



REPORTABLE

CASE NO: SA 105/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**MINISTER OF AGRICULTURE, WATER AND
FORESTRY
GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**First Appellant
Second Appellant**

and

**SERVE INVESTMENTS 84 (PTY) LTD
ADOLPHINE MUSHIMBA N.O.
AGRICULTURAL PROFESSIONAL SERVICES
(PTY) LTD
NAMIBIA INDUSTRIAL DEVELOPMENT SOCIETY
MASTER OF THE HIGH COURT OF NAMIBIA
KAVANGO EAST COMMUNAL LAND BOARD
GCIRIKU TRADITIONAL AUTHORITY**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent**

Coram: DAMASEB DCJ, SMUTS JA, and ANGULA AJA

Heard: 10 October 2022

Delivered: 28 October 2022

Summary: The Government of Namibia and the Namibia Development Corporation (NDC) (now the Namibia Industrial Development Agency (NIDA)) entered into an agreement termed a project lease agreement (the PLA) with Agri-Pro for the latter to manage and operate the agricultural project referred to in the agreement. After the death of the sole shareholder in Agri-Pro, the then executor of the estate engaged Serve Investments 84 (Pty) Ltd (Serve) to act as project manager of the project. Serve took on Agri-Pro's task under the PLA and operated the project with effect from December 2015. On 7 September 2018, the former executor of the estate and Serve concluded a sale of shares agreement, selling those shares to Serve. In terms of clause 22 of the sale of shares agreement, it was conditional upon the Minister of Agriculture, Water and Forestry (the Minister) to provide his written consent for the transfer of shares. The condition requiring the Minister's consent to the sale of shares is required by Art 11.1 of the PLA which, provides that no shares in Agri-Pro can be transferred without the written consent of the Minister and NDC. Serve endeavoured over a period of time, without success, to secure the written consent of the Minister and NDC. As a consequence of the inaction of the Minister and NDC, Serve brought an application to the court *a quo*, seeking an order declaring that the Minister and NDC were deemed to have consented to the sale of shares, alternatively, for an order to direct them to consent to the sale or in the future alternative to make a decision to consent or not within seven days. The application was opposed by the appellants on the grounds of privity of contract – the Minister declined to answer factual allegations concerning the background leading to the sale of shares agreement as the Government was not party to it. The Minister however also opposed the relief on the grounds that a lease agreement of the premises to Agri-Pro, as it would be constituted under the sale of shares agreement, would be contrary to the provisions of s 17B of the Communal Land Reform Act 5 of 2002 (the Act) by reason of the shareholding in Serve (being held by shareholders outside Namibia).

The court *a quo* made an order on 22 December 2021 directing the Minister and NDC to make a decision within 5 days of the order whether or not to consent to the sale and transfer of the shares and communicate their decisions to the legal practitioner of Serve by that date. The court found it unnecessary to make a finding on the applicability or otherwise of s 17B of the Act because Serve had made an application under s 17B. The court *a quo* further ordered that the Minister and NDC were to pay the costs of the application.

The appeal is against the order compelling the Minister to make a decision. The appellants also opposed Serve's cross-appeal against the refusal of the court *a quo* to declare that the Minister and NDC be deemed to have given their consent or to direct that such consent be given.

The issues on appeal were that the court must determine firstly whether the High Court was precluded by reason of privity of contract or secondly by s 17B of the Act from granting its order. The third issue concerns whether exceptional circumstances exist to justify this court to direct that the Minister and NDC to grant their consent to the sale of shares as is sought in the cross-appeal.

Held that, the shares to be sold are those of Agri-Pro. Agri-Pro is a party to the PLA and has the rights and obligations as set out in the PLA. Under the PLA, its rights and obligations to operate and develop the agricultural project on that land are accorded to it by NDC and the Minister pursuant to the Government's Green Scheme initiative. Its right to sell its shares are however restricted by article 11.1 of the PLA (requiring the consent of the Minister and NDC), failing which such a sale would amount to a breach as specified in article 11.2.

Held that, the privity of contract point by the Minister in this regard is contrived and fails to take into account the contractual context of both clause 22 and article 11.1. It thus follows that the High Court was correct in brushing aside this baseless point.

Held that, Agri-Pro's rights and duties as project manager do not remotely approach the forms of customary land rights set out in their different manifestations contained in s 21 of the Act. Nor do they contemplate a lease-hold under the Act in the sense that the term is generally understood and used in the Act.

Held that, s 17B of the Act does not find application by reason of Agri-Pro's rights under the PLA not constituting a customary land right or a right to lease-hold as contemplated by the Act.

Held that, it would be premature for this court to direct the Minister to consent to the sale as it has not been established that the Minister's stalling amounted to a decision

to refuse consent. Nor has it been shown that the Minister is biased or that the decision is a foregone conclusion. This matter is still at the *mandamus* stage.

Held that, exceptional circumstances would need to be shown for a court to substitute its own decision for that of a decision-maker for the compelling reasons set out by the Chief Justice in *Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism* 2010 (1) NR 1 (SC).

Held further that, exceptional circumstances would ordinarily only arise after a decision is taken and would invariably relate to a fatally flawed and fraught process of decision making and result in a reluctance on the part of a court to remit a matter for decision-making because of that.

It thus follows that both the appeal and cross-appeal are unsuccessful.

APPEAL JUDGMENT

SMUTS JA (DAMASEB DCJ and ANGULA AJA concurring):

Introduction

[1] This appeal and cross-appeal concern a sale of shares in the third respondent, Agricultural Professional Services (Pty) Ltd (Agri-Pro).

[2] The factual background giving rise to these proceedings can be shortly stated. In July 2014, the Government of Namibia and the fourth respondent, then known as the Namibia Development Corporation (NDC), and now the Namibia Industrial Development Agency (NIDA), entered into an agreement termed a project lease agreement (the PLA) with Agri-Pro for the latter to manage and operate the agricultural project referred to in it. The PLA in turn concerned an agricultural project on a tract of agricultural land in a communal area forming part of the Shitemo Irrigational Project on

the banks of the Kavango River. This project formed part of the Government's Green Scheme Policy (the Scheme).

[3] The Green Scheme Policy is a government policy initiative implemented by the Ministry of Agriculture, Water and Forestry with the purpose of developing irrigation based agronomic production in Namibia to increase agricultural output. At the same time, the initiative seeks to achieve social development and upliftment of communities located at irrigation areas and promote skills development and economic opportunities for them. The Cabinet paper adopting the policy also refers to the stimulation of private investment together with local employment creation as objectives of the Scheme.

[4] In the first paragraph of the preamble to the PLA, the parties record that they are desirous 'to cooperate for the purpose of operating, developing and managing the Shitemo Irrigation Project for the promotion of agricultural production'.

[5] The sole shareholder in Agri-Pro, the late Mr Aaron Mushimba, passed away and the former executor of his estate engaged the first respondent, Serve Investments 84 (Pty) Ltd (Serve), as project manager of the project with effect from December 2015. Serve then took on Agri-Pro's tasks under the PLA and operated the project. On 7 September 2018, Serve and the former executor of the late Mr Mushimba's estate concluded a sale of shares agreement, selling those shares to Serve. In terms of clause 22 of the sale of shares agreement, it was conditional upon the Minister providing his written consent for the transfer of shares, thus sold to Serve, by 31 November 2018. That date was subsequently extended to 31 December 2021. This condition requiring the Minister's consent to the sale of shares in terms of clause 22 is required by article 11.1 of the PLA. In terms of article 11.1 of the PLA, no shares in

Agri-Pro can be transferred without the written consent of the appellant (the Minister of Agriculture, Water and Forestry – the Minister) and NDC.

[6] Serve endeavoured over a protracted period without success to secure the Minister's and NDC's written consent to the sale of shares. As a consequence, Serve brought an application to the High Court, seeking an order declaring that the Minister and NDC were deemed to have consented to the sale of shares, alternatively for an order to direct them to consent to the sale, or in the further alternative to make a decision to consent or not within seven days.

[7] The Minister opposed the application. The approach adopted by the Minister was that he had made no decision because he was not a party to the sale of shares agreement which was not binding upon him. The Minister declined to answer factual allegations concerning the background leading to the sale of shares agreement as the Government was not party to it. The Minister however also opposed the relief on the grounds that a lease agreement of the premises to Agri-Pro, as it would be constituted under the sale of shares agreement, would be contrary to the provisions of s 17B of the Communal Land Reform Act 5 of 2002 (the Act) by reason of the shareholding in Serve.

[8] It is not disputed that the premises upon which the project is conducted is in a communal area. The Minister pointed out that although registered in Namibia, Serve's sole shareholder is a South African company which in turn is owned by another corporate entity registered in the Grand Cayman Islands and managed by a Swiss asset manager known as Inoks Capital SA.

[9] Section 17B of the Act requires that a foreign national seeking to acquire a customary land right or a lease-hold of land in a communal area must first obtain the written authorisation of the Minister before applying for such rights. The Minister's position is that the relief sought is not competent as it presupposes the Minister's decision and directs that he makes such a decision. He further states that no decision had been made or could be deemed to have been made. The Minister's position is that Serve would first need to comply with s 17B to have access to the land in question and that the High Court application sought to circumvent s 17B of the Act is ill-considered and should be dismissed for this reason alone.

[10] The current executor in the late Mr Mushimba's estate and Agri-Pro initially opposed the application but failed to deliver their answering affidavits timeously. They filed a condonation application to do so belatedly. This was refused by the High Court. That order is not the subject of this appeal and they are not before this court in respect of the appeal. The cross-appeal was duly served upon them but they were not given notice of the date of hearing by the registrar of this court. The date of hearing did however come to their knowledge on 13 September 2022 and they did not seek to place argument before this court on the cross-appeal. When the matter was called in court, their legal practitioner, Mr Kasper was present and informed the court that he held a watching brief on their behalf. He very properly pointed out that his clients did not seek to oppose the cross-appeal and abided by the decision of this court.

Approach of the High Court

[11] The High Court heard the matter on 17 December 2021. Because the sale of shares agreement had been extended to 31 December 2021, the court made an order on 22 December 2021, directing the Minister and NDC to make a decision within five

days of the order whether or not to consent to the sale and transfer of the shares and communicate their decisions to the legal practitioner of Serve by that date. The Minister and NDC were also ordered to pay the costs of the application.

[12] The court's order was in the form of granting a *mandamus* against the Minister and NDC. The court declined to grant the main relief sought – an order deeming the Minister and NDC to have granted consent, or the first alternative to direct the Minister and NDC to consent to the sale of shares agreement.

[13] The court found it unnecessary to make a finding on the applicability or otherwise of s 17B of the Act because Serve had, out of an abundance of caution but not accepting its applicability, made an application under s 17B.

This appeal

[14] The Minister and the Government of Namibia appeal against the order compelling the Minister to make a decision. They also oppose Serve's cross appeal against the refusal of the High Court to declare that the Minister and NDC be deemed to have given that consent or to direct them to give such consent.

[15] The appellants' heads of argument were filed a few days late because the registrar's letter apprising the parties of the date of the appeal had been mislaid in the office of the Government Attorney. Their heads were filed very soon after the realisation of their due date. The appellants applied for condonation for the late filing of their heads and for reinstatement of the appeal. Serve's position is that it does not take issue with the explanation but with the prospects of success of the appeal. Given the rapid manner in which the lapse was addressed and the lack of prejudice, the application for condonation and reinstatement is hereby granted.

The parties' submissions

[16] The government appellants take the point for the first time in their written heads of argument that the then Minister took a decision on 17 December 2019, essentially not to grant consent based on a 'finding' that the sale of shares agreement had lapsed. It is then contended with reference to the oft misquoted and misunderstood judgment in *Oudekraal Estates (Pty) Ltd v City of Cape Town*¹ that this 'decision' stood until and unless set aside on review. Not only was this point not raised by the Minister in his answering affidavit, but it is completely contrary to the very position on the facts taken by the Minister that he had not taken a decision at any stage and that he would apply his mind to the issue once an application had been made as a foreign entity under s 17B of the Act. This new point is thus inconsistent with the Minister's opposition to the application and his grounds of appeal and can be summarily disposed of at the outset.

[17] It is also clear on the facts that the Minister's letter of 17 December 2019 does not constitute a decision as to the granting of consent or not – and was understandably not construed as such at the time. It was merely an incorrect understanding of the factual position concerning the validity of the PLA and misconstruing that factual issue.

[18] It did not constitute a finding in any sense and was a misapprehension which was subsequently corrected. It did not amount to a decision on the question of consent (by considering that the PLA had lapsed, which had not occurred).

[19] There were in essence two other arguments raised by the government appellants on appeal which had also been raised in the court below.

¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) para 26.

[20] In the first instance, a point is raised that privity of contract would preclude an order compelling the Minister and NDC to consider consent. Counsel contended that clause 22 of the sale of shares agreement is not enforceable as against the Minister (and NDC) and that the court *a quo* erred in directing him to make a decision on the issue.

[21] The second argument mounted against the judgment and order of the High Court is based upon s 17B of the Act. It was argued that s 17B of the Act requires a statutory application by Serve as a foreign national to obtain written authorisation of the Minister before applying to acquire a customary land right or a right of lease-hold. Counsel contended that Serve was a foreign national for the purpose of this provision, despite being a Namibian registered company but because its shareholding was held by foreign registered companies. It was argued that the High Court erred by not holding that s 17B also precludes the relief granted.

[22] Counsel for Serve argued that s 17B did not apply to this matter – an issue which had not been raised by the Minister until his answering affidavit to the application. Counsel also pointed out that the Act does not define a foreign national. It was argued that when the legislature intended to make provision for special definitions to apply to locally incorporated legal entities for the purpose of being regarded as foreign nationals because of their shareholding, this needed to be specifically done. In the absence of a specific provision of that nature, counsel submitted that a locally registered company with its principal place of business and domicile in Namibia would be regarded as a local company and not a foreign national.

[23] Counsel also argued that the nature of Agri-Pro's rights under the PLA furthermore do not amount to a customary land right or the right of lease-hold. It was contended that the PLA entailed a contract for Agri-Pro to operate, develop and manage the agricultural project and the land for the promotion of agricultural production. It was thus not necessary, so counsel contended, for Serve to make an application under s 17B.

[24] As to the point of privity of contract, it was argued that the right of the Minister to consider and consent or not is contained in article 11.1 of the PLA and that clause 22 in the sale of shares agreement merely gave effect to article 11.1. The agreements, so counsel contended, were 'tied at the hip' and that the point had no merit.

[25] Counsel also argued that the nature of the project within the Green Scheme initiative involved the exercise of public power by the Minister and that the decision making is of an administrative nature and amounted to administrative action. The Minister was thus obliged to consider the application for consent as a contractual matter and in the exercise of administrative powers.

[26] It was argued that the protracted period of inaction coupled with the failure to raise any objection or even concern on the merits of Serve's application for consent meant that the High Court should have ordered the Minister to grant consent or declaring that consent be deemed to have been given.

[27] Counsel relied upon *Minister of Health and Social Services v Lisse*² to submit that given the lack of dispute on Serve's suitability, there were exceptional circumstances justifying the High Court and this court to make the decision on consent and to direct that the Minister grant consent to the sale of shares.

[28] Counsel for the Minister however countered that the facts in *Lisse* were distinguishable in that there were findings of bias and a fraught process in that matter unlike this matter where the Minister had expressed no view on the issue.

Issues for determination

[29] Having disposed of the unsustainable new point (concerning a decision on 17 December 2019), there are essentially three matters for determination on appeal. The first two relate to the government appellants' challenge upon the order of the High Court, namely whether the High Court was precluded by reason of privity of contract or secondly by s 17B of the Act from granting its order.

[30] The third question concerns whether exceptional circumstances exist to justify this court to direct that the Minister and NDC to grant their consent to the sale of shares as is sought in the cross-appeal. These issues are addressed in that sequence.

Privity of contract

[31] The Minister opposed the application on the basis that he was not a party to the sale of shares agreement and that the principles relating to privity of contract meant that clause 22 cannot be enforced against him as a contractual matter.

² *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC).

[32] Whilst it is certainly correct that the Minister (and NDC) are not parties to the sale of shares agreement, this does not mean that rights relating to that agreement cannot be enforced against them. A sale of shares would ordinarily be between the seller and purchaser, as has occurred here. That agreement includes clause 22 which provides:

'This agreement shall be subject and conditional to the following condition:

- 22.1 that the Minister of Water and Agriculture provides his written consent for the transfer of the shares as contemplated in terms of this agreement before or on 30 November 2018, failing which this agreement shall immediately lapse and become null and void. Should the necessary consent not be forthcoming from the Minister, the purchaser shall have the pre-emptive option to continue to farm on Shitemu under mutually agreed re-negotiated terms with no changes in the purchase consideration, provided that all monthly payments in terms of the outsourcing agreement are timeously effected by the purchaser, failing which, the provisions of clause 10.2 above shall apply *mutatis mutandis*;
- 22.2 notwithstanding anything else to the contrary contained in this agreement, should the purchaser fail on the due date to provide the guarantee as contemplated in clause 4.2 above, this agreement shall immediately lapse and become null and void. In such event, the seller shall be entitled to enter into negotiations for the sale of the shares with any other interested party.'

[33] The shares which are to be sold are those of Agri-Pro. It is a party to the PLA and has the rights and obligations as set out in the PLA. Under the PLA, its rights and obligations to operate and develop the agricultural project on that land are accorded to it by NDC and the Minister pursuant to the Government's Green Scheme initiative. Its rights to sell its shares are however restricted by article 11 of the PLA. It is headed 'Change in membership of Agri-Pro Namibia' and reads:

'11.1 Agri-Pro Namibia shall ensure that no shares or interest shall be transferred from its shareholders or associates at the date of any such approval, nor that any shares or interest shall be transferred to any person or corporate body without the prior written consent of the Ministry and NDC, which consent shall not be unreasonably withheld.

11.2 A transfer or allotment contemplated herein without the prior approval or consent of the Ministry and NDC shall be deemed to constitute a breach of this agreement.'

[34] Article 11 thus limits the sale and transferability of shares in Agri-Pro during the subsistence of the PLA. Any sale of shares during its subsistence would need to comply with article 11.1 (requiring the consent of the Minister and NDC), failing which such a sale would amount to a breach as specified in article 11.2.

[35] In order to give effect to the obligation in article 11.1, the sale of shares agreement has included clause 22, requiring the parties to obtain the Minister's consent and thereby comply with article 11.1 of the PLA. The Minister's right to give or refuse consent arises from article 11.1, as does his obligation to consider an application for consent directed to him. It does not arise from clause 22 of the sale of shares agreement which the Minister incorrectly seeks to read in isolation of the overall contractual setting. Clause 22 in the shares sale agreement merely seeks to give effect to article 11.1 of the PLA.

[36] The point taken by the Minister in this regard is contrived and fails to take into account the contractual context of both clause 22 and article 11.1. The High Court was correct in brushing aside this baseless point.

Section 17B

[37] During the protracted correspondence between the parties preceding the application concerning the issue of consent to the sale of shares, s 17B was not raised by the Minister. Nor is it referred to in the PLA. It was raised for the first time in opposition to the High Court application. Section 17B provides:

- '(1) A foreign national who wishes to acquire customary land right or right of leasehold must first obtain a written authorisation of the Minister before he or she applies for such rights.
- (2) An application for the written authorisation referred to in subsection (1) is made in the prescribed manner and form.
- (3) Upon receipt of the application for the written authorisation referred to in subsection (2), the Minister may grant the application with or without conditions or refuse the application.
- (4) The Minister may prescribe criteria and conditions upon which a foreign national may be granted customary land right or right of leasehold under this Act.'

[38] The first question which arises concerns whether the rights of Agri-Pro amount to a customary land right or a right of lease-hold.

[39] Counsel for the appellants correctly accepted that the Minister would have the burden to establish that s 17B applies to Agri-Pro's rights under the PLA.

[40] A customary land right is defined in the Act to mean 'any of the rights referred to in paragraphs (a), (b) and (c) of s 21'. Those rights, set out in s 21, are the following:

- '(a) a right to a farming unit;
- (b) a right to a residential unit;
- (c) a right to any other form of customary tenure that may be recognised and described by the Minister by notice in the Gazette for the purposes of this Act.'

[41] A lease-hold is not defined in the Act, although a lease-holder is defined as 'a person to whom a right of lease-hold has been granted under this Act'. A right of lease-hold for agricultural purposes arises for the purposes of the Act after the Minister has designated by notice in the Gazette an area which a land board may grant for agricultural purposes under s 31 of the Act.

[42] Turning to Agri-Pro's rights under the PLA, the subject matter is the Shitemo Irrigation Project which is leased to Agri-Pro 'to develop, operate and manage' the project in line with the Green Scheme Policy.

[43] In the preamble to the PLA, it is stated that NDC 'entrusts' Agri-Pro 'to operate, develop, manage and administer the project' and that Agri-Pro is to render 'farming services to the small scale irrigation farmers at cost plus administration fees as determined by the Ministry. The Minister in turn has the responsibility to settle and incorporate small scale farmers into the project who would occupy portions of project land.

[44] The NDC's obligation is to make available the project comprising a total of 1000 hectare for a period of 20 years.

[45] Agri-Pro's duties essentially concern developing, operating and managing the project on the basis of sound business principles. Its duties also include the upgrading of irrigation and maintaining infrastructure.

[46] Nowhere in the PLA is there reference to a customary land right or a lease-hold as contemplated under the Act. Agri-Pro's rights and duties as project manager do not

remotely approach the forms of customary land rights set out in their different manifestations contained in s 21. Nor do they contemplate a lease-hold under the Act in the sense that the term is generally understood and used in the Act.

[47] It would follow that s 17B does not find application by reason of Agri-Pro's rights under the PLA not constituting a customary land right or a right to lease-hold as contemplated by the Act. It is unnecessary for present purposes to express a view as to what is meant by the term 'foreign national' of a corporate entity in that section.

The cross-appeal

[48] Serve refers to the long history of ministerial inaction in response to the application for consent to the sale of shares. It involves an inordinately long period spanning from a meeting in November 2018, followed up by submissions, attempts at further meetings as well as correspondence continuing until 21 July 2021. This extended period of inaction on the part of the Minister is difficult to comprehend in the context of the compelling purpose and objectives contained in the Green Scheme Policy initiative.

[49] Counsel for Serve contended that this protracted inaction coupled with the failure to raise any objection concerning Serve's suitability would amount to exceptional circumstances to justify an order compelling the Minister to consent to the sale. Counsel for the Minister vigorously disagrees and points to an absence of bias or the fact that it is not established that a referral to the Minister is a foregone conclusion.

[50] The determination of the appropriate remedy in review proceedings was recently considered by this court with reference to applicable authority:³

³ *President of the Republic of Namibia & others v Anhui Foreign Economic Construction Group Corporation Ltd & another* 2017 (2) NR 340 (SC) para 61-62. See also *Pamo Trading Enterprises CC &*

'Under the common law, once invalid administrative action is established in review proceedings, the default remedy is to set aside the impugned act and remit it to the decision makers for a fresh decision. Only in exceptional circumstances will a court substitute its own decision for that of the decision maker, as was succinctly set out by the Chief Justice in *Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism*.⁴ This principle is reinforced by the separation of powers upon which our Constitution is based.⁵ Furthermore as a matter of constitutional principle, the exercise of public power in conflict with the law and thus invalid should be corrected or reversed in accordance with the principles of legality and the rule of law,⁶ as had been argued by Mr Namandje in respect of the award of the project in the Permanent Secretary's letter.

As was stated by Moseneke DCJ in *Steenkamp NO v Provincial Tender Board, Eastern Cape*:⁷

"It goes without saying that every improper performance of an administrative function would implicate the Constitution and entitle the aggrieved party to appropriate relief. In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law. It is nonetheless appropriate to note that ordinarily a breach of administrative justice attracts public-law remedies and not private-law remedies. The purpose of a public-law remedy is to preempt or correct or reverse an improper administrative function. In some instances the remedy takes the form of an order to make or not to make a particular decision or an order declaring rights or an injunction to furnish reasons for an adverse decision. Ultimately the purpose of a public remedy is to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law."

another v Chairperson of the Tender Board of Namibia & another 2019 (3) NR 834 (SC) para 63.

⁴ *Waterberg Big Game Hunting Lodge v Minister of Environment and Tourism* 2010 (1) NR 1 (SC) at 31G-33C.

⁵ See *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board & others* 2001 (12) BCLR 1239 (C) at 1259D-E approved by the Chief Justice in *Waterberg* at p 31H. See also *Oudekraal* paras 26-27.

⁶ *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, SA Social Security Agency & others* 2014 (4) SA 179 (CC) para 42.

⁷ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para 29.

[51] Not only is the matter in *Lisse* distinguishable, as pointed out on behalf of the appellants because of the finding of bias, but also because in this matter the decision-maker is yet to make a decision. These remedies arise when decisions are liable to be set aside. In the absence of establishing that the minister's stalling amounted to a decision to refuse consent, which is not *Serve's* case, these proceedings are essentially at a *mandamus* stage – compelling the Minister (and NDC) to make decisions. It has not been shown that the Minister is biased or that the decision is a foregone conclusion. It would be premature for a court to direct the Minister to make a specific decision.

[52] Exceptional circumstances would need to be shown for a court to substitute its own decision for that of a decision-maker for the compelling reasons set out by the Chief Justice in *Waterberg*. In this appeal, the considerations involved in decision-making surrounding the PLA are heavily policy laden in the context of the Green Scheme initiative where technical considerations relating to agricultural matters and social benefits relating to training and employment creation are involved. These areas where a court is not proficient and is ill-equipped to address and where deference is appropriate to the executive branch with expertise or where advisors with expertise are engaged.⁸

[53] Exceptional circumstances would ordinarily only arise after a decision is taken and would invariably relate to a fatally flawed and fraught process of decision making and result in a reluctance on the part of a court to remit a matter for decision-making because of that. This would not readily arise when a decision is yet to be taken. *Serve*

⁸ *CSC Neckartal Dam Joint Venture v Tender Board of Namibia & others* 2014 (1) NR 135 (HC) para 69.

has not even contended that the Minister is incapable of applying an unbiased mind to the question, let alone established that.

[54] It follows that the cross-appeal must fail.

Conclusion

[55] Both the appeal and the cross-appeal are unsuccessful. The order of the High Court would however need to be adjusted to take into account the time which has elapsed within the context of the contractual deadline for the sale of shares. Counsel for the appellants proposed that a 30 day period for the decision would be sufficient. That would however need to include reasons if consent is refused. For the purpose of the respective orders as to costs, the time apportioned to argument on the appeal was two-thirds and one third on the cross-appeal.

Order

[56] The following order is made:

- (a) The appellants' application for condonation for the late filing of heads of argument is granted.
- (b) The appeal is dismissed with costs to include the costs of one instructing and two instructed legal practitioners.
- (c) Paragraph 2 of the order of the High Court is replaced by the following:

'The Minister and NDC are directed to make a decision within 30 days of this order (as amended by the Supreme Court) whether or not to consent to the sale and transfer of shares agreement as read with article 11 of the Project Lease Agreement and to communicate such decision to the first

respondent (Serve) in writing within such 30 day period together with reasons therefore if consent is not granted. If granted, such consent will be deemed to have been given by 31 December 2021.'

- (d) The cross-appeal is dismissed with costs, to include the costs of one instructed and one instructing legal practitioner.

SMUTS JA

DAMASEB DCJ

ANGULA AJA

APPEARANCES

APPELLANTS:

T Chibwana

Instructed by Government Attorney

RESPONDENTS:

J Marais SC (with him C Gibson)

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