IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU)
SITTING AT CAPE TOWN

Case No: 715/2023

GEORGE MOERASRIVIER BOERDERY (PTY) LTD Applicant

and

THE DIRECTOR ANIMAL HEALTH, DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT First Respondent

MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT Second Respondent

Coram: Justice J Cloete

Heard: 14 May 2024

Delivered electronically: 21 June 2024

JUDGMENT

CLOETE J:

Introduction and relevant factual background

[1] This is an opposed application in terms of PAJA[1] for the review and setting aside of a decision taken by the first respondent (the "Director") on 30 January 2023 in which she is alleged to have *'failed to follow and/or implement'* the decision or directive of the second respondent (the "Minister") of 17 August 2022, coupled with substitution relief.[2] The applicant no longer seeks separate declaratory orders in the terms contained in prayers 1 and 2 of the notice of motion.

[2] The relevant factual background, which is to all intents and purposes common cause, is as follows. The applicant had a flourishing poultry business in the George area until an outbreak of HPAI (avian influenza or "flu") on two of its farms. The first, on the farm Onderplaas, was confirmed by a laboratory report received on 26 May 2021. The results were immediately transmitted to the state veterinarian, Dr Vivien Malan, who on 27 May 2021 placed that farm under quarantine. In terms of the quarantine letter and subsequent verbal instruction of Dr Malan, the appellant had to destroy all 195 648 chickens on site plus all poultry products including 3 199 536 eggs, as well as manure and feed. There is no dispute that all this occurred in accordance with governmental avian flu protocol.

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1 Promotion of Administrative Justice Act 3 of 2000.
2 In terms of s 8(1)(c)(ii) of PAJA.

[3] On 8 June 2021 avian flu was also detected on the applicant's farm Moerasrivier, ultimately resulting in the destruction of a further 181 704 hens, 10 000 free range chickens and 2 186 796 eggs, again along with manure and feed. The applicant has calculated its total loss to be R31 892 847.63 based, essentially, on market value of the destroyed chickens and product.

[4] On 29 August 2021 the applicant applied to the Director for compensation in terms of s 19(1) of the Animal Diseases Act[3] (the "Act"). On 4 November 2021 the Director rejected the claim, informing the applicant that HPAI infected and in-contact chickens have no value and therefore nil compensation was payable. Aggrieved by this decision the applicant lodged an objection to the Minister (via the Director-General) in accordance with s 23 of the Act. The Minister appointed a panel of senior officers in her Department to conduct an investigation regarding the reasons for the objection and the circumstances giving rise to it, and to submit a written report to her as she was entitled to do in terms of s 23(3)(a) of the Act.

[5] The panel (comprised of the Director: Food Safety and Quality Assurance, the Director: Genetic Resources and the Deputy Director: Africa Relations) provided its report on 2 August 2022. Paragraph 8 of that report read as follows:

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[3] No 35 of 1984.

*'**8. RECOMMENDATIONS***

8.2 It is recommended that the Minister set aside the decision of the Director of fixing compensation at ZERO and remit the matter (application for compensation by the claimant) for reconsideration by the Director.

8.3 Further, recommend that the Director in her reconsideration consult with the claimant with a view of settling the claim at an acceptable compensation value.

8.4 It is recommended further that the Director must urgently develop and cause to publish the criterion in terms of section 19(2)(a) of the Act for the determination of a fair market value of the animal or thing.'

[6] On 17 August 2022 the Director-General in the Minister's Department provided the applicant with the Minister's decision. It read in relevant part as follows:

'2. In terms of section 23(4)(a) of the Act, the Minister has-

2.1 set aside the decision of the Director: Animal Health of fixing the value of compensation at ZERO and remitted the claim to the Director for reconsideration.

2.2 Ordered the Director to consult with the claimant in her reconsideration in order to settle at an acceptable compensation value.'

[7] The applicant arranged a meeting with the Director which took place on 16 September 2022. During the meeting the Director requested documentation from the applicant to substantiate the claim and requested a period of one month to give feedback on the value of reasonable compensation payable. On 19 September 2022 the applicant supplied the

Director with a detailed breakdown of the claim as well as a motivation therefor. The Director failed to give feedback within the period of one month as undertaken by her. A virtual meeting was held between the applicant and the Director on 14 December 2022. At that meeting the Director gave an undertaking to make a decision on the acceptable value of compensation by the latest 31 January 2023. On 30 January 2023 she provided the applicant with her decision on the acceptable value of compensation. She advised the applicant *inter alia* that:

> *'…No guiding reasons or recommendations for the Minister's decision have been provided. The …Act… also does not provide for a settlement mechanism. The Director: Animal Health therefore conducted the reconsideration of the valuation of the destroyed animals in line with provisions of the… Act… with due consideration to the following:*
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> 1. *The dates of valuation may be set at the date of destruction. There is no requirement for the date of valuation of a destroyed animal or thing to be set at any other time. Therefore, the prevalent prices for chickens and eggs at the time of destruction were considered…*
>
> 3. *The requirement to destroy animals as demanded by the… Act… are not dependent or conditional on compensation. Further, the purpose of Section 19… is considered to be to encourage co-operation with control measures that would put owners of animals in a worse off state than the disease affecting them, and not as if the animals had never been infected or in-contact with the disease at all.*
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> 4. *Regulation 30 does not prescribe nor fix values for compensation however, the value of the destroyed animal or thing should be based on a realistic assessment of the animal's fair market value in the state they are in when they are destroyed… The open market would not pay the same amount for an infected or an in-contact animal as it would for an uninfected and healthy animal, especially if the animal was infected with a*

> *serious fatal disease* [such as HPAI] *from which it is not able to recover or which would cause a lasting impairment of value.*
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> *In light of the above, the Director… concludes that the HPAI infected and in-contact chickens and eggs do not have any value. Therefore, the Director… concludes that no value above zero is acceptable for these animals and things.'*
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> (my emphasis)

Review grounds

[8] The present application was launched on 19 April 2023. The grounds of review are that the impugned decision of 30 January 2023 was: (a) taken in bad faith;[4] alternatively (b) *'contravened'* s 23(4)(a)[5] of the Act;[6] alternatively (c) was not rationally connected to (i) the purpose for which it was taken; (ii) the purpose of the empowering provision, being s 19(2) of the Act; (iii) the information before the Director or the reasons given for it by the Director and/or the directive of the Minister;[7] alternatively (d) consisted of a failure to make a decision;[8] alternatively (e) was so unreasonable that no reasonable person could have arrived at it;[9] alternatively (f) was otherwise unconstitutional or unlawful.[10]

[9] In addition, and seemingly as part of a "belts and braces" approach, the applicant contends that the decision was *'in contravention'* of s 6(2)(a)(iii), 6(2)(b), 6(2)(e)(ii), (iii) and (iv) of PAJA, namely bias; failure to comply with an

4 Section 6(2)(e)(v) of PAJA.
5 The reference in the notice of motion to s 23(4)(d) is a patent error since the latter subsection was repealed some time ago.
6 Presumably, s 6(2)(f)(i) of PAJA.
7 Section 6(2)(f)(ii) of PAJA.
8 Section 6(2)(g) thereof.
9 Section 6(2)(h) thereof.
10 Section 6(2)(i) thereof.

empowering provision; for an ulterior purpose or motive; the taking into account of irrelevant considerations or failing to take into account relevant ones; and/or because of the unauthorised or unwarranted dictates of another person or body.

[10] All of these grounds notwithstanding, during argument it became clear that the real issue for determination (and counsel were agreed on this) is the proper interpretation of a statutory provision, namely s 19(2) of the Act. Since interpretation is a matter for the court the parties' respective views on what s 19(2) means, and allegations made by the applicant about attempts by the Director and Minister at *ex post facto* justification, do not take the matter any further. Before turning to a consideration of s 19(2) it is however necessary to deal with a preliminary issue.

Whether review application premature

[11] Although not raised in her answering affidavit, during argument counsel for the Minister submitted that this application is premature since it was incumbent on the applicant to first exhaust its internal remedy of lodging a further objection to the Minister against the impugned decision of 30 January 2023.

[12] However as argued by counsel for the applicant the scheme of s 23 of the Act contemplates the lodging of an objection against a decision of the Director which is not the last word on the subject, since s 23(2) states that *'[a]n objection shall be submitted in the prescribed manner to the Director-General,*

who shall submit it together with his recommendations to the Minister <u>*for final decision*</u>*'* (my emphasis). In addition s 23(4)(a) provides that *'[t]he Minister may… confirm, vary or set aside the relevant decision* [of the Director]*… and may* <u>*for the disposal of the matter*</u>*, issue… such orders to the director as he may deem necessary'* (my emphasis).

[13] This is exactly what occurred in this matter. As I see it the impugned decision is nothing other than the Director's interpretation of the second "order" of the Minister, namely that the Director must consult with the applicant *'in order to settle at an acceptable compensation value'.* Moreover the Minister in her answering affidavit supported the Director's view on how her "order" should be implemented, going so far as to maintain that the Director enjoyed a discretion in the true sense which was not susceptible to further challenge. This averment makes plain that from the Minister's own perspective the impugned decision was not subject to any further objection being lodged with her in terms of s 23 of the Act; and in *Bluelilliesbush*[11] the Supreme Court of Appeal confirmed that *'in case of objection the statute subjects the decision of the director to overruling by* [the Minister]*, while making hers the "final decision"'*. I am accordingly unable to agree that this application was launched prematurely.

<u>Interpretation of s 19(2) of the Act</u>

[11] *Minister of Agriculture and Another v Bluelilliesbush Dairy Farming (Pty) Ltd and Another* 2008 (5) SA 522 (SCA) at para [6].

[14] The settled principles pertaining to interpretation are in essence as follows. The starting point is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to its preparation and production. It is an objective process and, while a sensible meaning is to be preferred, courts must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.[12]

[15] The preamble to the Act merely states that its purpose is to *'provide for the control of animal diseases and parasites, for measures to protect animal health, and for matters connected therewith'.* Section 19(2) of the Act reads as follows:

> *'(2) The director may, taking into consideration---*
>
> *(a) the applicable compensation, based on a fair market value of the animal or thing, which has been prescribed for purposes of this section or, where no compensation has been so prescribed, any amount fixed by him in accordance with any criterion deemed applicable by him;*
> *(b) the value of any thing which has in connection with the animal or thing been returned to the owner;*
> *(c) any amount which is due by the owner pursuant to any provision of this Act in respect of the animal or thing to the State; and*
> *(d) any amount which may accrue to the owner from any insurance thereof,*
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> *fix a fair amount as compensation.'*

[16] The previous regulation 30 of the Animal Diseases Regulations[13] provided as follows:

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[12] *Natal Joint Municipal Pension Fund v Ndumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].
[13] GN R2026 published in GG 10469 dated 26 September 1986.

*'**Compensation***

When compensation is payable to a responsible person in terms of section 19 of the Act, the applicable compensation shall-

(a) in the case of an infected animal, be 80 per cent of the fair market value thereof;

(b) in the case of an animal killed for any controlled veterinary act or for the spreading of a controlled animal disease, be 100 per cent of the fair market value thereof;

(c) in the case of an infectious thing, excluding an animal, and a contaminated thing, be 50 per cent of the fair market value thereof.'

[17] In *Bluelilliesbush*, decided before the amendment of regulation 30 which I deal with hereunder, the main issue before the court was whether the subject matter of the "fair market value" was the animal in its infected state (as the Minister and Director had contended) or its uninfected state as the claimants argued. The Supreme Court of Appeal held that compensation to be paid was clearly the fair market value of a healthy animal. The court also held that:

'17. It should be added, however, that reasons of policy and good sense appear to underscore the meaning in the regulations. The history that led to the dispute is partly chronicled in departmental memoranda and records released to the claimants in response to the application. It appears that a voluntary animal health scheme was introduced in 1969 to eradicate bovine TB. All animals testing positive were sent for slaughter: the compensation paid to farmers was based on 80% of the full market value (not slaughter value) of the animal. In 1992, after farmers and stock-owners from the former homelands joined the department's control scheme, the department reduced compensation to R200 per animal slaughtered, irrespective of value, because of lack of funds. Unsurprisingly, this proved unpopular with farmers, according to an account set out in a departmental memorandum, and very few presented their herds for testing. This led the department to recommend in September 1999 that a new system of compensation be introduced to take

account of the slaughter value of the animals – which was an improvement on the previous system, but ignored the productive value of dairy herds.

18. As the claimants pointed out, the departmental policy inadequately takes account of the Act's objectives, which are designed to elicit the voluntary cooperation of farmers. (The bovine TB control scheme is itself voluntary.) To give infected or suspect dairy cows their slaughter value for compensation purposes offers no incentive to farmers, small-scale or large-scale, to participate in disease control measures.

19. By corollary, as the claimants also pointed out, if fair market value were assessed on the basis that the animals destroyed were infected, the state would not be required to pay any compensation at all – since the farmer could simply sell the infected cattle out of hand for whatever could be achieved on the open market (that is, the animal's hide and whatever meat could be salvaged from it). The meaning in the regulations, by contrast, ensures the cooperation of farmers and their continued ability to farm…'

[18] The previous iteration of regulation 30 was substituted on 22 May 2009[14] and now reads as follows:

'When compensation is payable to a responsible person in terms of section 19 of the Act, the applicable compensation shall be determined by the director.'

[19] The Director (supported by the Minister) maintains that because regulation 30 no longer prescribes "fair market value" as a baseline for compensation all she is required to do is to *'fix any amount in accordance with the criterion deemed applicable by me…'* which is *'any criterion'* in her sole discretion. The Director further contends that *'I am empowered, in fixing the amount for*

[14] GN R588 dated 22 May 2009.

compensation, to take into account the nature of the disease which has infected the animal or thing. I must also balance the interests of the farmer with that of the fiscus and the non-farming public of South Africa'. In reaching her decision she relied on the expert opinion of Professor Ian Brown, the director of OIE/FAO International Reference Laboratory for Avian Influenza and Newcastle Disease; OIE Reference Laboratory for Swine Influenza, based in the United Kingdom. The upshot of his advice was that, such is the nature of HPAI it will be inevitable that due to the high risk of infection spread all animals and related product must be destroyed whether or not they have already been infected. It is for this reason that she determined nil compensation.

[20] However regulation 30 must be read in conjunction with s 19 of the Act. That section prescribes in s 19(1) that an application for compensation is based on loss to the claimant, and "loss" includes that incurred as a result of an animal or thing which has been destroyed or otherwise disposed of pursuant to any control measure which, in the present case, is common cause. Put differently, but for the governmental protocol for avian flu the applicant's "animals and things" would not have been destroyed, whether infected or not (there may be other cases, such as in *Bluelilliesbush*, which are different in the sense of a voluntary control scheme).

[21] I accept that the word *'may'* in the first sentence of s 19(2) does not confer an outright obligation on the Director to award compensation of some value in all instances. However had the legislature intended that this meant the Director

could simply refuse to exercise any discretion at all, s 19(2)(a) to (d) would have been rendered largely superfluous; and neither the Director nor the Minister have (correctly in my view) suggested such an interpretation.

[22] Further, and despite the amendment of regulation 30, the legislature has not seen fit to consequentially amend s 19(2)(a) which still contains the words *'the applicable compensation, based on a fair market value of the animal or thing, which has been prescribed for purposes of this section* [i.e. by regulation as set out in the definition section of the Act] *or, where no compensation has been so prescribed, any amount fixed by him in accordance with any criterion deemed applicable by him…'*.

[23] Accordingly on its plain wording "applicable compensation" is based on a fair market value of the animal or thing given the comma which follows the word "thing", and the Supreme Court of Appeal has made clear that such a value is that of an animal or thing in a healthy state. This must therefore be the yardstick against which the Director, where no formula for, or fixed, compensation has been prescribed, must determine the compensation to be paid in accordance with any criterion deemed applicable by her.

[24] I am thus unable to agree with the submissions made on her behalf during argument (and supported by the Minister) that the words *'or, where no compensation has been so prescribed, any amount fixed by him in accordance with any criterion deemed applicable by him'* must be read in isolation from, and without any regard to, the words *'the applicable*

compensation, based on a fair market value of the animal or thing'. They must be read together, since the starting point is the language of the provision itself (s 19(2)) read in context (s 19(1)) and having regard to the purpose of the provision (a healthy animal or thing as determined in *Bluelilliesbush*). Such an interpretation of s 19(2) is also objectively consistent with these principles and does not, in my view, amount to substituting what I might regard as reasonable, sensible or businesslike for the words actually used.

[25] There is a further consideration which deserves mention. In terms of s 2(2) of the Act *'[t]he director shall exercise his powers and perform his duties with due regard to any instructions issued by the Minister'.* Whatever the Minister may now contend, she was clearly of the view that nil compensation could not be awarded to the applicant. Part of her s 23(4) decision was to set that aside and her own order was for the Director to consult with the applicant in her reconsideration so as to settle at *'an acceptable compensation value'*. The Minister could not have intended, when she made that order, that nil compensation would be an acceptable compensation value, since if that were the case she would instead have simply upheld the Director's (first) decision; and the Director was statutorily bound, in terms of s 2(2) of the Act, to have due regard to the Minister's "instruction". It matters not that the Minister may later have changed her mind for whatever reason, since her s 23(4)(a) order to the Director stands until set aside.

[26] Having regard to all of the aforegoing it is my conclusion that the impugned decision of the Director taken on 30 January 2023 was not authorised by the

applicable empowering provisions, namely s 19(2) read with s 2(2) of the Act, and is thus reviewable and must be set aside in terms of s (6)(2)(b), alternatively s 6(2)(f)(i) of PAJA.

Substitution or remittal

[27] The applicant submits that this is an exceptional case as envisaged in s 8(c)(ii) of PAJA justifying this court in substituting the Director's impugned decision with one that the applicant must be paid the full amount of the compensation claimed. This, so it was argued, is because I am in as good a position as the Director, or *'even better'* to make such an order based on *'the facts and the history'* of this matter.

[28] However in my view this is one of those cases where a substitution of this nature would definitely cross the line in breach of the separation of powers doctrine, since by no stretch of the imagination could I be considered in as good a position as the Director to determine *'an acceptable compensation value'* of the destroyed poultry and product based on a healthy animal or thing. This is particularly so given the level of expertise required, and the end result is anything but a foregone conclusion. In any event, from the answering affidavits, it is apparent that there is a factual dispute regarding quantification of the applicant's claim for compensation. Substitution is not an appropriate remedy where a factual dispute is not resolved. A substitution order will not, in all the circumstances, be just and equitable.[15]

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[15] *Minister of Defence and Military Veterans and Another v Mamasedi* 2018 (2) SA 305 (SCA) at paras [25] to [27] and the authorities referred to therein.

[29] There appears to have been some suggestion by the Director that the impugned decision is not capable of reconsideration since she is now *functus officio*. I do not see how this can be the case because that decision is being set aside by this court. There is therefore nothing to prevent the Director from making a fresh determination on an acceptable compensation value as interpreted in this judgment.

Costs

[30] The papers in this application run to almost 800 pages excluding the rule 53 record and various interlocutory skirmishes which were resolved prior to the commencement of argument. I believe it fair to say that this is largely because the applicant launched a wide ranging attack on the Director and her impugned decision, including allegations of bias and bad faith, which were not demonstrated to be the case. In addition, while the applicant has been successful in its review relief, this has been on very limited grounds and it has failed to persuade me that substitution rather than remittal is warranted. There is nothing on the papers to indicate that the Director and the Minister opposed this application recklessly or spuriously and the case ultimately boiled down to one of statutory interpretation. In these circumstances it is appropriate that each party should bear their own costs.

[31] **The following order is made:**

1. **The decision by the first respondent made on 30 January 2023 to award the applicant nil compensation in terms of section 19(2) of the Animal Diseases Act 35 of 1984 ("the Act") is reviewed and set aside;**
2. **The applicant's claim for compensation in terms of section 19(1) of the Act is remitted to the first respondent for reconsideration; and in terms of section 8(2)(b) of the Promotion of Administrative Justice Act 3 of 2000, the Director shall take into consideration that the applicant's destroyed "animals or things" shall be valued on the basis that they were in a "healthy" state;**
3. **Save as aforesaid the application is dismissed; and**
4. **Each party shall pay their own costs.**

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J I CLOETE

For applicant: Adv A Knoetze

Instructed by: Martins and De Lange Attorneys (Mr B De Lange)

For first respondent: Adv C Puckrin SC with Adv R Jaga SC and Adv P Loselo

Instructed by: Office of the State Attorney (Mr S Appalsamy)

For second respondent: Adv Nkosi-Thomas SC with Adv T Monene

Instructed by: Office of the State Attorney (Mr S Appalsamy)