NOT REPORTABLE

CASE NO: SA 23/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

NAMIBIA FINANCIAL EXCHANGE (PTY) LTD	**Appellant**
and	
CHIEF EXECUTIVE OFFICER OF THE NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY AND REGISTRAR OF STOCK EXCHANGES	**First Respondent**
NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY	**Second Respondent**
MINISTER OF FINANCE OF THE REPUBLIC OF NAMIBIA	**Third Respondent**
ATTORNEY GENERAL OF THE REPUBLIC OF NAMIBIA	**Fourth Respondent**
PRIME MINISTER OF THE REPUBLIC OF NAMIBIA	**Fifth Respondent**

Coram: SHIVUTE CJ**,** MAINGA JA and HOFF JA

Heard: **6 June 2024**

Delivered: **03 September 2024**

Summary: On 8 May 2012, the appellant applied to the first respondent for a second stock exchange licence. On 9 September 2014, the application was declined following the exchange of numerous correspondence over a period of at least two years. The appellant avers that the decision was unlawful, that first respondent was not *functus officio* after 9 September 2014 because it still requested further documents from the appellant after 9 September 2014 thereby creating the impression that it would still assess the application when presented with the requested information.

Held that, the decision of 9 September 2014 was lawful. The appellant failed to provide by 9 September 2014, documents and/or information required in terms of s 8 of the Stock Exchanges Control Act 1 of 1985 (SECA) Act for the granting of a Stock Exchange Licence, this despite such information being requested already on 21 November 2012.

Held that, upon communicating the decision of 9 September 2014, the first respondent became *functus officio*.

Held that, there was no conflict of interest on the part of the first respondent, particularly when regard is had to the conduct of the parties throughout the application evaluation process.

Held that, the appellant caused significant delay in instituting the application *a quo*. However, the first respondent's contribution to the delay cannot be overlooked as he continued to request further information or documents after 9 September 2014. Such requests were in any event *ultra vires* the Act as he had no power in terms of the Act to revisit his decision of 9 September 2014.

In the result the appeal is dismissed with costs, such costs to include the costs of one instructing and one instructed legal practitioner.

APPEAL JUDGMENT

MAINGA JA (SHIVUTE CJ and HOFF JA concurring):

Introduction

[1] This is an appeal against the whole judgment and order of the High Court dismissing the appellant's application for a second stock exchange licence in Namibia including the costs order.

[2] The appellant launched an application on 26 July 2016 seeking the following relief:

> 'Take notice that NAMIBIA FINANCIAL EXCHANGE (PTY) LTD (hereinafter called the Applicant) intends to make application to this Court for an order:
>
> 1. Declaring unlawful the actions and decisions of the First and/or Second Respondents in arriving at the decision conveyed to the Applicant in a letter dated 9 September 2014, refusing to grant a licence to the Applicant to operate a stock exchange.
>
> 2. That a Rule Nisi be issued calling upon the First and/or Second Respondents and all interested parties to show cause (if any) on a date and time to be determined by the Registrar of the above Honourable Court, why:
>
> 2.1 the First and/or Second Respondents should not be compelled to award a licence to operate a stock exchange to the Applicant;
>
> 2.2 alternatively to prayer 2.1, the First and/or Second Respondents should not be compelled to consider the application submitted by the Applicant on 8 May 2012 for a licence to operate a stock exchange (together with all substantiating information submitted by the Applicant since 8 May 2012), in

conformity to all the substantive and procedural conditions laid down by the Stock Exchanges Act, 1985 and [any] other applicable law;

2.3 without detracting from the generality of prayer 2.2, compelling the First and/or Second Respondents to indicate to the Applicant –

2.3.1 In accordance with the Stock Exchanges Act, 1985 or any other law which requirements of those laws the Applicant must comply with in order to be granted a licence to operate a stock exchange;

2.3.2 What comprises sufficient financial resources that the Applicant must have for the proper exercise or carrying out the powers and duties conferred upon or assigned to a stock exchange by or under the Stock Exchange[s] Act or any other law.

3. Directing that the First and/or Second Respondents pay the costs of this application jointly and severally.

4. Granting Applicant such further and/or alternative relief as the Honourable Court may deem fit.'

[3] Third to fifth respondents did not participate in the proceedings below and do not participate in the present appeal as well.

Background

[4] During mid-2011 and early 2012, the founders of the appellant and with the assistance of consultants – Business Services and Management Solutions International led by Mr Anthony de Silva – established a second consortium to create a second Stock Exchange in Namibia to be called the Namibia Financial Exchange (Pty) Ltd (the appellant).

[5] The consultants appointed to the project commenced with research and development of the project in July 2011. The founders and promoters of the appellant then identified a gap in the money and capital markets in Namibia, causing indigenous Namibians to be marginalised, as most Namibian entrepreneurs had no access to or limited access to capital. After consultations with various stakeholders during 2011 to 2012, it became apparent to the appellant that there was a need for a second Stock Exchange in Namibia. In response to this epiphany, the appellant applied for a Stock Exchange Licence on 8 May 2012.

[6] The case for the appellant appears in the founding affidavit of Mr Helmut Kangulohi Angula, the founder and promoter of the appellant and chairman of its board of directors who deposes that the first respondent, (who was then the late Mr Phillip Shiimi), acknowledged receipt of the licence application and the prescribed application fee by letter dated 15 May 2012.

[7] Having heard nothing from the first respondent and on 29 May 2012, the appellant addressed a letter to the first and/or second respondents advising same of the stipulations in s 7(4) of the Stock Exchanges Control Act 1 of 1985 (SECA or the Act). In terms of that subsection, the Registrar of Stock Exchanges (the Registrar) is required to advertise an application for the issuance of a stock exchange licence by notice in the Government Gazette and two newspapers circulating nationally upon receipt of such application.

[8] By letter dated 11 June 2012, the first respondent informed the appellant that it was not able to consider the appellant’s application until it received all documents

relating to appellant's registration as a company. On 20 June 2012, the first respondent addressed a letter to the appellant again requesting further information, namely, (a) the name of the association and (b) the number of persons forming the association. The letter further informed the appellant that once it provided the information so requested, the first respondent would seek approval from the Minister of Finance for any number of persons that may form an association in terms of s 7(1) of SECA. The letter also reminded the appellant that in terms of the Financial Institutions and Markets Bill (the Bill) a Stock Exchange would be required to be incorporated as a company to carry on the business of a Stock Exchange.

[9] By letter dated 25 June 2012, the appellant informed the first respondent that the applicant for the stock exchange licence was the Namibia Financial Exchange (NAMFIN-X) and that same comprised of ten persons. By letter dated 1 August 2012, the first respondent pointed out to the appellant that at the time the appellant submitted its application on 8 May 2012, it did not indicate therein whether it was an association and there were equally no registration documents attached. The first respondent further informed the appellant that he forwarded a letter to the Minister of Finance seeking ministerial approval for the appellant's application.

[10] By letter dated 20 September 2012, the first respondent communicated to the appellant that ministerial approval had been received and that the first respondent would in terms of s 7(4) of the SECA advertise the appellant's application in the Government Gazette and two newspapers upon payment of the fees for such advertisements.

[11] On 21 November 2012, the first respondent wrote to the appellant as follows:

'NAMIBIA FINANCIAL EXCHANGE (PTY) LTD ("NAMFIN-X"): STOCK EXCHANGE APPLICATION

1. Your application submitted on May [8], 2012 and your subsequent presentation to NAMFISA on October 31, 2012 bear reference.

2. The review of the application revealed that it is incomplete and therefore is not considered to be duly submitted.

3. In this regard, the application will only be considered to be duly submitted upon submitting the documentation and information as enumerated below:

    3.1 The legal structure of NAMFIN-X as a company;
    3.2 Company documents as registered by the Company Registration Office;
    3.3 Directors Certificate (CM 29);
    3.4 Shareholders Certificate(s);
    3.5 Type of model/system to be deployed by NAMFIN-X;
    3.6 Any feasibility study done in Namibia in terms of the stock exchange businesses;
    3.7 Details of at least two members of NAMFIN-X who will carry on the business as buyers and sellers of listed securities;
    3.8 Details of the financial forecasts and assumptions used in the forecast;
    3.9 Business plan; and
    3.10 Organizational structure including details of key individuals who will be involved in the operation of the stock exchange business.

4. Attached are declaration and indemnity forms to be completed by directors and key individuals of NAMFIN-X.

5. Enclosed also is a process outline of the NAMFIN-X application.

6. Be informed that once NAMFISA has received the requested information and documentation then we will be in a better position to assess your application.'

The letter was not signed by the first respondent, but by one Ms Lily Brandt an employee of the second respondent, delegated by the first respondent. Appellant states that it was dumbfounded when it received the letter signed by Ms Lily Brandt, because according to appellant the information sought in that letter was already on record and the details concerning the business plan were to be discussed at the review meeting agreed upon at the meeting of 31 October 2012, which still had to be called.

[12] On 28 November 2012, the appellant wrote to the first respondent bemoaning the first and/or second respondents' failure to publish the appellant's application in the Government Gazette and newspapers. Despite bemoaning the failure to publish appellants' application, appellant only made funds available for the publication on 12 April 2013 which funds in a form of a cheque were acknowledged by the first respondent in his letter to appellant of 23 April 2013. Subsequently and on 15 and 23 May 2013 the appellant's application was published. Notwithstanding that appellant only provided funds on 12 April 2013, it lamented that the publication took place a year after the launch of the application on 8 May 2012, which according to appellant was a flagrant dereliction of duties imposed on the respondents by s 7(4) of SECA that caused appellant grave prejudice since the finalisation of its application had been unduly delayed. By letter dated 13 December 2012, the first respondent informed the appellant that the publication of the application was delayed by the resolutions taken at meetings between the parties. He further requested the appellant to indicate whether it would submit the documentation requested or not and further to confirm whether the application should be evaluated without the requested documents.

[13] In a letter dated 12 April 2013, the appellant raised its concerns over the fact that the first respondent as Registrar of Stock Exchanges or his nominees were remunerated by the Namibia Stock Exchange (NSX – the only stock exchange in the country at the time) for serving as directors on its Board. Such compensation was suspicious to the appellant as the first respondent or his nominees already were compensated by the second respondent and that there was a conflict of interest in that regard. In response, the first respondent informed the appellant that NSX was an involuntary association and therefore did not have directors. It had nominees. Further that the practice of remunerating nominees was stopped.

[14] By a further letter dated 23 April 2013, the first respondent informed the appellant that it still had not received the further documentation that it requested from the appellant, despite having given the appellant ample time to submit same. Further that, they however have had sufficient information to publish the appellant's application in the Government Gazette and newspapers. The first respondent drew the attention of the appellant to the provisions of s 8 of the SECA and that they would assess the application in terms of the requirements in that section. These sentiments were again repeated in the first respondent's letter to the appellant dated 5 August 2013.

[15] On 10 August 2013, the appellant by letter requested policy documentation used by the first and/or second respondents for assessing the merits of the exchange licence application in terms of the SECA to be made available to it to prepare its submission documents to meet these policy requirements. To this end, the appellant

set out timelines for the review of its application by the first and/or second respondents.

[16] On 2 September 2013 and by letter, the first respondent informed appellant that its review of appellant's application would be guided by the provisions of the SECA and that it would not be bound by the timelines set out by the appellant in its letter. Further that, since the appellant had failed to provide the documentation requested by the first respondent, appellant's application would be assessed in terms of s 8 of the SECA and in the absence of such requested documentation. The assessment, it was communicated, would be limited to the application submitted, the comments received from the public after publication of the application as well as the representations made by the appellant. The comments from the members of the public were attached to this letter and the appellant was requested to make representations thereon.

[17] On 26 February 2014, the appellant delivered documents to the first respondent. On 11 March 2014 and by letter to the chairman, first respondent acknowledged receipt of the documents and further stated –

> '1. . . .
>
> 2. . . .
>
> 3. We note that the Shareholders' Certificates were not attached. In this regard, you are requested to please submit the Shareholders' Certificates as obtained from the Company Registration Office in the Ministry of Trade.

4. We further noted an inconsistency in the company's share capital as indicated on Form CM2 Part B and the Allotment of Shares Annexure 6. Your Memorandum of Association indicates the shareholding to be 100 (one hundred) Namibian Dollars, a figure that does not reconcile with the Allotment of Shares Annexure 6 of your application pack. Kindly provide clarification on the above.

5. Kindly be informed that in terms of our Service Level Commitment, the 120 days for the application assessment will commence once we have received the required document as per paragraph 3 and a clarification on the matter raised in paragraph 4.'

[18] On 14 March 2014, the appellant provided the documentation requested. On 16 May 2014, Mr Matomola on behalf of the first respondent wrote to the appellant as follows –

'2. Having assessed the application of NAMFIN-X, the authority hereby request that you submit the following documentation as part of our review process:

2.1 Tax certificate of NAMFIN-X;
2.2 Banking details of NAMFIN-X (include the confirmation letter from the Bank);
2.3 Curriculum vitae of all directors as per the submitted Director's certificate;
2.4 Certified copies of identification documents of all directors; and
2.5 Certified copies of qualifications of all directors.

3. . . .

4. Finally, be informed that this specific information request will not have an impact on the 120 days for the outcome of the application in terms of our Service Level Commitment.'

[19] In a letter dated 17 July 2014, a certain Ms Rachelle Metzler (for the Registrar of Stock Exchange) requested further documents from the appellant, particularly

certified copies of Mr Helmuth Angula Junior's qualifications. This request was complied with on 31 July 2014.

[20] On 9 September 2014, the first respondent, by letter informed the appellant as follows:

'**RE: NAMIBIA FINANCIAL EXCHANGE (PTY) LTD ("NAMFIN-X") APPLICATION**

Reference is made to your application for the issuance of a stock exchange licence and our request for outstanding information and or documentation in letters dated 21 November 2012, 23 April 2013 and 05 August 2013.

1. Section 8 of the Stock Exchanges Control Act 1985 (Act No. 1 of 1985) (hereafter referred to as the "Act") provides that the Registrar may, after consideration of any objections under section 7(5)(*c*) of the Act, issue the applicant a licence to carry on the business of a stock exchange, if he is satisfied that:

   1.1 The interests of the public will be served by the issue of the licence;

   1.2 At least two members of the applicant will carry on the business as buyers and sellers of listed securities independently of and in competition with one another;

   1.3 The applicant has sufficient financial resources for the proper exercise or carrying out the powers and duties conferred upon or assigned to a stock exchange by or under the Act; and

   1.4 The proposed rules of the applicant comply with the requirements of the Act.

After a thorough assessment of your application, the Registrar found that the information provided in terms of the above requirements is not sufficient and thus declines your application on the following grounds:

(a) Details of Members

NAMFIN-X did not furnish the Registrar with details of at least two members who will carry on the business as buyers and sellers of listed securities as required in terms of section 8(*b*) of the Act. The details of these two members are a prerequisite for the issuance of a stock exchange licence by the Registrar.

(b) Financial Resources

In terms of point 1.3 above, the applicant should have sufficient financial resources to carry out the powers and duties conferred upon it. The Registrar is of the view that the Share Capital of N$70,000 as indicated in your application is not sufficient to conduct the business of this nature.

(c) Proposed Rules

The assessment of the proposed Rules of NAMFIN-X revealed that certain provisions of the Act were not included in the proposed rules of NAMFIN-X i.e.:

(i) The managing director of a member of NAMFIN-X, which is a corporate body, and at least 50% of the directors of a member are Namibian citizens, resident in Namibia as stipulated in terms of section 12(1)(*a*)(ii)(bb) of the Act; and

(ii) The President of NAMFIN-X, during his term of office, may be remunerated by the committee and does not himself buy and sell securities on behalf of other persons as required in terms of section 12(1)(*m*) of the Act.

If NAMFIN-X wishes to re-submit the application for a stock exchange licence; please ensure that you adhere to the requirements as laid out in the Act or as may be determined by the Registrar.'

[21] Appellant holds the view that the information requested was *ultra vires* the provisions of the SECA as amended and that the first respondent was not entitled to that information. Appellant further maintains that neither the SECA nor its regulations set out what would be sufficient financial resources of an applicant seeking a stock exchange licence and that at no point did the Registrar inform the appellant what

would be sufficient financial resources for purposes of s 8(c) of the SECA. It is further contended that the respondents never informed the appellant that they would decline the application on grounds (a) and (b) of respondents' letter of 9 September 2014 above, which was taking an adverse decision without affording the appellant the opportunity to be heard, a violation of the principles of natural justice and fair administrative action.

[22] On 29 September 2014, the appellant wrote to the first respondent informing him that the issues raised in its letter of 9 September 2014, 'were part of the 120 day review process leading to the conditions to be met to your satisfaction in terms of a provisional licence which we [the appellant] believed would be granted. You will recall that the reason why this information was not presented was to protect individuals and investors confidentiality prior to receiving a provisional licence. Thereafter these disclosures were going to be made'.

[23] On 6 October 2014 a meeting was held between some members of the appellant and the respondents to address the appellant's concerns. At that meeting the question of a provisional or conditional licence was mooted. The first respondent undertook to enquire into such a possibility. On 7 October 2014, the appellant addressed a letter to the first respondent confirming that the confidential information would be made available after the issuance of a provisional licence.

[24] In a letter dated 15 October 2014, the first respondent informed the appellant that a provisional stock exchange licence was not provided for by the SECA and that he would initiate a process to amend the SECA to make provision for a provisional

licence. First respondent further advised appellant that if it intended to proceed with its application prior to the amendment, the first respondent required further documents and details of five shareholders and directors.

[25] On 11 November 2014, Mr Helmut Angula the deponent to the appellant's founding affidavit held a meeting with the then Minister of Finance. He informed her of the first respondent's declining of appellant's application and the reasons first respondent relied on to decline the application. He further informed her that first respondent had mooted the idea of a provisional licence, while on 15 October 2014 he had already received first respondent's answer on the provisional licence. He went to an extent of enquiring from the Minister whether a provisional licence was possible. The Minister indicated that she would seek legal opinion from the Attorney-General (AG) on the issue.

[26] Mr Angula continued to aver that after the meeting with the Minister of Finance and after receiving first respondent's letter of 15 October 2014 to the effect that the SECA made no provision for a provisional licence, the appellant found itself in a dilemma of whether it should wait for the opinion sought by the Minister of Finance or continue with its application under the SECA as it were then or wait for the amendment the first respondent had hinted at. He further stated: 'In addition, the applicant still did not want to part with its confidential information under the circumstances where first respondent had ostensibly declined the application but still requested information pertaining to it'.

[27] The deponent further stated that appellant resolved to wait for the opinion of the AG. Appellant stated that in November 2014 Namibia held general elections, which brought change to the portfolios of the third – fifth respondents and that on 12 September 2015, Mr Phillip Shiimi the then first respondent and Registrar of Stock Exchanges passed on.

[28] On 8 October 2015 appellant wrote to the first respondent (who was then Mr Kenneth Matomola) informing him of the discussions it had had with the then AG regarding the then outstanding legal opinion. On 28 October 2015 Messrs Helmut Angula and Anthony de Silva met the then Minister of Finance to establish with him whether the legal opinion had been received. The Minister informed them that he had not yet received the opinion and by the time the appellant attested to its founding affidavit the Minister had not reverted to the appellant. By January 2016 the opinion was still not made available. On 21 January 2016 applicant addressed a letter to the first respondent demanding to be issued with a licence.

[29] As a result of the turn of events, on 27 January 2016 the appellant received a letter from the fourth respondent who proposed a meeting between himself, the first respondent and the appellant to resolve the matter. The appellant accepted the invitation. The meeting was held on 5 February 2016, but due to a substantial delay in the commencement of the meeting, only the fourth respondent attended the meeting. The appellant was advised that it could expect a letter from the Minister of Finance in reply to its letter of demand of 21 January 2016. But up to the time the application was lodged no such letter was received.

[30] However in reply to appellant's letter of 21 January 2016, in a letter dated 5 February 2016, the first respondent informed the appellant *inter alia* that 'the reasons for the refusal of your client's application are provided in the letter dated 9 September 2014. The Registrar's decision remains valid until it is overturned by the Board of Appeal or the High Court of the Republic of Namibia'. Further that, a provisional stock exchange licence was not provided for by the SECA. Lastly, that he was *functus officio* and could not issue a stock exchange licence, unless it submitted a new application which complied with the requirements of the SECA.

[31] On 11 April 2016, the appellant responded and among other things stated that it had consulted and obtained advice from senior counsel, with a view to prepare and if necessary institute legal proceedings and that it had been advised that the grounds on which its application had been refused fall within a narrow factual enquiry. It gave respondents a final opportunity to consider its application for the issuance of a stock exchange licence within 14 days. It then provided the details of at least two members (entities) who will carry on the business as buyers and sellers of listed securities as required by s 8(b) of the Act.

[32] Appellant also stated that while first respondent advised that the share capital of N$70 000 was insufficient to conduct a business of a stock exchange, the shareholders of the appellant had provided loan funding on a continuous basis, in cash and in kind, for the development, setting up and operation costs from July 2011. Up to that date, the value of the shareholder contributions was approximately N$5,6 million. It was stated that the high cost was primarily attributable to the delay in the finalisation of appellant's application. The respondents were further advised that the necessary changes were effected to appellant's proposed rules.

[33] In response and on 27 April 2016, the first respondent reiterated that he was *functus officio*.

[34] Appellant alleges that its application for a stock exchange licence was unduly delayed due to obfuscation on the part of the second respondent. Instead of considering the appellant's application expeditiously, second respondent raised extraneous obstacles to delay its application and ultimately refused the application on improper grounds which have no rational connection to the purpose of the Act.

[35] Section 7(3) of the Act makes provision for an application for a stock exchange licence in a prescribed manner, yet upon request by the appellant for such prescribed form, no such prescribed form or prescribed manner was made available to the appellant. At the appellant's first meeting with the first respondent around April 2012, none of the officials of the second respondent knew of the application process and none could provide the appellant with the prescribed manner or forms.

[36] The appellant as a result applied for a stock exchange licence with the information it regarded as relevant. The first respondent acknowledged receipt of the application as well as the application fee by letter dated 15 May 2012.

[37] Disgruntled by the outcome of its application, the appellant instituted proceedings in the High Court seeking the relief set out in para 2 above.

Respondent's case

[38] The first respondent Mr Kenneth Matomala who is the current Chief Executive Officer of the second respondent and the Registrar of Stock Exchanges, deposes that the late Mr Shiimi, who then was the Chief Executive Officer of the second respondent and the Registrar of Stock Exchanges took the decision of 9 September 2014 declining the appellant's application.

[39] He states that appellant delayed the process at least from 21 November 2012 by refusing to provide additional documents requested. Appellant responded by letter dated 29 September 2014, that the information and documents requested by the first respondent were not provided to protect the individuals and investors' confidentiality and the said information and documents would be furnished once a provisional licence was granted.

[40] He goes on to say that the first respondent then had to investigate whether a provisional licence was provided for by the SECA. On 15 October 2014, the first respondent informed the appellant that a provisional licence was not provided for by the SECA. The first respondent again set out in detail what documents and information were required. Instead of providing the information and documents requested, the appellant opted to wait for the decision of the AG which was requested by the Minister of Finance, even though the Minister of Finance is not the decision maker and could not prescribe to the Registrar what decision to take. The appellant waited for almost a year for the opinion of the AG. The appellant 'still mooted the provisional licence, making no attempt, whatsoever, to submit the outstanding documents'.

[41] He further on states that the appellant then approached the Minister of Finance to enquire whether he had received the opinion. The appellant's conduct of approaching the Minister of Finance with the view to interfere with the first respondent's decision making or to dictate to him what decision he should take, was not only inappropriate, but irregular. First respondent states that appellant at all times was legally represented, it could have obtained its own legal opinion but instead it waited and thereafter demanded to be issued with a licence despite acknowledging in its letter of 7 October 2014 that the outstanding information was important for the consideration of its application. It is further contended that the letter of demand was copied to the Chairperson of the Board of Namibia Financial Institutions Supervisory Authority (NAMFISA), the Prime Minister, Minister of Finance and AG, clearly with the intention to have the decision of the Registrar influenced by one or some of them.

[42] As regards the meeting with the AG, first respondent avers that he was not invited to the meeting of 5 February 2016. On 21 January 2016, the date on which the letter of demand was authored, the first respondent by letter set out the history of the appellant's application and informed the appellant that he was *functus officio*, but that it may submit a new application, for consideration. Once the Minister of Finance had received the opinion of the AG, regarding the provisional licence, he shared it with the first respondent in a letter of 8 February 2016. The AG's opinion was to the effect that the Act did not make provision for a provisional stock exchange licence.

[43] First respondent further states that appellant attempted to provide some of the information required, but that the appellant's actions after 15 October 2014 when it was informed that a provisional licence was not provided for by the Act, were

unreasonable, ill-advised and irregular. The delay caused by their actions was a delay of almost two years. The delay was prejudicial to the public. One of the first respondent's responsibilities is to be satisfied that it will be in the interest of the public to issue a stock exchange licence. As a result, the first respondent invites comments from the public in respect of an application for a stock exchange licence, as was done in the appellant's case. The comments from the public were received in June 2013 already. There have been significant changes in Namibia since then which may influence the comments of the members of the public. The information provided by the appellant between May 2012 and February 2016 can no longer be regarded as current. For these reasons, it would be unreasonable for the court to order the Registrar to consider the application submitted in May 2012 and supplemented thereafter.

[44] The first respondent maintains that the appellant must submit a new application that complies with the Act.

[45] As regards the relief sought in the notice of motion, the first respondent avers that there was nothing irrational about the decision of the first respondent dated 9 September 2014. The relief sought in prayer 2.1 is inappropriate as in matters of this kind, the relief sought would be for the court to review and set aside the decision where justified and have the matter remitted to the decision maker for reconsideration. The relief sought in prayer 2.2 of the notice of motion is an alternative prayer to prayer 2.1. Prayer 2.2 is problematic as explained above as it requires the court to order the first respondent to reconsider the application of the appellant submitted on 8 May 2012.

[46] In the letter dated 27 April 2016, the appellant was provided with forms that had to be completed as well as the s 8 requirements for the stock exchange licence to enable it to submit a new application and that the option remained open to the appellant: the forms and requirements have been revised. Further, what would constitute sufficient financial resources was also set out in the same letter and some guidance on the point was also given in the letter of 15 October 2014.

[47] First respondent states that the appellant's application was not unduly delayed because of any obfuscation on the part of the first and/or second respondents. From the appellant's own papers, the delay was caused by the appellant's failure to provide the requested documents and information. The appellant wanted to prescribe the process to be followed by the first respondent and the stages at which relevant information should be submitted by it. Such an approach was not only unheard of but also irregular and caused further delays. A further delay was caused because appellant refused to accept repeated assurances by the Registrar that its application would be treated confidentially as required by the Namibia Financial Institutions Supervisory Authority Act (NAMFISA Act). The appellant only submitted its business plan in February 2014, two years after it submitted its application. That business plan did not address the requirements in s 8 of the SECA, particularly s 8(c).

[48] First respondent's answer to appellant's allegation that the prescribed manner and form referenced in s 7(3) is contained in the SECA regulations of 18 July 1986 is that there are no regulations that prescribe the manner and form of an application for the issuance of a licence as contemplated in s 7 of the SECA.

[49] According to first respondent, it is correct that s 46 of the SECA does not require the first respondent or any of its nominated officials to assume the role of director of a stock exchange nor does it make provision for payment by a stock exchange to the first respondent or such nominated official for attending meetings as contemplated in s 46 of the SECA. The Act however does not expressly or impliedly prohibit the payment of sitting fees to the first respondent or his nominated officials. The first respondent denies any partiality on his part. Further, he averred that, while the sitting fees were not prohibited, in hindsight it may have been inappropriate considering the perception it would have given rise to. The issue had in any event become irrelevant as the practice was stopped. There was no conflict of interest.

[50] On confidentiality and secrecy, first respondent states that as s 30 of the NAMFISA Act makes provision for the preservation of secrecy, there was therefore no need for the fear that the appellant's confidential information would have been leaked and that appellant was assured that all its information would be treated with utmost confidentiality and secrecy in compliance with s 30 of the NAMFISA Act.

[51] On the criticism that first respondent did not know about the existence of the Stock Exchange Regulations, first respondent's answer is that the NSX was formed before the NAMFISA Act came into force, therefore the appellant's application is the first of its kind brought after the establishment of NAMFISA. It is true that since there is no prescribed form, none was provided to the appellant.

[52] First respondent admits that the SECA does not require the registration documents of an entity. However, the appellant in its application indicated that it was a private company. The first respondent needed clarity on the entity that was applying and hence requested the registration information, particularly because the SECA requires an association of persons to be applicants. There were no documents evincing the registration of the appellant as a company or an association. Initially, the appellant indicated in its application that it was a private company. Then it indicated it was an association of ten persons and later it indicated that its intention was to be registered as a company. Any licence to be issued had to be issued in the name of the correct entity. Therefore, the request for the registration documents was necessary.

[53] The first respondent's interpretation of s 7 is that the Minister must in respect of every application determine the number of persons forming the association.

[54] Appellant complains that it was dumbfounded when on 21 November 2012 it received a letter from Ms Lily Brandt instead of the first respondent, who sought further documentation. First respondent's answer is that though the first respondent was appointed to review the appellant's application, he did not have to sign every document. There is no requirement in the SECA to this effect. The persons who signed the letters were delegated by the first respondent to sign such letters. These persons then signed the letters on authority of such delegation, therefore those letters are official. He further states that the information required was to determine whether appellant was a company or an association as the licence had to be issued in the name of the correct entity and whether it would be in the interest of the public

to issue a licence and whether appellant had sufficient financial capital to operate its business.

[55] On the allegation that respondents delayed advertising the application, first respondent states that the appellant only provided the payment for the advertisements in April 2013. The application was then published on 15 and 23 May 2013. The delay in advertising the application was as a result of the appellant only paying for such advertisements in April 2013.

[56] First respondent denies an agreement to have review meetings, as the review function was that of the first respondent. It would have been irregular and inappropriate for the first respondent to review the appellant's application together with the appellant.

[57] The first respondent denies threatening the appellant when he informed it that the application would be considered on the information before it. The first respondent could not wait indefinitely for the information requested from the appellant, which information was not forthcoming.

[58] More than a year and a half after the documents were initially requested by the first respondent, the appellant was given an initial deadline for the delivery of such documents/information by 16 August 2013. This deadline was then extended to 13 September 2013, then to 11 October 2013 and again to 8 November 2013. It was after the appellant's failure to comply that the first respondent informed the appellant that he would consider the application based on the information before him. The first

respondent then, based on the information before him, declined the application on 9 September 2014.

High Court Proceedings

[59] The court *a quo* essentially determined the application on three issues mainly and these are (a) *functus officio*, (b) delay and (c) conflict of interest.

[60] Relying on the principles enunciated by this Court in *Hashagen v Public Accountants' and Auditors' Board*[1] the court *a quo* reasoned that once the decision of 9 September 2014 was given and communicated to the appellant, that decision became subject to the right of appeal or review and the first respondent consequently lost his jurisdiction in the matter. He was therefor precluded from going back to his decision or to assume power again in respect of the same decision.[2] The court further reasoned that, this Court in the *Hashagen* considered it impermissible on the doctrine of *functus officio* for the complainant to re-submit an affidavit based on new or additional facts as that would be inimical to the doctrine. So too, that court reasoned that, the first respondent's invitation to the appellant to submit further documents or information after the decision of 9 September 2014 was impermissible in terms of the doctrine of *functus officio.* The court as such confirmed that the first respondent was indeed *functus officio* after his decision of 9 September 2014 was communicated to the appellant.

[61] As regards the issue of delay, the court reasoned that the clock started ticking on 9 September 2014 when the first respondent communicated his decision to the

[1] *Hashagen v Public Accountants' and Auditors' Board* 2021 (3) NR 711 (SC).
[2] *Ibid*, para 30.

appellant. The appellant only instituted the proceedings on 26 July 2016, which the court below found was a delay of 22 and half months and therefore constituted a delay of almost two years. The court noted that the appellant afforded itself the leisure of inactivity during the periods it impermissibly attempted to solicit interference from the Prime Minister, Minister of Finance and the AG. These steps, so the court reasoned, caused significant delays which were neither necessary nor reasonable. There was, so the court reasoned, also tardiness in launching the threatened legal proceedings for which also no reasons were advanced, when such legal proceedings were threatened already in January 2016 and where senior counsel had been engaged before 11 April 2016 to prepare for legal proceedings.

[62] The court *a quo* found against granting condonation for the delay for the following reasons: (a) the appellant was legally represented throughout the application process; (b) the appellant caused an inordinate delay in its quest for a provisional licence as it was not necessary to wait for the AG's opinion when such advice could have been sought from senior counsel and legal proceedings instituted much sooner; (c) the letter of the appellant dated 21 January 2016 was copied to the Chairperson of the second respondent, the Prime Minister, the Minister of Finance and the AG (the clear intent with this approach, so the court found, was to have the first respondent's decision influenced by either the Minister of Finance or the AG – an invitation rightly not entertained by either one of them); (d) the court agreed with the first respondent that developments have occurred in Namibia since the appellant submitted its application which might influence public comment and that the comments of 2013 can no longer be regarded as current; and (e) further that due to

time lapse and developments that have since taken place, the information provided by the appellant between the years 2012 to 2014 are no longer current.

[63] As regards conflict of interest, the court noted that the decision of 9 September 2014 was taken by the late Mr Shiimi, whereas the payments/sitting fees received were in respect of other officials of the second respondent and the present CEO of the first respondent. Therefore, the decision of Mr Shiimi could not have been tainted by bias. In any event, the appellant continued to participate in the process after the issue of conflict of interest was addressed in the letter of March 2014. Such further conduct cured the objection. Therefore the court found that the point on conflict of interest should equally fail.

[64] On the merits, the court reasoned that compelling the first respondent to make a decision on outdated information would result in prejudice to the functionary, even if such information was supplemented. Doing so would not be prudent, in light of changes since 2012 in the economic landscape of the country, with particular regard to the impact the Covid-19 pandemic has had on the economy.

[65] The court reasoned that, throughout the process leading up to the decision of 9 September 2014, the first respondent gave the appellant *audi*. Further and critically so, the appellant acquiesced and participated throughout. It was further common cause that the application submitted in 2012 was defective. The application remained defective and non-compliant with s 8 of the SECA at least until April 2016. It was undisputed that the information required by s 8(c) was only provided in the letter dated 11 April 2016. It was only on 11 April 2016 that the appellant indicated that an

amount of N$5,6 million will be accessible from its investors, the averment which is vague. The court found that in terms of s 8(c), the appellant had to satisfy the first respondent that it had sufficient financial resources to conduct the business of a stock exchange. The appellant failed to satisfy this requirement, so the court below found. Further that, it was only on 29 September 2014, that the appellant informed the first respondent that the issue of foreign directorship had been corrected as envisaged by s 12(1)*(a)*(ii)(*bb*) of the Act. The appellant's application of May 2012 did not comply with the requirements of s 8 of the Act, hence the first respondent's decision of 9 September 2014. The fact that the appellant did not comply with s 8 of the SECA was conceded by the appellant in its letter dated 29 September 2014.

On appeal

[66] The appellant appeals against the whole judgment and order of the court below. The grounds of appeal in summary are in this form:

a) The court *a quo* erred in finding that the appellant did not persist with its argument that the decision of 9 September 2014 was inchoate.

b) The court erred in finding that the first respondent was within his rights on 5 February 2016 and 27 April 2016 when he advised that he was *functus officio*. This is so because the decision of 9 September 2014 was not final as first respondent requested further information. The court therefore failed to consider the reasoning of the South African Constitutional Court in *Njongi v Minister of the Executive Council, Department of Welfare, Eastern Cape* (CCT 37 of 2007) [2008] ZACC 4 (28 March 2008). That the doctrine

of *functus officio* was not applicable to the appellant's application, in that its strict application ought to have been relaxed owing to the request for further information.

c) The court failed to fully have regard to *Chandler v Alberta Association of Architects*, quoted in *Carlson Investments Share Block (Pty) Ltd v Commissioner, South African Revenue Services* 2001 (3) SA 2010 (W).

d) The court also erred in finding that the delay in instituting the application should be reckoned from 9 September 2014 to 26 July 2016.

e) The court took into account irrelevant facts for purposes of the issue of delay. The appellant was not required to rush to court. It had to ascertain the effects and terms of the decision, consult counsel, attempt amicable resolution, consult with deponents to its supporting affidavits and then prepare to lodge the application. That public interest in finality and certainty should give way to other considerations. Therefore, the delay was not unreasonable and should have been condoned.

f) The court erred in finding that even after raising the issue of conflict of interest, the appellant continued to participate in the process and that such further participation constituted consent and therefore cured the appellant's objection.

Statutory Framework

[67] The relevant provisions of the SECA provides as follows:

‘**Application for issue of renewal of stock exchange licence**

7 (1) Notwithstanding the provisions of section 30 of the Companies Act, 1973 (Act No. 61 of 1973), any number of persons as the Minister may approve may form an association to carry on the business of a stock exchange, and the association may apply for and be issued with a licence to carry on the business of a stock exchange.

(2) A stock exchange licence shall be issued or renewed by the Registrar.

(3) An application for the issue or renewal of a stock exchange licence shall be made in the prescribed manner and form, and be accompanied –

(a) by the prescribed application fee; and

(b) in the case of an application for the issue of a licence, by five copies of the proposed rules of the applicant.

(4) Upon receipt of an application for the issue of a stock exchange licence, the Registrar shall advertise the application by notice in the *Gazette* and once in each three consecutive weeks in two newspapers circulating nationally at the expense of the applicant.

(5) The advertisement referred to in subsection (4) shall state –

(a) the name of the applicant;

(b) the place where the rules of the applicant shall lie open for inspection by any member of the public; and

(c) the period within which any objections to the issue of the licence may be lodged with the Registrar, not being less than 14 days from the date of the last publication of the advertisement.

Issue of stock exchange licence

8 On the expiry of the period contemplated in section 7(5)(*c*) the Registrar may, after consideration of any objection lodged under that section, issue to the applicant a licence to carry on the business of a stock exchange, if –

(a) the interests of the public would be served by the issue of the licence;

(b) at least two members of the applicant will carry on the business as buyers and sellers of listed securities independently of and in competition with one another;

(c) the applicant has sufficient financial resources for the proper exercise or carrying out the powers and duties conferred upon or assigned to a stock exchange by or under this Act; and

(d) the proposed rules of the applicant comply with the requirements of this Act.

12 **Rules of stock exchange**

(1) The rules of a stock exchange shall be so designed as to ensure, to the satisfaction of the Registrar –

(a) that no person is admitted or allowed to continue as a member unless -

(i) such person is of good character and integrity;

(ii) in the case of a corporate body, it is managed and controlled by a board of directors of which –

(*aa*) the directors are of good character and integrity; and

(*bb*) subject to subsection (1A), the managing director and at least 50 per cent of the other directors are Namibian citizens resident in Namibia.'

Submissions and analysis of the evidence

[68] Mr Maleka for the appellant in his oral submission argued that the judge below found that the delay in appellant's application operated against the appellant only and not the respondents which is an approach inconsistent with the jurisprudence of this court because the court below reflected only on the conduct of the appellant without reflecting on the conduct of the opposing respondents. He submitted that the jurisprudence of this court makes it quite clear that an inquiry into the question whether or not there was undue delay must focus on the conduct of the relevant parties at play and further that on the facts that are common cause, much of the delay, if ever there was one, was attributed to the conduct of the respondents. He further submitted that the suggestion that a delay of two years is on the ultra-extreme that constitute undue delay is incorrect because there are judgments which indicate that, a challenge to an illegal or unlawful administrative action can be mounted way beyond the period of two years. He referred to a South African case *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2010 (1) SA 333 (SCA) where an unlawful administrative action was challenged 40 years after the decision was taken by the Administrator.

[69] The administrative decision which existed for 40 years was set aside because there were public interest considerations which militated against the operation of that decision. The appellant relies on the approach adopted in that case simply to make the point that it is not enough to reflect on the period and say that the period is inordinately long, one must look at the period in the context of the prevailing facts and the operating considerations of public interest.

[70] Counsel further submitted that the holding of the court below, particularly in para 34 of the judgment that it is obvious that a period of two years is unreasonable, that approach in itself is fundamentally mistaken. It was further argued that the holding on the question of undue delay that the clock started to tick from 9 September 2014 when the decision to refuse the application for the stock exchange licence was communicated to the appellant, is mistaken for a number of reasons.

[71] The decision communicated to the appellant did not make it quite clear to the appellant that the Registrar took the view that he was *functus officio* and therefore could not revisit the request to reconsider his decision. That there was nothing in the letter of 9 September 2014 which suggests to the appellant that the Registrar has taken the view that his decision is final and therefore *functus officio*. What is clear from the letter, so the argument went, is that the Registrar never communicated the fact that the application was rejected forever and a day. Instead, he made it quite clear that he could reconsider if what he perceived to be a proper application was resubmitted. He further contended that in the respondents' heads of argument they accept that the letter kept the door open for the appellant, more so that after the letter was sent to the appellant there were further engagements that took place between the parties on the one hand and the appellant, the Minister of Finance and the then AG at the time to try and break the impasse relating to the confidential information which the appellant was required to submit, but was concerned that it could land in the hands of its potential competitors. That the first time the Registrar communicated to the appellant that his decision of 9 September 2014 was final and that he was *functus officio* was in his letter of 5 February 2016.

[72] Counsel argued furthermore that appellant engaged the Registrar in its letter of 11 April 2016 wherein it provided the information to the Registrar on which the Registrar had declined the application. But that notwithstanding, the Registrar in his letter of 27 April 2016 repeated that he was *functus officio*. It is submitted that the Registrar's stance in the letter of 9 September 2014 and the letters of 5 February 2016 and 27 April 2016 cannot exist side by side. That the first time appellant came to know that the Registrar was *functus officio* was in the letter of 5 February 2016 and by the conduct of the Registrar, the clock started to tick on 5 February 2016 and not 9 September 2014. That it is that conduct of the Registrar the court below did not take into consideration and that had it done so, it would have found that the appellant was put on notice on the delay rule on 5 February 2016. Counsel submitted that a delay of four months from 5 February 2016 to July 2016 when the application was filed is not an unreasonable delay. The submission is reinforced by the contention that the court below was not dealing with an application which was required to be submitted within a prescribed time period, it was sufficient for the Registrar to be put on notice that the appellant intended to challenge the decision, which in itself was good enough to assess whether a subsequent application challenging the Registrar's decision was reasonable or not. Counsel submitted that the judge below was mistaken when he concluded that the time period started to run on 9 September 2014.

[73] If this Court is not with him or finds that the judge below was correct in concluding that the clock started to tick on 9 September 2014 and that there was undue delay, he submitted that it was a delay that should have been condoned. He

submitted that there are seven public interest considerations which justify the condonation of the delay which are manifestly common cause on the record, namely:

(1) In terms of s 7 of SECA an application for a stock exchange licence must receive a prior approval by the Minister of Finance, which in this case was granted, and still exists and not challenged by the respondents.

(2) The application which the Registrar purported to decline had gone through the administrative and procedural requirements of s 7 of SECA, among other things included advertisement of the application in the relevant media platforms, including the Government Gazette, interested persons and members of the public at large.

(3) There were no adverse comments or objections by any interested person or member of the public to the applicant's application for a stock exchange licence.

(4) The application was not something that was thought of without any prior research by the appellant about the need for a second competing stock exchange in the country.

(5) There exists a monopolistic market of a stock exchange in the country. It is in the public interest that there should be competition in that market, especially in the area where the appellant wishes to operate in order to

provide capital for individuals who are otherwise ignored in this monopolistic industry.

(6) Appellant has gone to great lengths and has incurred substantial expense in preparing the application in engaging third party consultants, and in engaging the Registrar to progress the application.

(7) The application was rejected on a narrow ground, that information which was previously sought was not given. Given the narrow ground on which the application was rejected it is submitted that a period of two years if the clock started to tick in September 2014, is the one which should have been condoned, given the fact that the application carried the public interest consideration.

[74] Counsel concluded on the point of delay by submitting that on any basis, whether as a matter of fact or the exercise of discretion the court below was wrong to conclude that there was inordinate delay, and in any event, it was wrong to conclude that the delay if ever one existed, should not be condoned.

[75] On the question of unreasonable delay Ms Bassingthwaighte on behalf of the respondents submitted that the letter of 9 September 2014 did not leave a door open for the appellant to resubmit or submit its application or supplement its existing application with further documents. It was actually the Registrar's letter of 15 October 2014. She relied on paras 4, 5, 6, 7 and 8 of the letter to make the submission above. Those paragraphs are in this form:

‘4. Following our meeting of 6th October 2014 and the Registrar’s inquiry into the matter of “Provisional or Conditional licencing”, we wish to highlight to you that such arrangements are not provided for in the Act, and therefore, the Registrar would not be able to legally issue a “provisional or conditional licence”.

5. We have however, noted the need for such a legislative provision and are initiating a process to amend the current Act to make provision for such provisional or conditional licencing. In the meantime, you will either have to fully comply with the current legislative requirements as stated in paragraph 2 above, or have to wait for the enactment of the amendment to the current legislation once finalised.

6. In the event that you opt to proceed with the application prior to the proposed amendments being enacted, the Registrar would require NAMFIN-X to provide, in relation to sub-paragraph 2.3 above:

6.1. A copy of the projected budgeted income statement, balance sheet and cash flow statement for a three year period from the date of anticipated commencement of business;

6.2. A schedule illustrating the funding provisions for anticipated supervisory responsibilities over the budgeted period;

6.3. A statement signed by the president specifying the critical assumptions made in the preparation of budgets and the sources from which the applicant will derive funding; and

6.4. Where arrangements have been made for the funding of any temporary shortfall in available cash resources, a statement must be provided by the party or parties concerned setting out the extent and terms of their commitment.

7. NAMFISA, as a supervisory body, has responsibility in terms of section 35 (15)(a) and (b) of the Financial Intelligence Act, 13 of 2012; to ensure that no

person who is not fit and proper, may control or manage directly or indirectly, any institution regulated by NAMFISA.

8. In light of paragraph 7 above, the Registrar would require that NAMFIN-X provide details of the shareholders and directors of the following entities that are shareholders of NAMFIN-X for assessment of their fitness and propriety.

- Torre Silva Investment Holdings (Pty) Limited;
- Full Screen Investments (Pty) Limited;
- Quote Africa Group Limited;
- H.K. Transkunene Consulting Service and Associates (Pty) Limited; and
- The Han Trust.'

[76] It was at this point, so argued Ms Bassingthwaighte that appellant continued to refuse to provide the documentation required of it and elected to pursue the option of a provisional licence and decided to involve the Minister of Finance and the AG, to assist in the process, that the open door created by the letter of 15 October 2014 closed. On this point counsel referred to appellant's letter of 21 January 2016 particularly paras 8 and 9 in support of the argument above where the following is stated:

'. . . Our client was then given the option to wait for the enactment of the amendment or continue with the application process that the Registrar and his officials were conducting. It follows that either alternative could not be acceptable to client.

Our client was aware of the fact that the Act was silent on the matter of provisional or conditional licensing. Our client's application was also not prepared on that basis. Rather our client expected to be issued with a licence as it was in the position to fulfil the requirements set out in section 8 of the Act. As such our client approached the then Minister of Finance to seek her position on the Registrar's determination as our client understood that the process of considering the application for the issue of a stock exchange licence was void of administrative justice. The Minister of Finance

> advised that she would approach the Attorney General for an opinion.' (Emphasis added)

[77] She further argued that from November 2014 to 12 September 2015 appellant remained inactive. The Registrar was entitled to assume or assumed that he was *functus* as far as the existing application was concerned. But the door was still open for the appellant to apply for a licence afresh, the point on which she is in agreement with counsel for the appellant. She does not support the finding by the court below where without making room for a fresh application by appellant, it said the Registrar's decision was final.

[78] On the issue whether the court *a quo* should have condoned the delay, counsel argued that in appellant's letter of 11 April 2016, appellant attempted to provide some documentation required but does not say it will provide N$5,6 million but says the N$5,6 million has been spent and the Registrar could not determine whether appellant had sufficient financial resources for the proper exercise or carrying out of the powers and duties conferred upon a stock exchange.

[79] In its letter of 11 April 2016, the appellant explains that its proposed rules were allegedly amended to reflect that the managing director and at least 50 per cent of its directors are Namibian citizens resident in Namibia in terms of s 12(1)(*a*)(iii) and (bb) of the SECA and its president during his term of office may be remunerated by the committee and does not himself buy and sell securities in terms of s 12(1)(*m*) of the SECA. Counsel pointed out that Mr Maleka urged this court to consider whether the proposed rules comply with all the requirements of the Act and submitted that, that is not one of the things this court should be engaged in and that it is not a foregone

conclusion as the appellant wants this court to believe. That the court would have to consider all the documents, apply its mind to the factors as if it is the regulator of the stock exchanges and decide whether the licence should be granted.

[80] When counsel turned to the explanation offered by appellant of why the documents requested from it were not provided earlier or at the time they were requested, its fears of its confidential information being shared with a competitor, she argued that, that issue does not hold water because the issue was resolved in 2013 and referred to the Registrar's letters of 14 March 2013, 23 April 2013 and 20 November 2013. She submitted that the fact of the matter is, the appellant has not provided any real reason why it did not provide all the information that was requested at the time. She contended that appellant accepts that at the time when the decision of 9 September 2014 was made, its application was incomplete because it had not complied with s 8 of the SECA and that, that decision cannot be faulted and there is no basis on which it can be set aside. In fact, so she argued, this is where the merits come into play. On the merits she contended that the review cannot succeed or would not have succeeded.

[81] Under the statutory scheme created by the SECA, the Registrar of Stock Exchanges in terms of s 8 of the SECA, may, after consideration of any objection lodged under s 7(5)(*c*) issue to the applicant a licence to carry on the business of a stock exchange, if –

(a) the interests of the public would be served;

(b) at least two members of the applicant who would be buyers and sellers of listed securities;

(c) the applicant has sufficient financial resources to carry out the powers and duties conferred upon a stock exchange; and

(d) the proposed rules of the applicant comply with the requirements of the Act.

[82] The four requirements form the bedrock of the issuance of a stock exchange licence and their compliance is therefore mandatory. Therefore non-compliance with s 8(b) – (d) cannot be said to be narrow grounds. The advice to that effect is ill founded. It is clear that from the Registrar's letter of 9 September 2014 declining appellant's application that appellant had not complied with s 8(b) – (d). This notwithstanding the numerous letters by the Registrar of 21 November 2013, 23 April 2013 and 05 August 2013 requesting the information or documentation from the appellant. It is safe to say from 8 May 2012 when the appellant lodged its application with second respondent to 9 September 2014, a period of exactly two years, the application was incomplete or defective as the court below found. The issue of incompleteness of the appellant's application up to that point is common cause.

[83] In fact responding to the Registrar's letter of 9 September 2014, appellant in its letter of 29 September 2014 in para 2 stated: –

> 'We advise that the matters raised in your aforementioned letter at a), b) and c) on page 2 were anticipated to have been part of the 120 day review process leading to the conditions to be met to your satisfaction in terms of a provisional licence which we

> believed (as was discussed with you at our meeting of 26 February 2014 before our submissions were presented in March 2014) would be granted. You will recall that the reason why this information was not presented was to protect individuals and investors confidentiality prior to receiving a provisional licence. Thereafter these disclosures were going to be made. This was stated categorically at the meeting on 26 February 2014. Notwithstanding this we shall submit all the required information as well as make the additions and/or amendments to the proposed Rules of NamFinX in this extended review process as advised by your letter.' (Emphasis added)

[84] That is why in my opinion, the first relief sought by appellant in its notice of motion seeks to declare unlawful the actions and decisions of the respondents in arriving at the decision of 9 September 2014, but not the decision itself because on the common cause facts it is unassailable. I agree with Ms Bassingthwaighte that, that relief is incompetent.

[85] After the letter of 9 September 2014, which should have been the end of the road for the appellant in as far as its application was concerned, the Registrar gave the appellant another lifeline, when he agreed to attend a meeting of 6 October 2014 initiated by appellant to address appellant's concerns. At that meeting the issue of a provisional licence was mooted. In fact, the Registrar indicated that he would initiate a proposal to amend the Act and he took it upon himself to investigate the possibility of a provisional licence.

[86] Eight days later on 15 October 2014, he reverted to the appellant by way of a letter, informing the latter that the SECA makes no provision for a provisional licence. He reiterated the provisions of s 8(a)-(d) as prerequisites that must be met for a stock exchange licence to be issued by the Registrar. It was in the same letter wherein the Registrar gave the appellant the option to either await the intended amendment to

the SECA or proceed with their application under the then current legislation and if it did, he required information from it which he adumbrated in the letter. As I have shown earlier on in the submissions of Ms Bassingthwaighte, both options were not acceptable to the appellant. It was at that point that appellant found itself in a dilemma and in its founding affidavit, it states: ‘In addition the applicant still did not want to part with its confidential information under the circumstances where first respondent had ostensibly declined the application but still requested information pertaining to it’.

[87] Once the appellant had rejected the options made available to it by the Registrar, Mr Helmut Angula who deposed to the founding affidavit of appellant, on 11 November 2014 went to see the Minister of Finance then and related to her the predicament the appellant found itself in and he enquired whether a provisional licence was a possibility. It must be remembered that at the time of the meeting with the Minister, the appellant was already in October 2014 informed by the Registrar that the SECA makes no provision for a provisional licence. The Minister informed Mr Angula that she would seek a legal opinion from the AG. From that point and for the greater part of 2015 appellant remained inactive until only on 8 October 2015 when appellant informed the Registrar (who was then Mr Kenneth Matomola) of the discussion it had with the AG regarding the opinion. On 28 October 2015 Messrs Angula and de Silva followed up with the then Minister of Finance on the legal opinion but it was still not received by the Minister. In the meantime on 12 September 2015, the then Registrar, Mr Phillip Shiimi passed on.

[88] From 15 October 2014 to the end of 2015 was a waiting period that had nothing to do with the Registrar, it was a choice the appellant had made for itself. January 2016 came, the opinion was still not available. On 21 January 2016, from nowhere, the appellant wrote to the Registrar accusing the Registrar of having insisted that the appellant obtain approval first from the Minister of Finance, that in December 2012 to its dismay the appellant discovered that some staff of the second respondent were conflicted regarding the consideration of its application, that the Registrar only gazetted the appellant's application on 15 October 2012 and published in the local newspapers six months later in May 2013.

[89] The letter proceeded to state that notices inviting the public to lodge objections no later than June 2013 represented an inordinate extension of the time frame proposed by the Act, in contravention of the Act, that instead of the rules of the appellant lying open for inspection, the regulator disseminated electronic copies to interested parties, which included the NSX, a competitor of the appellant and that as a result the appellant lost confidence and trust in the process of the consideration of its application and felt vulnerable with regard to its intellectual property and confidential proprietary information and that appellant believed that the application would be unjustly declined and that all the information relating to the application would be made available to the NSX and other potential competitors.

[90] The letter goes on to say the options given to the appellant by the Registrar in his letter of 15 October 2014 were not acceptable. That the appellant was aware that the SECA makes no provision for a provisional licence, that it expected to be issued with a licence as it was in the position to fulfil the requirements in s 8 of the SECA.

The appellant approached the Minister of Finance to seek her position on the Registrar's determination as the consideration of its application was *void* of administrative justice and it was advised that the Minister would seek a legal opinion from the AG. That several months went by since the meeting with the Minister, then it was the National election, and the death of the then Registrar. In May 2015 the AG assured the appellant that he did not see any legal impediment to a provisional licence and that his written opinion was submitted to the Ministry of Finance. The appellant advised the Registrar of that fact but no response was received from the Acting Registrar.

[91] The appellant seriously contends that the Registrar and/or second respondent's officials wilfully created a protracted delay in the application process with implicit intention to frustrate appellant, make it weary so it could lose interest in the application, in the result forfeiting the already substantial investment and expose appellant's intellectual and proprietary information to misuse; that the malicious intent of the respondents leaves appellant with no option but approach court for relief.

[92] Appellant demanded to be issued with a licence, subject to the requirements of the SECA within 14 days, failing which it was to institute proceedings against the respondents and adumbrated five reliefs including an order to refer the matter to the Anti-Corruption Commission.

[93] A careful analysis of the appellant's letter of 21 January 2016 against the evidence before us reveals that none of the delays complained of are attributable to the respondents but to the appellant itself. Once the appellant had submitted its

application on 8 May 2012, the issue arose whether it was a company or an association. On 25 June 2012 appellant wrote to the Registrar to provide the name of the association and that it is formed by ten persons. Three days thereafter on 28 June 2012, the Registrar approached the Minister of Finance to seek approval of any number of persons as the Minister may approve as per s 7(1) of the SECA. The Registrar acted promptly. The approval was granted on 17 September 2012 which was no fault of the Registrar. Again three days after the approval on 20 September 2012, appellant was informed of the approval, no delay again. In the same letter, appellant was informed that the Registrar would obtain quotations for the advertisements which would be forwarded to the appellant as the SECA requires the applicant to carry the costs of the advertisement. Four days later on 24 September 2012, the Registrar provided the appellant with the quotations. The appellant only provided the funding for the advertisement almost seven months later on 12 April 2013. The advertisements were carried on 15 and 23 May 2013. Any delay in both these instances lies with the appellant without any shadow of doubt.

[94] The issue of conflict of interests is meritless. Appellant claims that in December 2012 it learned with dismay that some of the staff of the second respondent were allegedly conflicted. It does not appear that the then Registrar was one of them. In any event that issue was considered resolved in 2013 and to raise it in 2016 as a ground for review, is misleading to say the least. The Registrar went out of his way to explain and meet the demands of appellant on the issue. The appellant, *inter alia*, demanded that the nominees of the Registrar who attend the NSX meetings in terms of s 46 of the SECA should not be referred to as directors in the NSX reports, and the NSX should be so informed. Additionally, the NSX should

cease paying them for the meetings they attend and they should be made to pay back all the moneys they were paid. The Registrar complied with all of that except that he refused to have his nominees pay back the money because some were no longer employees of the second respondent. In paras 39-52 of the appellant's founding affidavit appellant refers to the relevant statutory provisions of the SECA and s 8 appears in paragraph 52 but when the application was submitted on 8 May 2012, it did not meet the requirements of s 8 and that was before it learned of the alleged conflict of interest of some of the staff of the first respondent. The appellant's fears on the issue of conflict of interest sounds hollow. I agree with the court below that the appellant's application was defective from the date of its submission.

[95] In my opinion, nothing turns on the invitation to the public to lodge objections no later than June 2013 or the fact that the appellant's rules were disseminated to the adversaries, first because the last advertisement was done on 23 May 2013 and secondly there were no adverse objections, that much is confirmed by the appellant itself. In fact when the Registrar gave the appellant a week to comment on the objections it complained that it was a short period and the Registrar had to extend it to October 2013. Before the end of the year the appellant had made its comments.

[96] I already stated that the wait for the legal opinion of the AG had nothing to do with the Registrar. It was not one of his options to the appellant in his letter of 15 October 2014. In fact in that same letter he informed the appellant that the SECA makes no provision for a provisional licence, which was confirmed by the legal opinion more than a year later. In its letter of 21 January 2016, the appellant admits that it was aware that the Act was silent on the provisional licence and its legal

representatives would have advised it that way. It made it clear why it approached the Minister, 'to seek her position on the Registrar's determination'. The court below was correct when it said that conduct was improper. There can be no doubt that it wanted the Minister/AG and the Chairperson of the second respondent to influence the outcome of the application without it complying with s 8.

[97] The appellant in para 10 of its letter states that it was reassured in May 2015 by advice from the successor of the AG that he did not foresee any legal impediment to the issuing of the licence and that his opinion was submitted to the Ministry of Finance. The AG is not the regulator and his assurances have no bearing on the respondents. In fact, it only confirms that the appellant wanted the AG to influence the outcome of the application. The date of 15 May 2015 cannot be correct because the legal opinion is dated 17 December 2015. The opinion contradicts the alleged reassurances particularly paras 2.3, 2.8.2 and 2.8.3 of the opinion. In para 2.3, the opinion states that the Registrar is a creature of statute and is enjoined to act within the scope of the enabling legislation and that in discharging his functions must be guided, specifically, by the purposes of the enabling legislation. The Registrar acts as an administrative official who is subject to Article 18 of the Namibian Constitution. In para 2.8.2 the opinion says, the Act as it stood did not reveal an intention of the legislature to permit persons to carry on the business of a stock exchange if they do not meet the specified requirements in, or under the Act. In para 2.8.3, the opinion says:

> 'Over and above what is stated above, reading into the Act an implied power to issue a provisional licence would, in effect, mean that the Registrar is indirectly empowered to alter the requirements of the Act in respect of certain categories of persons contrary to section 3 of the Act, which section begins with the words *"[no] person*

> *shall carry on the business of a stock exchange, except under a stock exchange licence"* and in addition to the exemption contemplated in section 32 in respect of activities relating to carriers against shares. Reading the provisions of the Act in context does not, however, intimate an inference that the legislature intended to confer such power on the Registrar.' (Emphasis added)

[98] The Minister of Finance writing to the Registrar on 8 February 2016 informing him of the legal opinion which letter was received on the same date, stated, that the SECA does not make provision for a provisional licence. 'It follows that any application has to be considered and evaluated against complete and comprehensive compliance for a full licence. You are therefore urged to implement your mandate accordingly'.

[99] We know that up to 16 January 2016, the appellant was still not compliant with the Act. What then was it complaining about? The answer is nothing, I find it difficult to appreciate what the complaint is all about.

[100] The Registrar answered to the appellant's letter of 21 January 2016. He related the timeline of appellant's application, namely, the company/association issue, the approval of ten persons forming the association by the Minister of Finance, the advertisement of the application and the Registrar's requests for the outstanding information from the appellant to the point when the application was declined. He stated that in dealing with the appellant, the Registrar acted within the confines of the Act and guided by relevant provisions of the Namibian Constitution. He further stated that the reasons declining the appellant's application were in the Registrar's letter of 9 September 2014 and that, that decision remained valid until it is overturned by the Appeal Board or the High Court.

[101] The Registrar further reiterated the fact that the SECA makes no provision for a provisional licence and that the Registrar was a creature of statute and can only do what the enabling legislation allows him to do. He said he was *functus officio* and refused appellant's demand to be issued with a licence, 'unless you submit a new application which complies with all the requirements of the Act'.

[102] The appellant which demanded to be issued with a licence within 14 days in its letter of 21 January 2016, responded to the Registrar's letter (dated 5 February 2016) after two months on 11 April 2016 a delay the court below also took into consideration in the unreasonable delay finding. The appellant threatened legal proceedings again and stated that the grounds on which the Registrar purported to refuse appellant's application 'fall within a narrow factual enquiry'. To avoid the looming legal proceedings, the appellant provided the Registrar with a final opportunity to consider its application within 14 days regard had to the information it was providing. It then proceeded to provide the information 'requested in your correspondence dated 9 September 2014 on a confidential basis'. It provided the names of two entities, in terms of s 8(b), namely Velocity Namibia and Avior Capital Namibia. It described the entities as established and well-resourced trading firms with regional and international representation, that it has identified suitably qualified Namibians who shall be recruited for employment and leadership of the entities and that the entities are to be incorporated on the issuance of the licence. Further that in terms of the proposed rules of the appellant, other stock brokers may also apply for authorisation to be members should they meet the relevant criteria.

[103] On the financial resources, appellant had indicated in its company documents N$70 000 as its share capital and the Registrar indicated that it was not sufficient to conduct a stock exchange. Appellant stated that from July 2011 it had received loan funding on a continuous basis in cash and in kind from its shareholders for its activities and up to 11 April 2016 the shareholders' contribution was almost N$5,6 million and that, that high cost is primarily attributable to the delay in the finalization of the appellant's application, which means that money was already spent. The appellant went on to say the Registrar had not informed it as to what would be regarded as sufficient capital and neither was it given an opportunity to make presentations on the issue to satisfy the requirement of s 8(c) and that appellant was still awaiting the Registrar's advice in that regard.

[104] On the proposed rules of the appellant in compliance with s 8(d), two amendments were made as already indicated above in para 79.

[105] On 27 April 2016, the Registrar responded reiterating that he was *functus officio* and refused to accede to the appellant's demands.

[106] The Registrar's defence is that the cause of the delay in appellant's application was the continuous refusal by the appellant to provide the information requested by the Registrar and the appellant's incessant fixation on the issue of a conflict of interest by some officials of the second respondent in determining the appellant's application an issue considered resolved in 2013. I agree. The refusal permeates throughout from start to finish. The Registrar puts it this way, 'surely the

appropriate time for the information to have been provided was at the time the application was submitted'– that is during May 2012.

[107] The information was not provided when the application was submitted but was requested on 21 November 2012 in the letter of Ms Lily Brandt. The appellant refused to provide the information since that date throughout until 11 April 2016 when it made an attempt to do so. That is a period of over three years, to be exact, three years and almost five months. I say it 'attempted' to provide the information in its letter of 11 April 2016 because its own explanation of its financial resources still remains at N$70 000 share capital which the Registrar said is not sufficient to run the powers and duties conferred on the stock exchange and the Registrar cannot determine its financial resources. In fact the appellant says it is still waiting for the Registrar's advice in that regard, but then why demand to be issued with a licence when that requirement is not satisfied?

[108] That same applies to the requirement of at least two members of the appellant who would be buyers and sellers of listed securities. The appellant provided the names of two entities which are trading firms. Section 3 of the SECA among other things, restricts the right of buying and selling listed securities unless the person is a stock–broker or a bank. Stock-broker as defined in s 1 means any person who is a member of a licenced stock exchange and is under the rules of that stock exchange authorised to carry on the business of buying and selling securities on behalf of other persons or his own account, or on behalf of other persons and on his own account.

[109] Section 3(7)(*a*) provides that a person shall not be deemed to be carrying on the business of buying and selling securities unless, in the opinion of the Registrar: (i) it is a regular feature of his business to buy and sell securities . . . , and, (ii) he holds himself out as a person who buys and sells securities.

[110] Section 12 above requires that the rules of a stock exchange shall be so designed as to ensure, to the satisfaction of the Registrar:

> ‘(a) that no person is admitted or allowed to continue as a member unless –
>
> (1) such person is of good character and integrity.’

[111] A reading of sections 3, 8 and 12 makes it very clear that the letter of the appellant of 11 April 2016 and the information provided therein in reply to the Registrar’s decision of 9 September 2014, is still insufficient to comply with s 8. In the Registrar’s letter of 15 October 2014, he had required the full details of the shareholders and directors of the entities that are shareholders of the appellant for assessment of their fitness and propriety. Appellant could not submit entities without the names of the persons who would run those entities. In fact the letter stated that they were identified but still yet to be employed. The Registrar cannot make a determination of good character and integrity of such directors on the information that was provided, which means even if the decision of 9 September 2014 were to be reconsidered together with the information in the letter of the appellant of 11 April 2016, in my opinion, the application would still have failed for non-compliance with s 8(b) and (c).

[112] In my opinion the appellant fails on the merits. One looks in vain for the allegations by appellant against the respondents. This is a case where the appellant must blame itself for its conduct, of continuously refusing to provide the information sought from it and over prescriptive towards the respondents.

[113] The *functus officio* stance of the Registrar of 5 February 2016 is not one of the actions and decisions that caused the respondents to arrive at the decision of 9 September 2014 declining appellant's application which is appellant's main prayer. Mr Maleka argued that the court below on the delay reflected on the conduct of the appellant only and not on that of the respondents and that on the facts that are common cause much of the delay if any, was attributed to the conduct of the respondents. I am not persuaded by this argument. As I have demonstrated above, there is nothing to impute to the respondents as the cause for the delay on merits or to fault the approach of the court below on the point, to which I turn very briefly.

[114] The court below cannot be faulted on the approach it adopted on the delay. Its reasoning is that the decision of 9 September 2014 was done in no uncertain terms and for reasons given and that, the fact that appellant was also given the option to re-submit the application is neither here nor there because that option was really irrelevant in view of the decision that had clearly been made. The learned judge concluded that the decision of 9 September 2014 was neither inchoate nor incomplete. Once the decision was made, the principle of *functus officio* came into play. The court relied on the decision of this court in *Hashagen v Public Accountants' and Auditors' Board* which says an administrative decision is deemed to be final and binding once it is made. The decision maker cannot re-open or revoke the decision

unless authorised by law expressly or by necessary implication. The court below then found that once the decision of 9 September 2014 was communicated to the appellant, it became subject to the right of appeal or review and the Registrar consequently lost his jurisdiction in the matter. He could not go back on his decision or to assume power again in respect of the same matter. In other words, when the late Mr Phillip Shiimi purported to invite for the submission of further documents in his letter of 15 October 2014, he was mistaken in doing so as he was precluded by the doctrine of *functus officio*. The court on point concluded that the Registrar was within his rights when in his letters of 5 February and 27 April 2016 advised that he was *functus*.

[115] The court below further found that the period from 9 September 2014 to 26 July 2016 when appellant lodged its application is a period of almost two years, which was unreasonable. It further found that the delay could not be condoned for the reasons that appellant had legal advice at all times and should have appreciated the underlying policy reasons for instituting proceedings for judicial review or declaratory relief promptly and without undue delay, that the delays that the appellant allowed to occur were deliberate and were occasioned knowingly regardless of the consequences. It found that the appellant's ill-advised fixation with a provisional licence was flogging a dead horse and approaching the Minister of Finance and the AG and Chairperson of second respondent or copying to them the letter of demand of 21 January 2016 was done with clear intention to influence the decision of the Registrar by one or all of them. Furthermore, the threats contained in the letter of demand, the prejudice to the members of the public who would have made their

objections as far back as 2013, and the stale information provided during 2012 – 2014 is no longer current.

[116] The court turned to the merits and among other things found that it was common cause that the appellant's application was non-compliant and defective from its submission in May 2012. I agree.

[117] Mr Maleka argued that the conclusion by the court below that the delay of two years is on the *ultra-extreme* such that it constitutes undue delay is not correct and referred to the *Oudekraal Estates* decision where the decision of the Administrator taken in 1957 was challenged after 40 years. That decision is distinguishable on the facts from this case.

[118] In *Oudekraal*, on portion 7 of the Estate were located graves and Kramats. At least two important Kramats were located on portion 7, one of a man regarded by Muslims as having been amongst the most pious of men and the other a teacher of Islam. The Kramats form part of the Circle of Islam made up of Kramats around Cape Town. Muslims in their numbers visit these Kramats and graves. Cape Muslims speak of the practice as, 'om die Kramats te groet'. Portion 7 and the area around was regarded as sacred and a proper place for spiritual reflection and meditation.

[119] The right to freedom of religion and culture of the Muslim community, as well as the right of the broader community to have a heritage and environmental area of high significance preserved, the fact that the majority of Muslims were previously politically, socially and economically disadvantaged because of repressive and

disempowering apartheid policies and were therefore unable to effectively assert and protect their interests played a major role in determining the undue delay. In paragraph 82, the court said, 'in the present case it is in my view possible to correct the monstrous wrongs and injustices of the past without doing violence to the property rights of Estates'. While the Court in *Oudekraal* found the delay to be unprecedented, it found the circumstances equally unique, the entire area regarded sacred by a formerly marginalised section of South African Society.

[120] What comes out in the present case however, is appellant's perpetual refusal to provide the information requested deliberately for that matter regardless of the consequences. Its pursuit of a provisional licence well knowing by its own admission that the Act makes no provision for a provisional licence, is not only unfathomably deliberate and self-defeating but is so unreasonable. The comparison between the delay in this case and of what occurred in *Oudekraal* is out of place and stands to be rejected. Neither can public interest in the two situations be comparable. The public interest in the *Oudekraal* speaks for itself.

[121] On the principle of *functus officio*, it was argued that the suggestion that the Registrar was *functus* is fundamentally wrong as a matter of fact and law, because in his decision of 9 September 2014, the Registrar never took the position that he was *functus* but only did that on 5 February 2016 when the information he had requested was given to him. What the court below said on *functus officio* holds for this judgment. In the letter of 9 September 2014, the Registrar declined the application and gave reasons for doing so. He further said re-submit a fresh application. The court below articulates the law on *functus officio* in that regard, *inter alia*, it said when

the Registrar purported to reopen his decision he lacked jurisdiction and could not have done so; meaning re-opening his decision, but once the appellant had rejected his proposals in the letter of 15 October 2014, the Registrar was back in his initial decision as if he never re-opened it and *functus* kicked in.

[122] It must be remembered that when the appellant wrote in its letter of 11 April 2016, *inter alia* that 'we thus provide to you the following information requested in your correspondence dated 9 September 2014 on a confidential basis'. The Registrar never requested information in his letter of 9 September 2014. He gave reasons for declining the application. The main relief sought by appellant revolves around his decision of 9 September 2014. That decision was final and he only left the door open for a fresh application. Counsel's submission on this point should also fail.

[123] Can this court substitute its own decision for that of the Registrar or compel him to issue the licence to the appellant or give direction to the Registrar how he should go about the appellant's application? Mr Maleka argued that the primary remedy that the appellant asks the court to consider is one of substitution. When it was pointed to him that that relief was not part of the notice of appeal, counsel retorted that the court should take both prayers 1 and 2.3 together with para 4 to issue an order the court considers appropriate in the circumstances. That the Registrar did not refuse the application on public interest considerations but rather on s 8(b) and (c) which was a narrow basis and that if the court is not inclined to grant the remedy of substitution, the court should remit the matter back to Registrar with clear directions on how the matter should progress.

[124] Ms Bassingthwaighte to the contrary submitted that the court should not venture in that unknown direction as the court does not know whether the rules of the appellant comply with the Act.

[125] I agree. The answer to the question on point is 'No'. In *Trencon Construction (Pty) Ltd*[3] the Constitutional Court of South Africa summarised the factors a court should consider when determining whether an order of substitution is appropriate, namely: (i) whether the court is as well qualified to decide the issue as was the original administrator; (ii) whether the end result is a foregone conclusion; (iii) where there has been a delay in the finalisation of the matter, whether further delay of the matter would be unjustifiable; and, (iv) whether the original decision maker has demonstrated bias or incompetence. That court went on to say the ultimate question is whether a substitution order is just and equitable, which involves a consideration of fairness to all implicated parties. That court further said; a court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it.

[126] For the reasons I demonstrated above, particularly that the information the appellant purported to provide in its letter of 11 April 2016 was still not compliant with the SECA, in my opinion, the court cannot substitute its own decision for that of the Registrar or compel him to issue a licence to the appellant, nor giving directions on how he should progress going forward. The Registrar has in his letter of 27 April 2016, particularly para 3 referenced what the appellant is required to do. In fact, in his affidavit he states that the rules have changed, and appellant's information of

[3] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* 2015 (5) SA 245 CC paras 47 – 48. See also *Freedom under Law v Judicial Service Commission & another* (Case No 550/2022 [2023] ZASCA 103 (22 June 2023), para 86.

2012 is stale. It is over 12 years since the application was submitted and the invitation for this court to grant a substitution remedy is unattractive, and should be refused which I do. It follows that the conclusion arrived at by the court below cannot be faulted and the appeal should fail.

Costs

[127] There is no good reason why the costs should not follow the event.

Order

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

1. The appeal is dismissed.

2. The appellant is ordered to pay the respondents costs, which costs includes that of one instructing legal practitioner and one instructed legal practitioner.

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MAINGA JA

_____

SHIVUTE CJ

_____

HOFF JA

APPEARANCES

APPELLANT:	V Maleka Instructed by De Silva Inc.

FIRST & SECOND RESPONDENTS:	N Bassingthwaighte Instructed by AngulaCo Inc.
THIRD, FOURTH & FIFTH RESPONDENTS:	No appearance