through the Board of the Chairperson only.'

The Minister dealt with this nomination in his answering and stated simply that the general meeting of the members held on 12 August 2016 was not held according to his instructions and was not in compliance with the provisions of s 5(3).

[87] If regard is had to what I summarised in the two preceding paragraphs with regard to the meetings of the employees and the members of Meatco, it would appear that there was a lack appreciation of the time period available to convene meetings of interest groups. It is clear that the Minister's insistence on 'unwarranted adherence to fixed principles' and strict observance of formal communication channels and protocols under those circumstances was 'grossly unreasonable'. It is clear that he did not approach the situation in a pragmatic manner and with an open mind and the readiness to listen to yield to reason. The Minister ought to have considered all relevant information placed before him. It has been held that 'the required weight should be attached to a matter of importance and weight should not be given to yield a matter far in excess of (or less than) its' true value.[21] The Minister gave too much weight to procedures and protocol and less weight to substance thereby taking irrelevant factors into consideration. He thus failed to properly apply his mind.

[88] In my view, had the Minister acted reasonably, with an open mind and with a single desire of practically applying the power entrusted to him by the enabling statute to him in order find a solution, the outcome might have been different. Furthermore, he should for instance, when he received the document from the CEO contrary to protocol, to have simply accept the document, although pointing out what the procedure to be followed in future. Alternatively at the very minimum he should have asked his office to follow-up with the chairperson's office for the latter to forward him the employees' nomination. Equally he should have engaged the members with a view to direct them to follow the correct procedure to nominate their proposed candidates. Alternatively, at the very least he should have directed them to the chairperson so that the latter could facilitate convening their meeting in accordance with the 'fixed procedure' he so doggedly insisted upon. In my view, the considered facts and events described in the preceding paragraphs, clearly demonstrate that the Minister failed to apply his mind at all or to properly apply his mind to the issues before him.

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[21] *Bangtoo Brothers v National Transport Commission*, 1973 (4) SA 667 (N), 685A-E.

[89] In conclusion and in summary, I have arrived at the conclusion that the Minister was *functus officio* when he purported to appoint the current board whilst his illegal decision was still standing. Furthermore, the Minister acted *ultra vires* the provisions of s 5(3) and (4) when he purported to appoint the current directors of Meatco. The Minister failed to act fairly and reasonably as required by Article 18 of the Constitution, and his decision is therefore liable to be reviewed and set aside.

[90] In the result, I make the following order:

1. The two points *in limine* regarding the applicants' lack of *locus standi* and the applicants unduly delay in bringing the application are dismissed.

2. The decision by the Minister of Agriculture, Water and Forestry, made on 16 February 2017 to appoint the third to ninth respondents to the board of Meatco is declared to be in conflict with and *ultra vires* the provisions of s 5 of the Meatco Act, 2001 read with the relevant provisions of the Public Enterprises Governance Act, 2006 and to be in violation of Article 18 of the Namibian Constitution. The decision is hereby reviewed and set aside.

3. The respondents who opposed the application are to pay the applicants costs, jointly and severally the one paying the other to be absolved. Such costs are to include the costs of two instructed counsel and one instructing counsel.

4. The matter is removed from the roll and is regarded as finalised.

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H Angula

Deputy-Judge President

APPEARANCES:

APPLICANTS:	A W Corbett (with him S Rukoro) instructed by Tjituri Law Chambers, Windhoek
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