REPORTABLE

CASE NO.: SA 91/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MINISTER OF FINANCE **Appellant**

and

MERLUS SEAFOOD PROCESSORS (PTY) LTD **Respondent**

Coram: MARITZ JA, MAINGA JA and MTAMBANENGWE AJA

Heard: **7 June 2013**

Delivered: **30 September 2016**

APPEAL JUDGMENT

MAINGA JA (and MTAMBANENGWE AJA concurring):

[1] This appeal was heard by a full bench of this court (Maritz JA presiding) on 7 June 2013. Maritz JA volunteered to write the judgment. In the intervening months of 2013 and the whole of 2014 when the judge took early retirement at the end of that year I did not hear or receive any reason from him why the judgment was delayed.

[2] I understand from the Chief Justice who has on many occasions consulted with the other members of this court who sat with Maritz JA on this matter and other cases which were allocated to Maritz JA, to draft a judgment for the court that he has made a number of approaches to the judge before and after he went on retirement on the outstanding judgments but has only received unfulfilled promises. In fact, I understand that it was a condition of Maritz JA's retirement that he should have produced two judgments every month in 2015, but that agreement also came to naught. During March this year the Chief Justice, concerned about the outstanding judgments, once again consulted with all the members of this court who sat with Maritz JA in matters allocated to the judge and it was resolved that the other members would have to inherit all the matters which were allocated to the judge for the purpose of preparing draft judgments. This is how this judgment, among others, has ended up with me. Provided that Mtambanengwe AJA and I agree on the judgment the appeal can be finalised. I thus turn to consider the merits of the appeal.

[3] This is an appeal against the whole of the judgment and the declaratory order granted by the High Court, Windhoek in favour of the respondent (applicant in that court) in the following terms:

> '. . . I hold that the applicant (respondent) conducts a "manufacturing activity" within the ambit of the meaning assigned to it by the definition contained in section 1 of the Income Tax Act 24 of 1981, as amended, which finding will entitle the applicant further, in accordance with such declaration, to be recognised as such, and accordingly to apply afresh for the sought registration – in respect of the above considered "manufacturing

> activities" – in terms of Section 5A(i) of the Act – should it be so advised and if it so chooses.'

[4] The respondent's company operates a seafood–processing factory in Walvisbay. The main business of the company is the processing of raw fish. The respondent purchases such fish and processes it by cleaning, skinning and cutting such fish into various prime cuts and thereafter treating such fish for an enhanced shelf life. The fish is frozen and packaged for retail purposes, selling through wholesalers or retailers into the retail market and for onward sale to the consumer.

Background

[5] On 28 July 2004, a firm of accountants Ernst & Young Namibia on behalf of the respondent caused a letter detailing the activities in which the respondent was involved to be written to the Commissioner of Inland Revenue enquiring whether an application for manufacturing status in terms of s 5A of the Income Tax Act 24 of 1981 (the Act) can be made. The Acting Deputy Commissioner of Inland Revenue Mr Mans who was delegated to handle the matter visited the premises of the respondent located in Ben Amathila Avenue, Walvisbay and responded to the enquiry on 9 September 2004, after considering all the relevant information, in these terms, '. . . I regret to inform you that if your client should submit a formal application for registration, this office will not consider it positively'. On 21 April 2005 the managing director (MD) of the respondent nevertheless submitted a formal application for manufacturing status through the Ministry of Trade and Industry which in turn referred the letter to the Acting Deputy Commissioner of Inland Revenue. The application was refused on 5 August 2005. The Minister of

Fisheries then intervened when on 28 August 2005 he addressed a letter to the Ministers of Finance and Trade and Industry supporting the application of the respondent which, according to him, met the requirements laid down in s 5A of the Act. Unrelenting the MD of the respondent on 5 September 2005 also addressed another letter to the Ministry of Finance (the Ministry) for the attention of Mr Mans motivating why the respondent perceived the process to be a manufacturing activity as defined in the Act. To this letter Mr Mans on behalf of the Commissioner of Inland Revenue responded on 18 September 2005 reiterating his initial standpoint. Two days thereafter on 20 September 2005 the MD addressed a letter to the then Permanent Secretary of the Ministry, the current Minister of Finance Hon Mr Schlettwein. He was implored to intervene and *ad neuseum* repeated their view why they thought respondent was engaged in a manufacturing activity. The Permanent Secretary responded on 27 September 2005 rehashing the provisions of s 5A of the Act, and reiterating that the authority to approve the applications of the kind respondent was pursuing had been delegated by the Minister of Finance (Minister) to the Director: Inland Revenue. The Permanent Secretary also reiterated the fact that the processing of fish products is not regarded to be a manufacturing activity and that similarly previous applications were also rejected except for those involved in the canning of fish. During October and November 2005 the MD directed his correspondence to the Ministry of Trade & Industry voicing his frustration at the replies he had so far received from the Ministry.

[6] The efforts to attain the manufacturing status was renewed late January 2006. On 23 January 2006 the MD addressed a letter to the Ministry of Fisheries repeating the same issue. On 31 March 2006 he had a consultative meeting with

the Minister, the current Prime Minister Hon Kuugongelwa-Amadhila. On 7 April 2006 the MD addressed a letter to the Minister inviting her to visit the factory of the respondent in Walvisbay to familiarise herself with the operations of the respondent. The Minister delegated the Deputy Minister Hon Tweya to visit the factory on 30 June 2006. Hon Tweya was accompanied by two senior staff members of the Ministry. The MD invited the Ministers of Fisheries and Trade and Industry to be present as well. The Minister of Fisheries accompanied by his Special Adviser and Deputy Director Operations attended. The parties present discussed and inspected the activities of the respondent.

[7] On 25 September 2006 the Minister addressed a letter to the respondent stating in the penultimate para thereof: '. . . we have critically assessed, evaluated and carefully considered the merits of your application. In our opinion Merlus Seafood Processors (Pty) Ltd is involved in processing fish products into household small packages and does not perform manufacturing operation as defined in s 1 of the Income Tax Act 24 of 1981. Therefore, we regret to inform you that your application for manufacturing status was not successful'.

[8] Fifteen months later on 14 December 2007 the respondent lodged an ill-advised application in the Special Court for hearing income tax appeals to review and set aside the decisions taken by the Minister and/or any of the officials on 9 September 2004, 5 August 2005, 18 September 2005, 27 September 2005, 31 July 2006 and 25 September 2006 in refusing respondent's applications in terms of s 5A of the Act. The respondent further sought a declarator substituting the decision of the Minister and/or any of her officials that the activities carried on by

the respondent are manufacturing activities as contemplated in s 1 of the Act and that the requirements of s 5A of the Act were met.

[9] The efforts to set down the matter for hearing in the Special Court came to naught. From the correspondence between the respondent and the Registrar of the High Court it appears that the Registrar was not responding to the requests to set down the matter for hearing in the Special Court. During January 2009 the respondent was referred to the Office of the Attorney General as a representative of the Receiver of Revenue to facilitate the arrangements for the hearing of the review. After various correspondences between the respondent and the Government Attorney, the latter questioned whether there was a record of proceedings to be reviewed as the respondent created an impression that a record was not required. The Government Attorney further enquired why the review should be heard by the Special Court and suggested that the decision of the Minister was an administrative decision which should be reviewed in the normal course of business of the High Court. The correspondence that followed revolved around the said application that was filed on 14 December 2007 as the Ministry denied receiving such an application. The Government Attorney further reiterated that the application for review was not a matter for the Special Court.

[10] The stance of the Government Attorney must have prompted the respondent to approach the High Court with its grievances. Eventually on 2 December 2009 the respondent applied for review of the decision, and declaratory relief. I pose here to mention that in December 2009, the application was filed five years since the Commissioner of Inland Revenue declined the very first application

for manufacturing status on 9 September 2004 and more than three years since the Minister declined the application on 25 September 2006.

[11] *Verbatim*, the order sought was in these terms.

> '1. Reviewing and correcting or setting aside the decision of the respondent not to register the applicant as a manufacturer in terms of s 5A of the Income Tax Act 24 of 1981 reiterated on 25 September 2006.
>
> 2. Declaring the aforesaid decision unconstitutional and/or *null* and *void*.
>
> 3. Declaring that the applicant is entitled to be registered as a manufacturer pursuant to s 5A aforesaid.
>
> 4. Directing the respondent to register the applicant as such.
>
> 5. Directing that the respondent pay the costs of this application.
>
> 6. Granting the applicant such further and/or alternative relief as this Honourable Court deems fit.'

[12] The respondent's application in the court below was opposed by the minister on the ground that the business of respondent entails only the 'processing of raw fish', no physical or chemical transformation of the components or the materials into new products took place and therefore that process does not constitute a manufacturing activity as is defined in the Act. Appellant further contended in the court *a quo* that there was unreasonable delay in bringing the

application or the relief sought had prescribed; which arguments were all rejected. At the hearing in the court *a quo* the respondent abandoned the review application and the unconstitutionality of the decision by the Minister but persisted with the declaratory relief. The court *a quo* answered in the affirmative the issue it had raised whether having abandoned the review application, the respondent was entitled to the declaratory relief. This followed granting the relief as in para [3] above.

[13] At the heart of the dispute between the parties are the provisions of s 5A of the Income Tax Act and the definition of 'manufacturing activity'. The relevant provisions of s 5A reads:

> '1. A company which conducts or intends to conduct a manufacturing activity and which requires to be recognised as a registered manufacturer in respect of that manufacturing activity for the purposes of this Act, may apply for registration to the Minister.
>
> 2. . . .
>
> 3. Upon receipt of an application in terms of subsection (1), the Minster may register a company in respect of the manufacturing activity applied for if the Minister, acting with the concurrence of the Minister of Trade and Industry is satisfied that the manufacturing activity concerned –
>
> a) is or will be beneficial to the Namibian economy by way of net employment creation, net value addition, replacement of imports or an increase in net exports; and

b) represents or will represent an investment in a new manufacturing activity or a substantial expansion of an existing manufacturing activity.'

[14] A manufacturing activity is defined in s 1 of the Act as:

'(a) the physical or chemical transformation of materials or components into new products-

(i) whether manually or by mechanical or other process;

(ii) whether in a factory, at a private dwelling or any other place; or

(iii) . . .

(b) the assembly of the component parts of manufactured products . . . .'

[15] The arguments of prescription and undue delay raised on behalf of the appellant and which were dismissed by the court *a quo* were repeated on appeal. Additionally on behalf of the appellant, the arguments of the principle of separation of powers, the policy of judicial deference and procedural election by respondent (applicant) in the court below were raised. Take for example the issue of undue delay, the court below recognised that the delay might have adversely influenced a review court in the exercise of its discretion but went on to find, 'this factor does however, not immediately seem directly relevant to declarators. Nevertheless and even if relevant – the impact of this factor would to a great extent however have been ameliorated by the fact that the applicant (respondent) had initially lodged its review with the Special Court, which was not convened for a number of years by the authorities – surely a factor beyond the applicant's control'.

[16] This finding is not supported by the facts of the matter. In the affidavit which should have been filed in the Special Court, the respondent omitted to explain why it took more than fifteen months to appeal the decision of the Minister refusing its manufacturing status application. The nonsensical reason advanced for the delay is that no rules exists in the Act to govern the bringing of such an application therefore there are no time limits in existence. Section 73 of the Act which regulates appeals to the Special Court makes provision for a period of thirty days to lodge an appeal. The application would have failed on that score alone. The process to register the review in the Special Court and to have trusted an accountant to handle such a complicated case was so ill advised and a huge risk that the respondent took. To have attempted for two years to set down the matter for hearing in the Special Court is so unreasonable. When the Registrar of the High Court was not responding to the letters written to him/her on the set down the Judge-President, the head of that court, would have been approached. The appellant adumbrated the prejudices the Ministry, particularly the Receiver of Revenue, would have suffered due to the undue delay in bringing the application: some of its personnel who would be witnesses on the matter had left the Ministry, the tremendous administrative and financial burden on the fiscus if the order of the court below was correct or upheld and the similar applications from persons and institutions, not only in the fish industry, who were denied manufacturing status who would have claimed tax arrear benefits for over five years and more. In my opinion this is a clear case of undue delay.

[17] I did not intend to deal with any of the arguments on behalf of the appellant. The only submissions on behalf of the parties with which it is necessary to deal for the purposes of this judgment is the question which this court at the hearing of the matter directed to the parties, that is, the impact, if any, on this appeal, of the judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA). Both parties filed written submissions as directed. Mr Barnard for the appellant argued that the relevance of the *Oudekraal* judgment lies in the principle that:

> 'However anomalous it may seem, it is settled principle of law that even an unlawful administrative action is capable of producing legally valid consequences for as long as the unlawful act is not set aside by a court of law.'

[18] Mr Barnard submitted that in the present matter, even if the administrative act was invalid . . . the fact that the administrative act was not impeached and set aside should have precluded the court below from exercising its discretion in favour of the respondent.

[19] Mr Frank SC for the respondent conceded that the decision of the appellant to decline manufacturing status to the respondent still stands. He, however, submitted that the decision of the appellant has the consequence that the respondent was not entitled to registration as a manufacturer for the purpose of s 5A and 17A of the Act, for the particular year of assessment in which the appellant declined the application to register. Mr Frank accepts that the court below could not have declared that the Ministry must recognise that respondent conducts a

manufacturing activity for the 2006 or 2007 years of assessment, without that court having first set aside, on review, the appellant's decision in that regard. He however, argued that that was not what respondent ultimately sought and it is also not what the court below ordered. That the court below made the declarator on the facts that respondent conducts a manufacturing activity for the purposes of s 5A. That the finding is a legal issue which from the date the declaratory relief was granted, would have bound the Ministry if the respondent chose to apply for registration as a manufacturer in future years of assessment. In fact in the main heads of argument Mr Frank argued that whether the respondent carries manufacturing activity is not an administrative one but a question of law which falls pre-eminently in the domain of the courts and not any other branch of the State, the court was in as good a position itself to determine the issue. That there is no proposition in the *Oudekraal* judgment that militates against this court upholding the order of the court below.

[20] I have difficulty in understanding this submission. There is nothing legal about the operations of the respondent. What might be subjected to a legal interpretation is the word 'manufacturer' or 'manufacturing activity'. The appellant's case is that the operations of the respondent do not fit in the definition 'manufacturing activity'. That decision was made after the Ministry had visited the factory of the respondent not once but twice. Section 5A of the Act vests the power in the Minister and not the courts to make decisions one way or the other whether a company is engaged in a manufacturing activity. The argument is unfortunate. One of the responsibilities of the cabinet members in the national sphere is to ensure the implementation of legislation. See *President of the Republic of South Africa & others v South African Rugby Football Union & others* 2000 (1) SA 1 CC

at 67D-E. When the Minister exercised her power in terms of s 5A to refuse respondent's application the exercise of that power constituted administrative action. It is that administrative action the respondent sought to review, and which is the subject matter of this appeal. The respondent abandoned the review relief but persisted with seeking the declaratory order. Counsel for the respondent having conceded that the decision of the Minister was still alive, the question arises whether the decision of the Minister to refuse the respondent the manufacturer status could be disregarded as if it was never made. In other words could the court below exercise its discretion to grant the declaratory order without having reviewed the Minister's decision and set it aside. In my view on the facts of the case the court below could not.

[21] A similar question arose in the *Oudekraal Estates* matter. The facts in that case are briefly as follows:

In 1962 an undeveloped piece of land, erf 2802 Camps Bay, was proclaimed as the Oudekraal Township in terms of the Townships Ordinance 33 of 1934 (Cape). The official notification in the *Provincial Gazette* of the township followed the approval to establish the township by the then provincial Administrator, the endorsement on the title deed to the land by the Registrar of Deeds to the effect that it had been laid out as a township, and the opening in the deeds office of a township register, all duly completed by 1957. No further action was taken to develop the township until the current owner of the land, the appellant, submitted an engineering services plan in 1996 to the relevant local authority. The local authority refused to approve the plan because in its view the development rights

had lapsed. When the appellant approached the High Court for declaratory relief to the effect that its development rights be declared valid and of full force and effect, it emerged that there were a number of graves on the land and that approval to establish the township was granted in ignorance of the existence of these graves, some of which were kramats holding special religious significance for the local Muslim community.

The learned judges of the Supreme Court of Appeal Howie P and Nugent JA at 241D-242A-G reasoned as follows:

> '[24] There can be no doubt, however, that the presence on the land of religious and cultural sites of particular significance to a sector of the Cape Town community was a factor that should properly have been taken into account and evaluated, also on pre-Constitutional principles, in coming to the decision whether to permit the establishment of a township.
>
> [25] Whether the Administrator, as the ultimate decision-maker, was ignorant of the graves and kramats or not, the inescapable conclusion must be that he either failed to take account of material information because it was not all before him or if, in the unlikely event that it was before him, that he wrongly left it out of the reckoning when he should have taken it into account. In either situation his decision to lend approval on the terms he granted was invalid. It was, in addition, in either event *ultra vires* for the reason that it permitted subdivisions and land use in criminal disregard for the graves and kramats. It would be impossible to avoid desecration or violation if one were to make a road over it.
>
> [26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. <u>But the question that arises is</u>

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

[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter *Administrative Law* at 355:

> "There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are 'voidable' because they have to be annulled."

At other times it has been explained on little more than pragmatic grounds. In *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) Corbett J said at 381C that where a court declines to set aside an invalid act on the grounds of delay (the same would apply where it declines to do so on other grounds) "(i)n a sense dalay would . . . 'validate' a nullity". [1956] AC 736 (HL) at 769-70 ([1956] 1 All ER 855 at 871H; [1956] 2 WLR 88):

> "An [administrative] order . . . is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead.

> Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'"

See also Namib Plains and Tourism v Valencia Uranium 2011 (2) NR 469 SC at 482H-483A; Minister of Mines and Energy v Black Range Mining 2011 (1) NR 31 SC at 39E; Rally for Democracy v Electoral Commission 2010 (2) NR 487 SC at 522D-523A-F.

[22] I am in full agreement with the above sentiments and it follows that for so long as the Minister's decision to refuse the respondent manufacturing status continues to exist, the respondent cannot register as a manufacturer. The respondent or its legal practitioners could not have abandoned the review of the Minister's decision and this is where I disagree with the court below that under the circumstances/facts of this case it had a discretion to grant the declaratory order. The declaratory relief was depended for its survival in the granting of the review relief. The decision of the Minister and the declaratory order by the court below cannot co-exist on the same issue. The second order on the same issue is invalid.

[23] I have described the background and the chain of events which led up to the Minister's decision in sufficient detail. It was argued that the declaratory order was granted on the same facts of the review relief. But a careful reading of the record makes it clear that the respondent failed to establish review grounds or it cannot be said that the Minister failed to apply her mind to the operations of the respondent in accordance with the behests of s 5A of the Act and the tenets of

natural justice. ‘Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or is a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter’. See *Pepcor Retirement Fund & another v Financial Services Board & another* 2003 (6) SA 38 (SCA) at 54. See also *Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another* 1988 (3) SA 132 (A) at 152A-D. It is actually not surprising that the review relief was abandoned. The Ministry did not only bare the harassment of the respondent on its application but not once but twice the staff members including a Deputy Minister visited the factory of the respondent in Walvis bay to acquaint themselves with the operations of the respondent before the decision in question was taken. The Ministry took a decision that all activities of fishing enterprises except for canning do not qualify for manufacturing status. Many other companies in the fishing industry and meat industries had similarly applied but the applications were refused. It follows, in my view, that the granting of the declarator sought by respondent, infringed upon the long well-established policy by the Ministry which directs the qualification status of a ‘manufacturing activity’.

[24] A declarator is a discretionary remedy. It may be sought with or without some other remedy. It may be granted to settle some doubtful question of law on which an authoritative ruling is needed. In administrative law the great merit of the declarator is that it is an efficient remedy against *ultra vires* action by

governmental authorities of all kinds, including ministers and servants of the crown, and, in its latest development, the crown itself. Wade & Forsyth: *Administrative Law*, 8 ed at 562-570.

[25] In its judgment the court below in para 39, stated: 'on proper analysis the declarator sought would in this instance on its own merely result in an accurate interpretation of the statute'. The learned judge thereafter proceeded relying on foreign authorities to establish the meaning of the words 'manufacturing activity'. That court went at great length to include in its judgment the alleged transformation of raw hake graphically into the final product. The learned judge then held that the words should be interpreted widely as a restricted interpretation – 'given the declared purpose of the Act which clearly is intended to benefit the nation as a whole –would surely be counterproductive to–and would only restrictively achieve–those listed aims, purposes and objects of the scheme created by the Act'. Finally it found that the respondent was engaged in a manufacturing activity.

[26] In *Namibia Insurance Association v Government of Namibia* 2001 NR 1 (HC) at 12B Teek JP stated:

> 'It is nowadays the attitude of the courts in a number of countries to allow elected legislatures a large degree of discretion in relation to the form and degree of economic regulation selected by a democratic legislature. Therefore the determination of the merits or wisdom of an Act is the task of the elected representatives of the people wherever applicable.'

[27] In the case of *University of the Western Cape & others v Member of Executive Committee for Health and Social Services & others* 1998 (3) SA 124 (c) Hlophe J at 131G stated:

> 'It would also seem that our courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the court is in as good a position to make the decision itself. Of course the mere fact that a court considers itself as qualified to take the decision as the administrator does not per se justify usurping the administrator's powers or functions. In some cases, however, fairness to the applicant may demand that the court should take such a view.'

[28] In *Soobramoney v Minister of Health, KwaZulu–Natal* 1998 (1) SA 765 (CC) para 29 Chaskalson P said:

> 'A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility is to deal with such matters.'

[29] O'Regan J in *Premier, Mpumalanga, & another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 51 said:

> 'In my view . . . s 32 of the Act reserves the decision as to what grants should be made to State-aided schools to the second applicant, a duly elected politician, who is a member of the executive council of the province. By definition, therefore, the decision to be made by the second applicant was not a judicial decision but a political decision to be taken in the light of a range of considerations. For the reasons given by Lord Hailsham in the *Evans* case, a Court should generally be reluctant to assume the

> responsibility of exercising a discretion which the Legislature has conferred expressly upon an elected member of the executive branch of government. Accordingly, the Court should be slow to conclude that there is bias such as to require a Court to exercise a discretion, particularly where the discretion is one conferred upon a senior member of the executive branch of government.'

[30] I have already observed that s 5A of the Act reserves the decision on applications to be registered as manufacturers in the Minister. To have abandoned the review relief and isolate the operations of the respondent as a legal issue in the purview of the courts, such as to require the court below to exercise a discretion was misplaced. The decision of the Minister and the declaratory order, as I have already said cannot co-exist on the same issue. In the *Oudekraal* matter the decision of the provincial administrator to grant approval of the township was found to be invalid but for the reason that it was not set aside, it remained valid and the declaratory orders sought were refused. I therefore conclude that the respondent is not entitled to the declaratory order granting it the manufacturing status it sought in para 3 and 4 of the notice of motion.

[31] The costs should follow the result.

[32] Consequently I make the following order.

1. The appeal succeeds.

2. The declaratory order that the respondent conducts a manufacturing activity is set aside with costs.

3. The costs to include costs occasioned by the employment of one instructing and one instructed counsel.

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MAINGA JA

_____
MTAMBANENGWE AJA

APPEARANCES:

APPELLANT:	P C I Barnard Instructed by the Government Attorney
RESPONDENT:	T J Frank (with him R Maasdorp) Instructed by H D Bossau & Co