REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) ~~REVISED.~~

15/3/2018. .....
DATE SIGNATURE

14/3/18

CASE NO: 43235/2016

In the matter between:

SWANVEST 234 (PTY) LTD	Applicant
and	
THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	First Respondent
THE DIRECTOR OF THE DIRECTORATE OF ANIMAL HEALTH	Second Respondent
THE RED MEAT INDUSTRY FORUM	Third Respondent
AGRI SOUTH AFRICA	Fourth Respondent
WILDLIFE RANCHING ASSOCIATION OF SOUTH AFRICA	Fifth Respondent
THE SOUTH AFRICA OSTRICH INDUSTRY	Sixth Respondent

JUDGMENT

Sutherland J:

The Order

On 14 March 2018 I made this order and undertook to supply reasons later.

1. The point *in limine* raised by the third respondent that the applicant had not exhausted its internal remedies in terms of section 23 of the Animal Diseases Act 35 of 1994 is upheld.

2. In the absence of an exemption as contemplated in section 7(3)(c) of the Promotion of Administrative Justice Act 2 of 2000, the court has no jurisdiction to entertain a review application.

3. The review application is dismissed.

4. The applicant shall bear the costs of the First, Second and Third Respondents, including the costs of two counsel.

Introduction[1]

[1] The controversy in this matter originates in the long-standing desire of the applicant (Swanvest) to import a herd of Sable Antelope, which it owns, from Swanvest's camp in Zambia into South Africa. To do so requires a permit, as contemplated by section 6 of the

[1] References to the papers filed are designated [R..]

Animal Diseases Act 35 of 1984 (ADA) which permit may be issued by the second respondent, the Director of Animal Health (the Director).[2] An application for such a permit has been refused.

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[2] Section 6. Importation of certain controlled animals or things-
(1) (*a*) No person shall import into or convey in transit through the Republic any animal, parasite or contaminated or infectious thing except under the authority of a permit and in compliance with any condition imposed in such permit.
(*b*) A permit referred to in paragraph (*a*)-
(i) shall be obtained by an importer before the relevant animal or thing is removed from or out of any place outside the Republic by means of any conveyance or by any other means for the purpose of importing it into or conveying it in transit through the Republic;
(ii) shall, in respect of any animal or animal product referred to in section 16 (1) of the Livestock Improvement Act, 1977 (Act No. 25 of 1977), only be issued if the written authority contemplated in that section has been granted in respect thereof; and
(iii) shall, where the director requires that the animal or thing be detained in a quarantine station, only be issued on proof being adduced to him that a confirmation of accommodation has been furnished and fees have been paid, as contemplated in paragraphs (*a*) and (*b*), respectively, of section 5 (4) of this Act.
(*c*) When any person imports into or conveys in transit through the Republic animals or things of the same class on a regular basis from the same country, the director may, if he is satisfied that it will not defeat a controlled purpose, issue to such a person a permit referred to in paragraph (*a*) to so import or convey during the period specified therein consecutive consignments of animals or things of the same class.
(2) Any animal or thing in respect of which a permit has been issued-
(*a*) shall only be imported into the Republic through or at a place of entry referred to in paragraph (*a*) of the definition of "place of entry" in section 1 (1), or, in the case of any animal, through or at any other place which the director has, subject to the provisions of the Customs and Excise Act, 1964 (Act No. 91 of 1964), determined for purposes of this paragraph;
(*b*) shall be imported within the period specified in the permit;
(*c*) shall be detained in the prescribed manner at the relevant place of entry, and shall be made available to the director for purposes of the performance of controlled veterinary acts; and
(*d*) shall not without the written authority of the director, or contrary to any condition of such authority, referred to in section 8 (1) (*a*), be removed from such place.
(3) (*a*) The director may, if he knows or on reasonable grounds suspects, that any animal or thing is, contrary to any provision of this Act, or any condition of a permit-
(i) being removed, or has been removed, from any place outside the Republic, for purposes of importing it into the Republic; or
(ii) about to be imported by any person into the Republic; or
(iii) present on or in any conveyance, or forms part of any consignment, which is being or has been brought or sent by any person to the Republic, direct that the animal, thing, consignment or portion thereof determined by him, shall not be imported into the Republic or unloaded or removed from the conveyance, as the case may be, except with his consent and, if he has determined conditions in connection therewith, in accordance with such conditions.
(*b*) The director may, if he deems it necessary, make such direction known by notice in the *Gazette*, and shall, irrespective of whether it has so been made known or not, make known the provisions of the direction as soon as may be practicable to all persons who, to his knowledge, are or will be involved in the importation, unloading or removal, as the case may be, or to any person in whose service any such persons are, or who exercises control over them, or in respect of such unloading or removal.

[2] The focus of the present application, the latest piece of litigation in the saga stretching back to 2009, is on two decisions of the Director; first, the policy on importation of sable from Zambia, issued on 4 May 2015, and second, the refusal of the required permit on 6 May 2015. The application seeks to have these two decisions of the Director, Dr Mpho Maya, set aside on the basis that they are vitiated by bias, irrationality, capriciousness, arbitrariness, or a failure to apply her mind as contemplated in section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[3]

[3] The other respondents all have an interest in the outcome. Only the first and second respondents, (ie the Minister and the Director, referred to as such herein,) and the third respondent, the Red Meat Industry Forum (the Forum) have actively participated in the case. They oppose the relief sought.

[4] A late unopposed amendment to the notice of motion, seeks to have regulation 33(1) of Animal Health Regulations (R20126 of 26 September 1986) declared unconstitutional, for want of consistency with section 33(1) and (2) of the Constitution.

(c) The provisions of subsection (2) (c) and (d) shall *mutatis mutandis* apply in respect of any animal or thing referred to in subsection (3) (a) which has been imported, unloaded or removed with the consent of the director as contemplated in the lastmentioned subsection: Provided that in such application of the said subsection (2) (d) a removal contemplated therein shall not be effected unless the importer concerned has paid the fees which are in terms of this Act payable in respect of the relevant required permit.

[3] It cannot be controverted that the power conferred on the director is a discretion. The proper exercise of a discretion and the test for that has been addressed in *MEC, Environmental Affairs v Clairison's CC 2013 (6) SA 235 (SCA) at [10] – [22].* In short, the question is not to second guess the decision maker as to whether the choice exercised was correct or wrong but to check whether the functionary performed the prescribed function. Chiefly, this enquiry provokes questions about what relevant information was before the decision maker and whether any inference can be drawn that it was ignored or that irrelevant factors were allowed to influence the choice intrinsic in the decision. In other words, is there a rational connection between the material relevant to the decision and the actual decision taken?

This regulation prescribes a 90-day period within which to lodge an objection to a decision taken in terms of the ADA, calculated from the date the decision is taken, but does not expressly refer to a right to be given reasons prior to lodging the objection.[4]This issue is wrapped up with the issue of whether Swanvest ought to be non-suited for want of exhausting internal remedies, either timeously or at all.[5]

The Preliminary issues

[5] At the outset of the hearing, the parties indicated that they were in agreement to deal with a discrete point that could dispose of the whole application. The forum had raised a point *in limine* that Swanvest had not exhausted its internal remedies pursuant to the provisions of the sections 21 and 23 of the ADA. Upon that footing, it was contended that section 7(2)(a) of PAJA inhibited the court from entertaining the review, unless the provisions of section 7(2)(c) of PAJA were satisfied; the latter sub-section permits a court upon application by a party to determine whether "exceptional circumstances" exist to warrant the applicant for review to be "exempt" from compliance with section 7(2)(a). The further contention was that Swanvest had to be unsuited because no application for

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[4] Regulation 33(1): Objections against decisions of or steps taken by the director

(1) An objection lodged in terms of section 23(1) of the Act against a decision of, or steps taken by the director or by another person or body referred to in section 10(7)(a) of the Act, shall be submitted to the Director-General within 90 days of the date on which such decision was given or steps taken.

(2) Such objection shall be submitted in the form of an affidavit and shall-

(a) state the decision or steps against which the objection is lodged; and

(b) state the grounds on which such objection is based."

[5] See: Dentenge holdings (Pty) Ltd v Southern Sphere mining and Development Co 2014 (5) SA 138 (CC) at [115]- [117].

exemption had been made. Swanvest in turn, having been alerted to this argument in the Forum's answering affidavit, brought the amendment to the notice of motion already alluded to. [6] It is Swanvest's case that it has complied, at very least "substantially' with its obligation in terms of the ADA to pursue internal remedies, and on this footing, the point *in limine* must be dismissed.

[6] Accordingly, the issue of the alleged non-exhaustion of an internal remedy and the issue of the unconstitutionality of regulation 33(1) was addressed separately from the principal controversy.[7]

The Structure of the ADA

[7] First, the structure of the ADA as regards decisions made by the Director and challenges to such decisions, needs to be described.

[8] The Director of the Directorate of Animal Health is the creature of section 2(1). The section goes on to state that the Director "....shall exercise the powers and perform the duties conferred or imposed upon the director by or under the [ADA]" Moreover, the

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[6] Other than file an amended notice of motion including a further prayer that regulation 33(1) be declare unconstitutional, and a day before the hearing filing heads of argument on that issue, Swanvest had not raised this constitutional point in any of its affidavits, founding, replying, or supplementary. The respondents contended that this failure alone warranted the point and argument not be entertained. that was a sound submission. *(see: Yannokou v Apollo Club 1974 (1) SA 614 (A) and Booth NNO v Minister of Local Government, environmental affairs and Development Planning 2013 (4) SA 519 (WCC) at [41] – [42]*.)Nevertheless, in order to put the controversy to bed finally, I have not unsuited Swanvest on that ground.

[7] This procedure on Application enjoys the approval of the decisions in *Brian Kahn Inc v Samsudin 2012 (3) SA 310 (GSJ) at [4]; Reymond v Abdulnabi & Others 1985 (3) SA 348 (W) at 349E-F;* and *Theron & another NNO v Ioubser NO & Others 2014 (3) SA 323 (SCA) at [11]- [14].*

Minister may instruct the Director too. It is not in dispute that the refusal of the permit was a decision that the Director is authorized to make[8]. Section 21 regulates in some detail the strictures that apply to the decisions of the Director and how she is required to administer 'applications claims and requests'.[9] The part of section 21 especially relevant to the controversy among the parties is section 21(3)(c)(i):

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[8] During the course of argument, it was contended on behalf of Swanvest, that the making and issuing of a policy was not an act that the director made 'in terms of' section 21 the ADA. In my view, this argument is incorrect, but need not to addressed for the purposes of the resolution of the point *in limine*.

[9] Section 21 provides:

General provisions regarding applications, claims and requests.

(1) Subject to the provisions of this Act regarding any particular application, claim or request, any application, claim or request which is under this Act required or permitted to be lodged with or directed to the director, shall-

(*a*) be made or submitted in the prescribed manner;

(*b*) contain the prescribed particulars and information;

(*c*) be made or submitted within the prescribed time; and

(*d*) be accompanied by the prescribed documents and the required prescribed application, or other, fees or amounts:

Provided that-

(i) the applicant or claimant shall furnish to or supply the director with such further particulars, information and documents which he may require, at his request;

(ii) the director may in any particular case in his discretion condone any deviation from, or non-compliance with, any provision of paragraph (*a*), (*b*) or (*c*), or regarding documents referred to in paragraph (*d*).

(2) Subject to provisions to the contrary in this Act, no prescribed application, or other, fees or amounts shall be refundable to any applicant or claimant.

(3) The director-

(*a*) shall consider any application, claim or request lodged with or directed to him under this Act, and may in connection therewith make such further investigations or enquiries as he may deem necessary;

(*b*) may in his discretion refuse or grant, subject to the provisions of this Act, any such application, claim or request, provided that, in the lastmentioned case, all due fees or moneys referred to in subsection (1) (*d*) have been paid, and may, where he grants it, impose such conditions in respect thereof as may be prescribed, and conditions which he may deem necessary, taking into consideration the nature and purpose of the relevant application, claim or request and, where applicable, the promotion of the relevant controlled purpose;

(*c*) shall-

"(3) The director-.....

(c) shall-

(i) where the application, claim or request is refused, notify the applicant or claimant in writing thereof and of the grounds on which the refusal is based; ...."

[9] Plainly, section 21 empowers the Director in several ways, and obliges the Director in several respects as to how she must discharge her functions.[10] It must follow that the Director is constrained by these provisions as to how to make a valid decision pursuant to her powers. In particular, in refusing an application, such as a permit contemplated in section 6(1), she must do so (1) in writing, (2) to the applicant, (3) and provide 'the grounds' on which the refusal is based.[11] A refusal by her which was deficient for want of all these elements would not be a valid decision.

[10] Section 23 of ADA[12] plainly provides for a comprehensive procedure to re-evaluate a decision made by the Director to which objection has been taken. A decision taken by

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(i) where the application, claim or request is refused, notify the applicant or claimant in writing thereof and of the grounds on which the refusal is based; or

(ii) where the application, claim or request is granted or acceded to, issue in writing the required permit, authority, consent or other proof of assent or approval, as the case may be, to the applicant or claimant; and

(*d*) may, where it is still possible, at any time when it is deemed necessary by him, withdraw any such permit, authority, consent or other proof of assent or approval, as the case may be, by written notice to the person concerned.

[11] An argument was advanced on behalf of Swanvest that there is a jurisprudential distinction between the term "grounds" as used in ADA and the term "reasons" as used in PAJA. In my view this distinction is groundless because the two phrases are linguistically interchangeable in ordinary discourse and a comparison of the usage in the two statutes offers no logical or policy ground or reason to understand the terms to have a distinguishable substance in the context of a need to justify a choice or decision.

[12] Section 23 provides: Objections against decisions of and steps taken by director and certain other persons and bodies.-
(1) Any person who feels aggrieved by any decision of or steps taken by the director, or by any

the Director is subordinated to a view to be taken by the Minister. Moreover, in appropriate cases an investigation into the grounds of the objection may be ordered as directed by the director -general of the department. After the Minister has decided, perhaps adversely to the desires of the objector, a review might follow. In such a review the reasons for the minister's decision are the subject matter of enquiry, not that of the Director. Plainly, the Director does not have the last word.

[11] This internal procedure is not lightly to be evaded. It may be regarded as an example of a "strong" internal remedy. The obligations on the director-general are

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other person or body referred to in section 10 (7) (*a*), or by any employee or other person under the control or direction of any such person or body, in terms of this Act, may within the prescribed time and on payment of the amount which is prescribed, lodge in accordance with the provisions of this section an objection against the decision or steps with the Minister.

(2) An objection shall be submitted in the prescribed manner to the Director-General, who shall submit it together with his recommendation to the Minister for a final decision.

(3) (*a*) For the purposes of his recommendation contemplated in subsection (2), the Director-General may, if he deems it necessary, designate one or more senior officers in the department to institute an investigation regarding the reasons for the objection and the circumstances which gave rise to the complaint, and to submit to him a written report concerning it.

(*b*) The director and any other officer who has been involved in the decision or steps, shall not be designated under paragraph (*a*).

(*c*) The person who lodged the objection, or a representative authorized by him in writing, and the director or other officer, person or body who have been involved in the decision or steps concerned, may, at their own request or at the request of the officer or officers referred to in paragraph (*a*), submit oral or written representations to that officer or officers, and may be interrogated.

(4) (*a*) The Minister may, after consideration of the objection and the recommendation of the Director-General, confirm, vary or set aside the relevant decision or steps, and may for the disposal of the matter, issue, subject to the provisions of this Act, such orders to the director as he may deem necessary.

(*b*) The Director-General shall notify the person who lodged the objection and the director in writing of the decision of the Minister.

(*c*) If the Minister varies or sets aside the decision or steps in question, the amount referred to in subsection (1), or such portion thereof as determined by the Minister, shall be refundable to the person who has lodged the complaint.

onerous. The aggrieved party is not limited to its initial objection, but of its own volition, may make further inputs and thus be heard again before the Minister has the last word.

A chronological narrative of the relevant facts

[12] The facts can be succinctly described. The hard facts are not in dispute; the debate flowed from the significance of statements made by the respective parties.

[13] The impugned decisions were made on 4 May and 6 May 2015.

[14] The relevant text of the refusal of the permit [R995] read thus:

> **"RE: APPLICATION TO IMPORT SABLE ANTELOPE FROM ZAMBIA**
>
> 1. We refer to your application for a permit under the Animal Diseases Act 1984 (Act No. 35 of 1984) to import sable antelope from Zambia to South Africa. As you know, a court order was granted on 27 February 2014 Case Number: 64765/2012 in the North Gauteng High Court in Pretoria.
>
> 2. The Court order contemplated a process to be followed
>
> 3. The process contemplated by the court order has been finalised. This process has resulted in the publication of an Import Risk Analysis and Import Policy on the importation of sable antelope from Zambia on the Department's website.
>
> 4. I have considered your application for a permit under the Animal Diseases Act 1984. In light of the import policy and having applied my mind to the matter, I have decided not to grant a permit due to inter alia the level or risk or introducing exotic diseases (and its consequences if there is an outbreak) through the importation of sable from Zambia being unacceptably high."

[15] Notable is the allusion to the policy, and to the allusion of the 'unacceptable' risk.

The significant portions of policy document [989-994] read thus:

> "This policy is published in compliance with the court order of 27 February 2014 Case Number: 64765/2012. This policy deals with the importation of sable antelope from Zambia into the Republic of South Africa.
>
> In compliance with the court order mentioned above an import risk analysis (IRA) was conducted in terms of the OIE Code. The scope of the risk analysis related to the importation of sable antelope from Zambia, with particular reference to the circumstances of the sable antelope mentioned in the import application that formed the basis for the court order mentioned above.
>
> The conclusions regarding the hazards identified in the risk analysis are summarised below [*then follows a catalogue of diseases and the risk assessments described a low, very low, negligible]*
>
> As part of the risk analysis, questionnaires were sent to Zambia to obtain the required information from the exporting country according to the OIE guidelines. The information that Zambia provided was not sufficient to allow the South African Veterinary Authority to confirm compliance with all the relevant Articles of the OIE guidelines. Further information was sought but was not received by the time of finalising the IRA.
>
> Considering Zambia's reliance on passive surveillance, the information provided raised doubt over whether Zambia would be in a position to detect exotic and trade-sensitive diseases, like CBPP, PPR, Nairobi sheep disease, Rift Valley Fever etc. in a timely and reliable manner. It also raised doubts about the efficacy of any disease control and biosecurity efforts being instituted by the Government Veterinary Authorities in Zambia, including the ability of Zambia to provide trade-related guarantees, like those for the certification of effective pre-expert guarantees, like those for the certification of effective pre-export quarantine of live animals.
>
> Based on the information received from Zambia, it also served no purpose in organising a visit to Zambia as the information supplied was far from sufficient to enable and warrant a verification exercise.
>
> In reference to the IRA conducted, it has thus been concluded that the risk of importing sable antelope from Zambia is unacceptable given the information available at this point in time."

[16] It was argued that the refusal letter ought not to be understood as incorporating by reference the reasons or grounds contained in the policy. It may be sound to argue that the text of the policy was not incorporated as is sometimes done in the composition of affidavits. However, the communication is plain: the Director had regard to the policy, the portions of which are cited above. moreover, the Director says, ostensibly aware of the dictum in *Kemp v Van Wyk* [13] that she 'independently' applied her mind to the particular application for a permit.

[17] This letter provoked a response from Swanvest on 10 June 2015 [R998]. It addressed itself to the Director. In that letter it stated that it wanted "full grounds and/or reasons" by 24 June 2015 and that a review of the decision was to be considered.

> **"THE DIRECTOR: ANIMAL HEALTH**
> **DELPEN BUILDING**
> ...
>
> Dear Sir
>
> **RE: REFUSAL OF PERMIT APPLICATION: SWANVEST 234 (PTY) LTD: IMPORT OF SABLE ANTELOPE FOM ZAMBIA TO SOUTH AFRICA**
> Writer refers to the above matter and confirm that our firm has been instructed by Swanvest 234 (Pty) Ltd to address this letter to your office. A decision was made by the Director: Animal Health to refuse the import application, which decision was made on 6 May 2015.

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[13] See: Kemp v Van Wyk 2005(6) SA 519 (SCA) a case dealing with a review of a decision of the Director of the Directorate of Animal Health, Per Nugent JA at [1]:
"A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all...."

> Our instructions are to request from your office full grounds and/or reasons for the refusal of the permit and request that you will provide full grounds and/or reasons for the refusal of the permit in writing to our office, by no later than 24 June 2015.
>
> We hold further instructions to consider the grounds and reasons for the refusal of the aforementioned permit and to consider a review application against the Director: Animal Health...."
> (underling supplied)

[18] The Director, through the medium of her legal officer, wrote back on 24 June 2015 [R999] thus:

> "Your letter request reasons for the decisions made by the Director of Animal Health on 06 May 2015. It is in consequence, a request for reasons in terms of Section 5 of the Promotion of the Administrative Justice Act, Act 3 of 2000. As you know, the Act provides that we must furnish you with reasons within 90 days of the request thereof.
>
> Accordingly, we will furnish you with the reasons requested within 90 days of your letter of 10 June 2015. We will use our best endeavors to provide the reasons to your client as quickly as possible. Your deadline of 24 June 2015 is unreasonable and not in keeping with the provisions of Section 5 of the Promotion of Administrative Justice Act.
>
> Our rights remain reserved...." (underlining supplied)

[19] Plainly, the letter of 24 June understood that Swanvest was pursuing a review process, noted that it would be governed by PAJA, and undertook to comply with Section 5(1) of PAJA.

[20] On 1 October 2015, the substantive reply was given under the rubric "Reasons for the refusal of an import permit to import sable antelope from Zambia. It contained a long traverse of several diseases and comment on the level of risk posed and how such risks might be mitigated. This portion of the "reasons" was a repetition of the material set out in the policy. As regards passages pertinent to this controversy, it stated that:

"RE: REASONS FOR THE REFUSAL OF AN IMPORT PERMIT TO IMPORT SABLE ANTELOPE FROM ZAMBIA

Your letter dated 10 June 2015 refers. In addition to the contents of our letter dated 6 May 2015, listed below per disease is a summary of the reasons for refusal to grant a veterinary import permit to import sable antelope from Zambia, the full details of our position and the reasons for refusing the permit, apart from the letter dated May 6 2015, is also contained inter alia in the Risk Analysis, a copy of which has already been provided to you.

Zambia has an infected status from FMD. However, as previously discussed, Zambia has provided inadequate information about their status and disease control measures for FMD in response to South Africa's questionnaire and did not respond to the FMD-specific questionnaire at all. There is no regular monitoring of the sero-types causing the various outbreaks and no information has been provided about the sero-types being involved in the more recent outbreaks during 2013. However, it is noted that serotypes A and O cannot be excluded as being present in Zambia and in fact serotype O was detected in Zambia in 2000 and is possibly still present, as no evidence has been provided that it was eliminated.

FMD control in Zambia appears to rely primarily on vaccination, supported by movement controls in areas where outbreaks occur. The reliability of these measures is uncertain, given the paucity of information provided by Zambia. The main uncertainties relating to FMD are the current distribution and prevalence of FMD infection in Zambia and the potential for sable to become infected and transmit infection, possibly in the absence of obvious clinical signs. The overall risk estimate for the introduction of FMD in sable imported from Zambia was Moderate, in the absence of further risk mitigation measures.

CONCLUSION

In reference to the Import Risk Analysis conducted for sable antelope from Zambia into South Africa, it has thus been concluded that the risk of importing sable antelope from Zambia, due to the risk assessed in respect of the introduction of the aforesaid exotic diseases into South Africa, is unacceptable given the information available at present." (underling supplied)

[21] Notably, it was stated that reasons had already been given on 6 May 2015, and allusion was made to the risk analysis, both documents said to be in the possession of Swanvest.

[22] On 15 December 2015, Swanvest served on the Minister and on the Director an affidavit styled "Affidavit in terms of section 23 of [the ADA]" [R843] by Swanvest's attorney. This document, it is said, was intended to be an objection as contemplated in section 23. In paragraphs 6 and 7, [R845] Swanvest's grievance was described as being the decisions of Dr Mpho Maja, the incumbent Director taken on 6 May 2015. No allusion was made to the policy decision of 4 May 2015, which subsequently was cited in the review Notice of Motion. The objection, in paragraph 8, also alleged, by implication, that the impugned decision violated the international agreement on sanitary and phytosanitary measures, known as the "SPS" agreement.

[23] No further responses were ever received. Some six months later, on 18 May 2016, the attorney for Swanvest wrote to the Minister and to the Director to complain about a lack of reaction to the objection. It stated:

> **"THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES**
> **AGRICULTURE PLACE**
> ...
>
> AND
>
> **THE DIRECTOR OF THE DIRECTORATE**
> **OF ANIMAL HEALTH,**
> **DELPEN BUILDING**
> ...
>
> Dear Sirs/ Madam
>
> **RE: SECTION 23 OBJECTION AND AFFIDAVIT FILED ON 15 DECEMBER 2015: SWANVEST 234 (PTY) LTD AGAINST A DECISION BY THE DIRECTOR: DIRECTORATE OF ANIMAL HEALTH TO REFUSE THE SWANVEST 234 (PTY) LTD APPLICATION FOR IMPORT OF THE ZAMBIAN SABLES FROM ZAMBIA AS PER THE APPLICATION TO IMPORT**

> You are kindly referred to the Notice of Filing of the Affidavit in terms of Section 23 of the Animal Diseases Act, No 35 of 1994 filed at your offices on 15 December 2015.
>
> Our client views the opinion that nearly 6 months passed without receiving any response from your office in respect of the Section 23 Objection against the aforementioned decision by the Director: Directorate of Animal Health.
>
> In the event your decision on the objection will not be received before 25 May 2016, our clients will proceed with a review application against the decision by the Director: Directorate of Animal Health."
> (Underling supplied)

[24] Nothing happened. Accordingly, the review was initiated on 5 December 2017.

Has there been an exhaustion of the internal remedies?

[25] On behalf of Swanvest it is argued that there was 'substantial compliance'. By this was meant to be conveyed that once the objection had been lodged, within 90 days of getting the Director's "full" reasons, and there was no response, there was no more that Swanvest was *obliged* to do, or indeed *could* do, to push the internal remedy procedure forward. It was therefore at liberty, so the argument ran, to review the decision that sparked its grievance; ie that of the Director.

[26] The respondents take the point that the objection was late because the 90-day period ran from 6 May 2015, ie the period stated in regulation 33(1) as contemplated to be the 'prescribed' period mentioned in section 23(1). If it was indeed late, it was an ineffective objection requiring no response. This is why regulation 33 is challenged by Swanvest for unconstitutionality; ie there cannot be an obligation to lodge an objection

without first getting reasons, hence if regulation 33 properly read means that the 90 days is triggered by the decision before reasons are given, it offends the 'constitutional right to get reasons. There are several difficulties with this line of reasoning which shall be addressed hereafter. However, a more damning point warrants attention at once.

[27] If it were to be assumed that the objection was in the prescribed form, served timeously on the correct person and was therefore unobjectionable in any material respect, there remains the sore point about the next step in that internal process. That next step would be the Minister expressing a view, having had regard to the director-general's recommendation, after the investigation that might have been ordered, which would include, at the option of Swanvest, further submissions.

[28] Section 5(3) of PAJA provides that:

> " If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason."

[29] Accordingly, why is it not *the Minister's inaction* that is the subject matter of the review? if internal remedies had been exhausted then the Minister would have answered Swanvest. On the facts, the Minister owes Swanvest an answer, assuming the objection was timeous. It seems to me that on Swanvest's own thesis it cannot demonstrate that it has "complied" even "substantially". Had it sued the Minister in respect of the constructive decision of the Minister, as contemplated by section 5(1) of PAJA, there would be room to contend that internal remedies had been exhausted, but that is manifestly not

Swanvest's case, which, circumlocutiously, expressed through a submission of 'substantial compliance' implies that internal remedies were exhausted.

[30] The upshot, in my view, is that if a party contends it has exhausted internal remedies and therefore has no need to invoke section 7(2)(c) of PAJA[14] to procure an exemption from so doing, then the internal remedy exercised cannot be stillborn, as is evidenced in this case. The hard fact is that internal remedies have not been exhausted precisely because the Minister never addressed an objection. Even if the Minister were to be held to be at fault, the fact remains that the remedy was not exhausted. The culpable failure of a decision maker to make a decision would ordinarily be a significant element in an exemption application as envisaged by section 7(2)(c). But that is not Swanvest's case.

[31] I turn now to deal with the contentions of the respondents.

[32] First, the meaning to be attributed to regulation 33(1) must be addressed. Self-evidently, it must be read together with the statute under which it is made. When the 90-day period within which to object is triggered by the decision to be objected to, it means just that: the period runs from the date of the decision. There is nothing in principle that is unfair nor unconstitutional about this time bar *per se*.[15]

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[14] Section 7(2)(a) provides: Subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. Section 7(3)(c) of PAJA provides:
A court or tribunal may, in exceptional circumstances and on application by the person concerned exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

[15] See: Brummer v Minister of Social Development 2009 (6) SA 323 (CC) at [51]

[33] Second, the idea that regulation 33(1) violates some 'constitutional right to reasons' is too vaguely put. The Constitutional norm is simply fair administrative action; a right to reasons derives from PAJA. Moreover, PAJA exists to provide for a right to reasons in respect of administrative action in general. In this particular instance, the ADA prescribes, as addressed earlier, the form in which a valid decision of the Director can be made; ie it must be accompanied by the "grounds" upon which it was based. If the grounds were stated on 6 May 2015, the substratum of the case advanced on behalf of Swanvest, about *waiting* for reasons, disintegrates. The respondents contend that the grounds were stated on 6 May 2015 in the refusal letter. To this, Swanvest has conceded that *some* grounds were stated, and drawing on its demand for "full grounds and/or reasons' in its letter of 10 June 2015, it seeks to mine the phrase "inter alia'; used in the refusal letter of 6 May to lay a foundation for a right to *more reasons.*

[34] Is this perspective, on the facts, correct? On behalf of the respondents it was correctly contended that the reasons given by an official decision-maker need not be exhaustive of the details but rather, as long as the aggrieved person was fairly informed of the thrust of the grounds upon which the request was denied, the obligation to inform the aggrieved person *properly* has been discharged. In my view, with or without the benefit of the hindsight that comes from having read the multitude of allegations in these papers, what Swanvest was told on 6 May 2015 is the whole story. The decision of 6 May was, so to speak, ripe to be objected to there and then. The "use of the phrase 'inter alia' did not hold out the promise of significant other reasons. Indeed, read with the policy

document, which is incontrovertibly what its author intended, a narrower meaning can be attributed to the words. A fair reading of the paragraph conveys that the Director purported to do two things; first have regard to the policy, and second, independently ask whether the policy should be applied in this particular case, to conclude, among the reasons derived from the policy document, the level of risk was in her view too high. In my view, therefore, on the facts, grounds or reasons as envisaged by section 21(3)(c) of the ADA were given, whereupon the 90-day period was triggered at once and the objection was out of time.

[35] However, assuming that this factual finding were not possible or incorrect, and by implication a decision had been announced and communicated bereft of grounds or reasons, regulation 33(1) read with sections 21 and 23, did not deny Swanvest any rights to grounds or reasons, because the structure of the internal remedy embraced the prospect of a further investigation including a further opportunity for *audi alterem partem* and any material ignorance of why the permit was refused could be addressed in that subsequent process, culminating in the Minister making a decision. Thus, even on that footing, regulation 33(1) is not at risk of denying a 'constitutional right'.

[36] Insofar as the thesis underpinning the argument that regulation 33(1) is unconstitutional, is concerned, it fails on its own terms because regulation 33(1) cannot be interpreted in a vacuum, but rather as part of the entire ADA edifice, which guarantees reasons in section 21(3)(c).

Conclusions

[37] As a result, I gave the order on 14 March 2018: in summary:

[38] The application is premature, Swanvest having not exhausted the internal remedy in section 23 of the ADA.

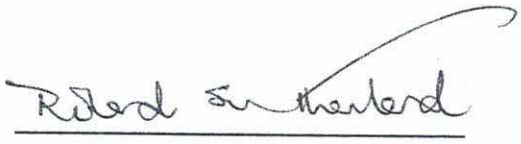
[39] The Director gave reasons, as contemplated in section 21(3) (c) of the ADA on 6 May and the 90-day period within which to object ran from that date.

[40] The objection lodged was out of time.

[41] Even if the objection had been timeous, the Minister did not react, the remedy was not exhausted, and an exemption, relying in part upon such alleged failure, against the Minister was the appropriate action to have taken, not to embark on a review of the Director.

[42] Regulation 33(1) does not, properly interpreted, read with the ADA violate any constitutional norm.

[43] The costs must follow the result.



Roland Sutherland
Judge of the High Court,
Gauteng Division, Pretoria

Heard: 13 March 2018
Order: 14 March 2018
Reasons: 16 March 2018

For the Applicant:
Adv Barnard Knoetze SC, with him
Adv HJ Benade,
instructed by Van De wall & Partners

For the First and Second Respondents
Adv Terry Motau, with him,
Adv Anban Govender,
instructed by the State Attorney,

For the Third Respondent:
Adv H Epstein SC, with him.
Adv Dirk R Van Zyl
instructed by Fairbridges Wertheim Becker