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**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 5779/2020

In the matter between:

**RCL FOODS CONSUMER (PTY) LTD**

Applicant

and

**WESTERN CAPE MINISTER OF LOCAL GOVERNMENT,  
ENVIRONMENTAL AFFAIRS AND DEVELOPMENT  
PLANNING**

First Respondent

**DEPARTMENT OF ENVIRONMENTAL AFFAIRS  
AND DEVELOPMENTAL PLANNING, WESTERN CAPE**

Second Respondent

**HOPEFIELD ABATTOIR (PTY) LTD**

Third Respondent

**VERMIKOR (PTY) LTD**

Fourth Respondent

**JUDGMENT DELIVERED ON 6 FEBRUARY 2023**

**VAN ZYL AJ:**

**Introduction**

1. This is an application pursuant to the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") to review and set aside the decision of the first respondent ("the Minister") taken on 10 December 2019, dismissing an internal appeal by the applicant ("RCL") against the environmental approval issued by the

second respondent (“the Department”) for the development of a free-range chicken farm on erf 1[...], Hopefield, in favour of the fourth respondent (“Vermikor”).

2. Erf 1[...] is situated closer than 3km (2,94km, according to the papers) from the RCL facility in Hopefield (“the RCL Hopefield facility”), which is, according to RCL, a significant operation forming an integral part of RCL's integrated national value chain.

3. RCL explains that its farms are managed and controlled according to a strict and delicately-balanced protocol which ensures the stability and well-being of the chickens and the national production line. There are stringent biosecurity measures in place at each phase of the rearing process, including at the RCL Hopefield facility, to ensure the safety of the chickens, the health of consumers, and the protection of the environment from biosecurity risks such as Avian Influenza.

4. RCL’s case is, in short, that these measures are rendered nugatory if there are other farms within a transmissible area which do not adhere to such controls. Free-range farms (like the one the third respondent wishes to establish) pose a heightened risk because, by their very nature, the environment cannot be controlled and, as the State Veterinarian has acknowledged (and as will be discussed in more detail later), free-range birds pick up coccidian, worms and mites in their environment. These infections and parasites may then be transmitted in the environment, through wild birds, rodents or through the air.

5. The free-range facility at erf 1[...] poses such a risk to the RCL Hopefield facility. If the risk were to eventuate – if, for example, an Avian Influenza outbreak occurred at erf 1[...] - the prevailing industry standards would require every bird within a 3 km radius to be culled. This would include all the birds at the RCL Hopefield facility, and would have a devastating knock-on effect to RCL’s entire value chain, amounting to hundreds of thousands of birds, and millions of rands. It would also significantly impact the local chicken market given that RCL supplies almost all of the retail chicken stock to outlets such as KFC, Nando’s and Chicken Licken in South Africa, as well as various major retailers and wholesalers. In turn, chicken is the major source of protein in South Africa and a vital part of food security in South Africa.

6. On account of these risks, RCL submitted an objection to the application for the grant of authorisation for the operation of a free-range chicken farm on erf 1[...]. When the application was approved notwithstanding its objection, RCL appealed internally (as it had to do under its duty to exhaust its internal remedies (section 7(2)(a) of PAJA)) to the Minister.

7. During the appeal process, the Minister solicited and received comments from two State Veterinarians into the bio-security risks. Both the State Veterinarians (Dr Davey and Dr Roberts) agreed with RCL's objections and highlighted the risk in approving a free-range farm so close to the RCL Hopefield facility. The State Veterinarians recommended against such approval.

8. Notwithstanding these recommendations, the Minister dismissed RCL's appeal and did so (as appears from the contemporaneous reasons) on the mistaken belief (so RCL contends) that the State Veterinarian had supported the application.

9. RCL now seeks to review and set aside the Minister's decision and either substitute it with a decision upholding the appeal, or remitting the decision to the Minister for redetermination. It seeks relief on essentially four grounds of review.

10. First, RCL contends that the Minister failed to take into account relevant considerations, in that the Minister is purported to have:

10.1 Inaccurately recorded that the State Veterinarian, Dr Davey, did not support RCL's objection, in other words, the Minister took the decision based on the incorrect understanding of Dr Davey's position;

10.2 Failed to consider the various reports of the State Veterinarians which form part of the Rule 53 record, and thus reached a decision based on incorrect facts;

10.3 Breached the so-called "no-difference" principle; and

10.4 Impermissibly sought to justify his reasoning on an *ex post facto* basis.

11. Second, RCL contends that the Minister irrationally relied on the audit checklist as being sufficient to address biosecurity concerns on the following bases:

11.1 The audit checklist is not enforceable; and

11.2 The Minister relied on further *ex post facto* reasoning. In this regard RCL contends that he impermissibly found that small-scale operators such as Vermikor, could not be expected to comply with the stringent biosecurity measures placed upon entities such as RCL. RCL says that such reasoning "*appears nowhere in the Minister's initial decision*".

12. Third, RCL contends that the Minister failed to take into account the impact of Vermikor's operation on RCL's export status and veterinary approval.

12.1 The Minister found that RCL failed to provide evidence that its site had compartmentalisation status or traded with parties that require a 10km separation distance between facilities. RCL says that such information had in fact been provided.

12.2 RCL contends that the Minister failed to consider the cumulative effect of the establishment of a small-scale poultry farm on RCL's operations.

13. Fourth, RCL contends that the appeal process was procedurally unfair inasmuch as the appointed environmental assessment practitioner ("the EAP") was partisan and selective in the information that she furnished to RCL and to the Minister.

14. The application is opposed only by the Minister. He defends the appeal decision and argues, *inter alia*, that:

14.1 The application conflates the grounds of review and appeal and is at its heart an attempt to re-argue RCL's failed internal appeal;

14.2 RCL seeks to impose its views on what constitutes appropriate biosecurity measures on the Minister (in other words, RCL seeks to act as the regulator); and

14.3 RCL's objection to the approval granted to Vermikor is a disguised attempt to impose a 10km buffer zone around its operations despite there being no applicable legislative or policy basis for the imposition of such a buffer zone. What RCL seeks to do is to preclude small-scale farmers from operating within a 10km radius of RCL's operations, in an effort to limit its own risk.

15. These three points appear to me, on consideration of the papers and heads of argument, to relate mainly to RCL's complaints in relation to the Minister's views on the biosecurity measures implemented at the Vermikor site and the effect of the grant of the environmental authorization on RCL's operations (the second and third grounds of review), and I shall address them at those junctures.

16. The Minister contends further that RCL misconstrues the manner in which the reasonableness standard operates and, in fact, seeks to arrogate to itself the power of the regulator. Rather, RCL's remedy is a challenge to the Standard for Inspection of Poultry Farms for Export ("the Export Standard"), issued by the Animal Health Directorate of the erstwhile Department of Agriculture, Forestry and Fisheries ("DAFF") that imposes a 400m exclusion zone for exporting purposes as opposed to the 10km exclusion zone that RCL argues for.

17. These issues are addressed below following a factual background in relation to the RCL Hopefield facility, and the course that the application for environmental authorization and the subsequent internal appeal took.

### **Factual background**

#### **The RCL Hopefield facility and the concept of biosecurity**

18. RCL is South Africa's largest processor and marketer of chicken, and the Hopefield facility comprises some 15% of RCL's total national breeding flock. The facility has been in existence since 1983 and has been operated by RCL since 1994. Its location was specifically chosen for its remoteness. Each of the 19 chicken houses at the facility rears approximately 7 500 pullets (that is, chickens under the age of one year) twice a year. The number of birds which are moved through the facility per year to stock

the laying sites is 264 000 female birds and 33 000 male birds.

19. The RCL operations are not individual, standalone chicken farms. Each facility forms a significant link in the overall national value chain. Chicks are originally raised in rearing farms. At 22 weeks, the chicks are transferred from the rearing forms to the laying farms, such as the RCL Hopefield facility. From that facility, broiler chicks are transferred to broiler farms and RCL's processing plants, prior to distribution of a variety of products to supermarkets, restaurants and fast-food chain stores and export channels.

20. According to RCL, any disruption to the processes at any facility will result have disastrous consequences. Its effect will be felt at each stage in the process. For example, the 2017 outbreak of Avian Influenza had a notable effect on the poultry industry and resulted in losses in excess of R5 billion.

21. In addition to supplying the local market, RCL exports poultry products to neighbouring countries. In order to export its poultry meat and processed products to Namibia, Botswana, Swaziland, Lesotho and Mozambique, RCL is required to produce "ZA inspection" reports which require certification that there have been no Avian Influenza outbreaks or other biosecurity risks within a specific area radius: for Swaziland and Mozambique the radius is 10km, whilst Namibia requires 50km in some cases. (The Minister points out that the South African statutory requirement is a 400m exclusionary zone.)

22. RCL explains that biosecurity relates to the protection of biological entities from factors that influence their adaption, performance or survivability. At its simplest, reduction of the disease challenge in poultry requires that there are adequate measures in place that reduce the exposure levels of poultry to disease-causing organisms. Biosecurity extends, however, beyond disease control and relates in addition to other stress factors that could affect the animal.

23. Strict biosecurity measures are in place at all RCL facilities to maintain the integrity and health of the flock and to ensure the safety and non-contamination of the birds at the facility, and in the relevant environment. The biosecurity measures are not

only to the benefit of RCL, but to all poultry producers in South Africa. The applicable Biosecurity protocol contains 33 distinct measures that are in place to ensure the safety of the chickens at the facilities. All of these measures will continue to be implemented on a continuous basis.

24. The Minister acknowledges the effectiveness and importance of these measures, but cautions that RCL cannot dictate and impose its own biosecurity measures on smaller poultry producers that cannot afford measures as stringent as those of a large-scale broiled chicken producer. To do so would keep smaller enterprises out of the market, or eventually put them out of business.

25. RCL argues, however, that due to the nature of a free-range layer farm and the fact that the poultry houses are not environmentally controlled, the risk and likelihood of a disease outbreak at erf 1[...] is significantly increased. The risk arises in a number of ways: it may occur through direct contact with wild birds and poultry; it may be spread through rodents (via populations and their pathogens which can spread through populations) and it may be spread by means of aerosols. For that reason the environmental authorisation of erf 1[...] Hopefield within a 3km radius of the RCL Hopefield facility puts the RCL farms at increased risk, both directly and through the risk of losing the ZA status should there be a notifiable disease outbreak at erf 1[...].

26. The Minister contends, in turn, that it is speculative for RCL to make these assumptions. There is only a risk if there is a disease outbreak at the Vermikor facility.

#### The application for environmental authorisation

27. The Vermikor application for environmental authorization, submitted pursuant to the provisions of the National Environmental Management Act 107 of 1998 ("NEMA"), proposed, *inter alia*, that a total of 60 000 chickens would be housed at the facility.

28. When RCL became aware of the application, it objected to the authorisation, primarily on the basis that the application did not take into account the proximity between the RCL Hopefield facility and erf 1[...], and the fact that the locality of 1[...] creates the situation whereby the transmission of Avian Influenza and other diseases to

the RCL Hopefield facility is multiplied exponentially. RCL submitted that these biosecurity risks were of such a nature that the application fell to be refused.

29. Notwithstanding these objections, the application was granted by the Department on 5 March 2019. RCL contends that, in the reasons for decision, there was no reference at all to the specific concerns raised by RCL. The reasons simply record: *"Concerns were raised with respect to biosecurity risk and the impacts it will have on the existing poultry farm should a disease break out. It must be noted that the EMPr [the environmental management programme] includes mitigation measures to minimise potential biosecurity risks. Further, the threat of any disease is existing and it cannot be said for certainty that the proposed development will be the cause of any outbreak"*.

30. RCL points out that no mention was made of which mitigation measures purportedly included in the EMPr were considered sufficient to *"minimise potential biosecurity risks"*, nor was there any consideration of how the measures would counter the risks.

#### The internal appeal and the input from the State Veterinarians

31. RCL subsequently appealed to the Minister in terms of section 43 of NEMA and the National Appeal Regulations, 2014, promulgated thereunder.

32. During the appeal process on 16 July 2019, the Minister directed Vermikor to obtain commentary and input from the State Veterinarian in relation to the biosecurity concerns which had been raised in respect of the proposed development on erf 1[...]. The State Veterinarian was specifically asked by the Minister to address and provide comment on the submission by RCL that (1) *"RCL FOODS' broiler chicken facility which is located approximately 3km from the proposed chicken houses will be placed at risk due to the lack of biosecurity and health risks posed by the proximity of Vermikor Ltd's farm to its Hopefield operations"*, and (2) *"The site of the proposed free range facility contravenes norms and standards for the positioning of poultry farms"*.

33. RCL contends that the request was originally not disclosed to it, and that that



constitutes a procedural defect in the process. It appears, however, from the record that the Department in fact provided RCL with it – it was Vermikor's EAP who had initially refused to disclose them to RCL. This is dealt with later below.

34. Four responses were received from the State Veterinarians in relation to the appeal and the request for additional information from the Minister. These responses are set out in full because the manner in which the Minister treated them forms the crux of RCL's case.

35. First, on 12 August 2019 the State Veterinarian, Dr Davey, sent an email to the EAP indicating that she supported RCL's submissions: "Unfortunately I agree with the Rainbow sentiments. I am a bit jaundiced as I have seen too many business plans for these small farmers and then what happens when they get settled and then we are powerless to do anything to get them to keep their biosecurity up to scratch. The AI [Avian Influenza] decimated the poultry industry in 2017, and then when a 'section' is thrown out then the whole production line takes a knock and can take up to a year to sort itself out. Food security is then compromised." (Emphasis added.)

36. The second email, dated 9 September 2019, was also from Dr Davey, dated 9 September 2019. It records:

*"I did go through the EMP and on page 6 the Animal Diseases Act, Act 35 of 1984 is not listed.*

*I do not know much about free range layers (besides that they require a lot more medication than battery hens as they pick up coccidian, worms and mites in their environment) so I have asked a colleague to comment.*

*Also, shade cloth does not keep rodents out - I don't think anything keeps them out as they can get through the smallest of holes or they burrow to get where they want to be. I will get back to you with the general biosecurity measures when I recast them".*

37. Following receipt of this email, and despite Dr Davey specifically disclosing that she did not yet have sufficient information to assess the biosecurity measures and that

she would revert to the EAP, the EAP sought to discourage the compiling of further information dealing with biosecurity from the State Veterinarian. The EAP recorded in correspondence to the Minister that the State Veterinarian *"cannot find significant fault"* in the biosecurity measures and that the comments from the State Veterinarian were *"not sufficient enough to warrant sending them to the IAPs for a 30 day commenting period"*.

38. RCL submits that this recordal (which served before the Minister) is not correct, and does not accurately reflect the position of the State Veterinarian. Dr Davey had by that stage already recorded that she *"agreed with RCL's submissions"* and that the proximity of the farms created a biosecurity, and food security risk. The submission that the State Veterinarian *"cannot find significant fault"* is not true, given the content of Dr Davey's email of 12 August 2019.

39. Moreover, Dr Davey did in fact amplify her position thereafter, and again confirmed her agreement with RCL's biosecurity concerns raised in relation to the development. On 9 October 2019, Dr Davey provided further comments and substantiated her objection to the proposal in a report headed *"Re: Request for Additional AI Information in terms of Appeal Against Environmental Authorisation for Free Range Egg Farming Erf 1[...]"*. Dr Davey records the following:

39.1 *"There will always be risk associated with farming and how the risk is managed will determine the outcome of the risk."*

39.2 *"When there are many poultry farms situated in a small geographical area. the population density of poultry obviously increases. Should a disease break out on one farm, the spread of disease to another farm is normally inevitable especially if there are no or few biosecurity measures in place. With spread of disease the infective dose circulating in the environment increases dramatically to a dose where even stringent biosecurity measures may fail. An example of this was on outbreak of Salmonella gallinarum in the Paardeberg area where there is a high density of commercial poultry forms during 2016. Another good example was the outbreak of Avian Influenza (AI) in the Paardeberg area during 2017. A further example is the outbreak of a different strain of Infectious Bronchitis (IB), a non-controlled disease in the Allans area, which is another high-density poultry area in Dec 2018 which continued into 2019."* (Emphasis

added.)

40. Dr Davey then responded to the specific questions asked of her in the request of 16 July 2019. In relation to namely whether the Vermikor development posed a risk to RCL's farm approximately 3km away, she "agrees" with such statement for the following reasons:

40.1 The proximity of the two farms;

40.2 The fact that the free-range farm is a higher risk than an environmentally controlled farm. as a result of more contact with wild birds that can be carriers of disease;

40.3 There is no biosecurity plan in the EMPr;

40.4 There is no provision for vaccination, monitoring and evaluation in the EMPr; and

40.5 There is no provision for veterinary involvement through a poultry consultant in the EMPr.

41. In relation to the second question, namely whether the proposed facility contravenes norms and standards for the position of poultry farms, Dr Davey recorded that although there is no specific prescribed distance between poultry farms, the decision on distance is "made on risk" and may be guided by the State Veterinarian (although the ultimate decision rests with DAFF). Dr Davey recorded that, during the Avian Influenza outbreak in 2017, farms within a 3km radius of an outbreak were considered to be at particular risk; and the Department of Agriculture Contingency Plans for Newcastle Disease refer to a "restricted area" and a "control area" in this respect.

42. As to whether the biosecurity risks posed by a free-range farm may be a threat to RCL's continued export, Dr Davey confirmed that each importing country has its own set of criteria, and that if RCL loses its ZA status, then the breeder farms that are supplied by the RCL Hopefield facility would lose their ZA status, as would the hatchery and the broiler layers supplied by the hatchery, so there would be no export of broiler meat.

43. Dr Davey thus supported RCL's objection that RCL will be placed at risk due to the proximity of the Vermikor farm, the RCL facility will not be suitably isolated from the free-range farm in accordance with the norms and standards that are in place; and RCL's continued export may be in threat. If RCL loses its ZA status, it will not be able to supply eggs to breeders, compromising food security in the country, and will not be able to export broiler meat.

44. Another response had previously been received on 14 March 2019 from Dr Roberts, a State Veterinarian: Epidemiology, emphasizing the biosecurity risks presented by the approval. Dr Roberts records:

*"Under the Animal Diseases Act (35 of 1984) certain animal diseases have been designated as controlled diseases, for example Avian Influenza. Under section 9 of the Act, 'The Minister [of Agriculture] may for any controlled purpose prescribe general control measures, or particular control measures in respect of particular animal diseases and parasites'.*

*During an outbreak of a controlled animal disease, it is accepted practice for Veterinary Services, authorized by the Minister via the National Director: Animal Health, to declare a disease control area around an infected property and to place restrictions within this area on the movement of animals, their products and any other potentially contaminated things. For example, the section on the control of avian influenza in the draft "Animal Disease Control Contingency Plans" for the Western Cape states 'the control area (CA) may be established to form a buffer between the infected (restricted) and free areas. It should have an outer boundary no closer to the restricted area boundary than about 10km. This will assist in containing the disease within the restricted area'.*

*It therefore follows that any farm within a control area instituted during a controlled disease outbreak will be restricted in the movement of animals and vehicles and may not be able to function as usual, especially if usual activities involve frequent movement of animals". (Emphasis added.)*

45. As appears from what is set out below, RCL's main contention in these proceedings is that the Minister, in considering the record, had no regard to Dr Davey's further response and report, and to the response of Dr Roberts.

#### The refusal of the appeal

46. An internal memorandum was subsequently prepared by the Department and addressed to the Minister on 2 December 2019. RCL says that the Minister relied upon this document as the basis for his decision (the Minister denies the implication that this was the only document he had relied upon, but more about that below). The memorandum confirms that specific requests were made to the State Veterinarian for her opinion on the biosecurity risks arising to the RCL facility as a result of the grant of the environmental authorization.

47. The memorandum records expressly that the State Veterinarian "*did not object*" to the proposed development. It refers only to Dr Davey's email of 9 September 2019 wherein she recorded that she did not have sufficient expertise in the area and indicated that she would revert once she had more information. No mention is made at all of Dr Davey's initial concerns, or of her subsequent reports, including the substantive report of 9 October 2019, or of the opinion of Dr Roberts.

48. On 10 December 2019 the Minister refused RCL's appeal. The Minister accepted the EAP's submission that the impact of biosecurity had been adequately addressed in the EMP. In relation to the input from the State Veterinarian, the Minister recorded:

*"When additional information was requested during this appeal process, the Western Cape Department of Agriculture's State Veterinarian did not object to the proposed development and commented as follows regarding the biosecurity measures which have been included in the EMP:*

*'I did go through the EMP and on page 6 the Animal Diseases Act, Act 35 of 1984 is not listed.*

*I do not know much about free range layers (besides that they require a lot more*

*medication than battery hens as they pick up coccidian, worms and mites in their environment so I have asked a colleague to comment.*

*Also, shade cloth does not keep rodents out- I don't think anything keeps them out as they can get through the smallest of holes or they burrow to get where they want to be.*

*I will get back to you with the general biosecurity measures when I receive them".*

49. The input referred to by the Minister was the generic response received from Dr Davey on 9 September 2019 who, at that stage, indicated that she was not in a position to make an assessment. No reference is made by the Minister to the other comments of the State Veterinarians referred to earlier. RCL argues that it appears that the Minister did not take into account that both Dr Davey and Dr Roberts had indicated that they agreed with RCL's submissions regarding the biosafety risk. The Minister accepted what had been placed before him (incorrectly) in the memorandum to the effect that there was "*no objection*" from the State Vet.

50. The various grounds of review are discussed against this background.

### **The first ground of review: Failure to take relevant considerations into account**

#### **The Minister's inaccurate recordal of the State Veterinarians' position**

51. RCL submits that the Minister's reliance on the inaccurate statement that the State Veterinarian did not support RCL's objection, is the end of the matter. RCL calls this a "*killer point*" which is dispositive of the review, with reference to the case of *Trinity Asset Management (Pty) Limited v Grindstone Investments 132 (Pty) Limited* 2018 (1) SA 94 (CC) at para [91].

52. As mentioned earlier, the Minister takes umbrage with RCL's contention that the internal appeal memorandum was "*the document that the Minister relied on as the basis for his decision*". The implication of this statement is that the Minister only had regard to the internal memorandum. RCL effectively contends that the memorandum inaccurately recorded the position of the State Veterinarian (Dr Davey) and that the Minister simply

adopted this inaccurate position in his reasons for decision. This is expressly denied the answering affidavit where the Minister states the *“internal appeal memorandum is not the only document that I took into account in deciding the appeal.”*

53. I accept, on the papers, that the Minister had not simply rubberstamped the memorandum. He was entitled to rely thereon in reaching his decision: see *MEC for Environmental Affairs and Development Planning v Clairisons CC* 2013 (6) SA 235 (SCA) at para [31]: *“Nor can there be any objection to the political head of a department adopting recommendations made by the departmental officials, no matter that their recommendations are emphatic. It is precisely to formulate and ensure adherence to policy that departmental officials are there. It must be borne in mind that an appeal in the present context is not a quasi-judicial adjudication. It is a reconsideration by the political head of a department of a decision made by his officials. Baxter observes that: ‘Since the primary function of a minister is a political one, this form of appeal is obviously only appropriate where it is considered that policy and administrative considerations are paramount and that disputes involving such considerations require his personal settlement. The minister can hardly be expected to adopt a detached posture, acting as an independent arbitrator...’* [Emphasis added.]

54. The Minister further argues that the first ground of review is not a *“killer point”* as contemplated in the *Trinity Asset Management* case. This is because it is not merely a law point based upon undisputed facts, which was the case in the *Trinity* matter. I agree that the facts in the present matter are not undisputed. The questions as to what the Minister considered in reaching his decision and the Minister's interpretation of the views of Dr Roberts and Dr Davey are heavily disputed and inextricably linked to one of the bases underpinning the first ground of review. They are also not merely points of law.

55. Be that as it may, RCL contends that despite the various justifications put forward by the Minister in the answering affidavit (including *ex post facto* reasoning, and a resort to the discredited “no-difference” principle), it is clear that the Minister's contemporaneous reasoning for the dismissal of the appeal is based on incorrect facts. The State Veterinarian had not supported the application on erf 1[...]. On the contrary, both Dr Roberts and Dr Davey had supported RCL's objection on the basis that the Vermikor facility constituted a biosecurity risk.

56. RCL's argument is that the Minister's misapprehension and material mistake of fact vitiates the decision. It is well-established that a material error of fact is a ground of review, even though it is not one of the grounds of review expressly listed in section 6(2) of PAJA: see, for example, *Chairman of the State Tender Board v Digital Voice Processing (Pty) Ltd*, *Chairman of the State Tender Board v Sneller Digital (Pty) Ltd and others* 2012 (2) SA 16 (SCA) at paras [34] and [35], with reference to *Pepcor Retirement Fund and another v Financial Services Board and another* 2003 (6) SA 38 (SCA) at para [47] where it was held that:

*"In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should ... be reviewable ..."*

*The doctrine of legality ... requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts: it should not be confined to cases where the common law would categorise the decision as ultra vires."*

57. In the circumstances of this case, RCL submits that the Minister's discretion was not exercised properly, because it was not exercised on the basis of the true facts. In dismissing the appeal, the Minister took the decision on incorrect facts. The decision accordingly stands to be reviewed and it is irrational (see *Wakkerstroom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality* [2019] ZAMPMHC 20 (29 October 2019) at para [101]). The Minister failed to take into account a material consideration, namely the reports of Dr Davey and Dr Roberts which supported RCL's objection.

58. Further, to the extent that those reports served before the Minister, the Minister's decision is not rationally connected to the information before the Minister



and, to the extent that those comments did not serve before the Minister, the Minister's decision is vitiated by a material error of fact, namely the mistaken belief that the application was supported by the State Veterinarian when in fact the opposite is true.

59. It does not, however, appear from the answering papers that the Minister simply misunderstood Dr Davey's comments as not being supportive of RCL's objection to the environmental authorisation. What he did understand was that she did not object to the proposed development. The Minister states that Dr Davey indicated in her initial correspondence that she did not know much about free-range farms, but that she would seek further comment from a colleague on the biosecurity measures that were proposed for imposition on Vermikor, and whether such measures were sufficient.

60. Despite her disclosure that she does not possess the requisite expertise in an area of free-range farming, and indicating that she would seek assistance from a colleague, Dr Davey subsequently provided a report in her own name and without any indication of what, if any, input was obtained from a colleague with the requisite expertise. In the report she purports to deal in detail with the precise issue in which she has no specific expertise. The Minister saw no objection in Dr Davey's 9 October 2019 report. She did have concerns, and noted a possible increased risk as a result of the proximity of Vermikor to the RCL's operation, but the increased risk to another poultry producer was not the only aspect to consider in granting the environmental authorisation. The other aspects were addressed by the Minister in the course of the appeal decision.

61. The Minister was of the view that Dr Davey agreed with RCL's submissions for incorrect reasons, in that she stated that the EMPr did not have a biosecurity plan or a vaccination plan when audit checklist, which forms part of the EMPr, in fact included a biosecurity plan and a vaccination plan. She was also incorrect in stating that the Department is *"powerless to do anything to get [smaller poultry producers] to keep their biosecurity up to scratch"*. The Minister was entitled to and bound to consider Dr Davey's stated mistrust of smaller poultry producers, and her admission that she has a *"jaundiced"* view in relation to the ability of such producers to maintain adequate biosecurity measures.

62. Dr Davey noted that in the event of an Avian Influenza outbreak, RCL's continued export status may be at risk, a fact that the Minister was aware of in that RCL had

repeatedly, and throughout the process, raised the loss of its ability to export in the event of such an outbreak, and the potential economic effects on RCL.

63. The Minister was, however, not bound by the views of Dr Davey and was required to take into account the full range of views placed before him. In all of these circumstances the Minister did not misunderstand Dr Davey's views. He was fully apprised of the correct facts, namely that she supported RCL's concerns, but he disagreed with her.

Did the Minister fail to take into account the State Veterinarian's views?

64. The core of RCL's factual complaint is that because the internal memorandum addressed by the Department to the Minister refers to Dr Davey's initial concerns whilst no mention is made of her subsequent comments, or of the comment of Dr Roberts, this must mean the Minister failed to take those comments into account in reaching his decision.

65. As indicated earlier, RCL contends that it is impermissible for the Minister to assert in his answering affidavit that the full extent of Dr Davey's views served before him when he took his decision, and the fact that the Minister only referred to Dr Davey's initial email in the reasons for decision does not mean that he did not consider the further emails and documents in which Dr Davey's views were expressed.

66. It is common cause that all of Dr Davey's communications are contained in the Rule 53 record. The Minister states that he considered the full extent of her views when the decision was rendered.

67. RCL contends that the Minister's submissions are not credible because he provides no evidence as to when, or how it is alleged that the views of Dr Davey and Dr Roberts were taken into account. RCL contends that the Minister's averments that he took the views of Dr Davey and Dr Roberts are bald and unsupported by the facts, and moreover, if the report of Dr Davey had been taken into account the Minister would have had to explain why he came to a decision that did not follow their recommendations.

68. I agree with the submissions made on the Minister's behalf that this approach would require a decision-maker to refer to every single document which served before

them, and to prove that they took each such document into account in reaching a decision. This approach runs counter to the principles governing application proceedings which require an applicant to prove that which they allege.

69. The Minister states in his answering affidavit that he considered the reports of the State Veterinarians in reaching the decision. The documents are contained in the Rule 53 record. The Minister, as respondent, has the benefit of the rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635, reformulated as follows in *NDPP v Zuma* 2009 (2) SA 277 (SCA) at para [26]: *"It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's ... affidavits, which have been admitted by the respondent ..., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*

70. I cannot, on the affidavits before me, conclude that the allegations contained in the Minister's answering affidavit are bald or uncreditworthy. The Minister states that regard was had to all of the State Veterinarian reports, and these reports appear in the Rule 53 record. The content of the Rule 53 record has not been challenged. It forms part of the contemporaneous record (together with the internal memorandum and the appeal decision), and I cannot infer that it does not constitute an accurate and complete record of the documents that the Minister had regard to in reaching the decision, as he states that he had.

71. In any event, the failure to make direct reference to all of the State Veterinarian's reports in the decision does not render the decision reviewable irregularity. The reasons provided need not be perfect. They must be adequate. In *Koyabe and others v Minister for Home Affairs and others* 2010 (4) SA 327 (CC) at paras [63] to [64] the Constitutional Court stated as follows:

"[63] Although the reasons must be sufficient, they need not be specified in minute detail, nor is it necessary to show how every relevant fact weighed in the ultimate finding. What constitutes adequate reasons will therefore vary, depending on the circumstances of the

*particular case. Ordinarily, reasons will be adequate if a complainant can make out a reasonably substantial case for a ministerial review or an appeal.*

*[64] In Maimela, the factors to be taken into account to determine the adequacy of reasons were succinctly and helpfully summarised as guidelines, which include –*

*'the factual context of the administrative action, the nature and complexity of the action, the nature of the proceedings leading up to the action and the nature of the functionary taking the action. Depending on the circumstances, the reasons need not always be "full written reasons": the "briefest pro forma reasons may suffice". Whether brief or lengthy, reasons must, if they are read in their factual context, be intelligible and informative. They must be informative in the sense that they convey why the decision-maker thinks (or collectively think) that the administrative action is justified.' ...*

*The purpose for which reasons are intended, the stage at which these reasons are given, and what further remedies are available to contest the administrative decision are also important factors. The list, which is not a closed one, will hinge on the facts and circumstances of each case and the test for the adequacy of reasons must be an objective one." [Emphasis added.]*

72. Having regard to the content of the appeal decision, there is no basis for a departure from the principle set out in *Koyabe*.

73. In summary, the Minister did not make a bald assertion that he considered the views of the State Veterinarians. He explains that he had done so in detail in his answering affidavit and the *Plascon-Evans* principle must, accordingly, operate in his favour. Even if it were held that the Minister's contention that he considered the views of Dr Davey amounts to a bald denial, then this is an instance where a bare denial is sufficient because there is no other way open to him, and nothing more can be expected of him (see *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para [13]).

Does the alleged mistake of fact complained of render the decision reviewable?

74. If the Minister was in fact mistaken as to Dr Davey's views, is that a mistake of fact

that would justify interference with the Minister's decision?

75. In *Pepkor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) 38 (SCA) at para [48] it was stated: "Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant. or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide." [Emphasis added.]

76. The distinction between appeal and review is discussed in more detail in the context of the second ground of review. For present purposes, the legal principles governing judicial review based on mistake of fact are, broadly, as follows (see *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and another* 2020 (4) SA 453 (SCA) at para [23], with reference to *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para [12]), and this does not detract from the approach taken in *Pepkor supra* upon which RCL relies:

76.1 A review court may interfere where a functionary exercises a competence to decide facts but fails to get the facts right in rendering a decision, provided that the facts (a) are material, (b) were established, and (c) meet a threshold of objective verifiability. In other words, an error as to material facts that are not objectively contestable is a reviewable error.

76.2 The exercise of a judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence. is not reviewable, even if the court would have reached a different view on these matters were it vested with original

competence to find the facts.

77. For RCL to succeed in a review based on a mistake of fact, it must therefore demonstrate that the Minister disregarded uncontentious and objectively verifiable facts which were material and which would have resulted in a different decision had they been taken into account. The Minister argues that, in the present matter, there are no common cause, incontrovertible or objectively ascertainable and material facts presented by RCL which ought to have been considered over and above the material placed before the Minister.

78. The fact that Dr Davey supported RCL's concerns cannot be deemed to be a material and uncontentious fact given that her support was based on certain incorrect facts and assumptions (as alluded to earlier). She further expressed skepticism as regards small-scale chicken farmers' abilities to maintain biosecurity, and admitted a lack of expertise in the field of free-range chicken farming.

79. I agree with these submissions. Dr Davey's views were, at best for RCL, part of a range of views that the Minister was required to take into account. There is thus no reviewable mistake of fact in this matter.

#### Ex post facto justifications in the answering affidavit

80. The next leg to RCL's first ground of review is that the Minister used the answering affidavit as an opportunity to supplement the reasons originally given by him in justification of the decision.

81. RCL contends that it is well-established that an organ of state which provides one set of reasons under PAJA or Rule 53 may not seek to improve on those reasons or file better reasons when it delivers its answering affidavit in subsequent review proceedings. Such new reasons are rejected as an impermissible "*ex post facto rationalisation of a bad decision*" (*National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para [27], referred to in *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC) at fn 85), and "*There is no place in our law for hindsight as an administrative cure-all*" (*Commissioner, South African*

*Police Service v Maimela* 2003 (5) SA 480 (T) at 486F-H).

82. RCL contends that the Minister's answering affidavit constitutes an example of impermissible *ex post facto* reasoning. The record itself and the reasons provided by the Minister at the time that the impugned decision was taken confirm that when the Minister took the impugned decision, reliance was placed only on the short email received from the State Veterinarian, Dr Davey, of 9 September 2019 that she did not have sufficient expertise in relation to free range chickens and would seek the assistance of a colleague.

83. The Minister did not consider Dr Davey's subsequent, detailed and adverse recommendations of 9 October 2019, or the recommendation from the other State Veterinarian, Dr Roberts, who had been asked by RCL to comment on the biosecurity aspect of the development, discussed earlier. As indicated, in the internal Departmental memorandum dated 2 December 2019, reference is made only to Dr Davey's initial email. In the contemporaneous document which sets out the Minister's reasons for the impugned decision, specific reference is made to Dr Davey's email of 9 September 2019, but no mention at all is made of Dr Davey's report of October 2019 or of the opinion of Dr Roberts obtained in March 2019.

84. In the answering affidavit, the Minister asserts that "*... the full extent of Dr Davey's views served before me when I took the appeal decision. The fact that I only referred to her initial email in my reasons for decision does not mean that I did not consider the further emails and documents in which her views were expressed*". This averment (or a variation thereon) is repeated many times through the affidavit.

85. RCL argues that this is impermissible. The Minister cannot say that the reports were taken into account in coming to the impugned decision when the contemporaneous evidence (his record of decision) indicates that they were not. The Minister accordingly takes refuge in the fact that they "*served before him*". But this is not what the law requires – section 6(2)(e) of PAJA requires that relevant considerations must be "*taken into account*" or "*considered*", not merely that they form part of a large pack of documents provided to a decisionmaker.

86. Given what the Minister explains in his answering affidavit as to his approach to the reports, I do not think that much is to be read into the phrasing “served before him” as opposed to “taken into account” or “considered”. When regard is had to his affidavit as a whole, it is clear that he intended to state that he had considered or taken into account those reports (see *Basson N.O and another v Orcrest Properties (Pty) Ltd; In re: Basson N.O and others v Orcrest Properties (Pty) Ltd; In re: Basson N.O and others v Orcrest Properties (Pty) Ltd* [2016] 4 All SA 368 (WCC) at para [71]).

87. RCL argues that the Minister's submissions in this regard are in any event not credible. The Minister provides no evidence as how the views of Dr Davey and Dr Roberts were taken into account. The averment is a bald one, unsupported by the facts. If the report of Dr Davey of October 2019 had been taken into account, the Minister would have had to explain why he came to a different decision. The contemporaneous reasons do not do so, because they do not mention the report at all.

88. To the extent that the Minister did have the report of Dr Davies of 9 October 2019 and the report of Dr Roberts before him when the decision was taken, the decision is irrational because it bears no rational connection to this information, and there is no basis in the contemporaneous reasons to understand why the Minister declined to follow the State Veterinarian's recommendation, after having specifically requested input on the particular aspect.

89. I do not agree that the Minister bolstered his reasoning in the answering affidavit in an impermissible manner. In the *Lotteries Board* case to which RCL refers, the reason provided for the impugned decision was simply that the application had been refused because of the fact that a set of required annual financial statements had not been signed. That was the only reason given, and was – unsurprisingly -held by the Court to have been unreasonable. The case is distinguishable from the present one.

90. Also, in the case of *Commissioner, South African Police Service supra* a single and woefully inadequate reason was given for the impugned decision initially, and no reasons at all were given in respect of the subsequent internal appeal. The Court stated at 486C-487A:



*"I now proceed to consider the reason that the Commissioner gave to the first respondent. ... The reason given to the first respondent was 'premises/residence does not conform to required standar(d)'. The reason adequately conveys that the Commissioner refused the licence because a dwelling does not conform to a required standard. It is cryptic in that it does not convey which dwelling is referred to nor where the required standard is to be found. Regulation 28(3)(a) of the regulations promulgated under the Act provides that a safe for the safe-keeping of a firearm 'shall to the satisfaction of the Commissioner . . . be affixed flush to a floor, wall or other immovable structure or part thereof of the house . . . or other dwelling place of an applicant concerned'.*

*With the benefit of hindsight, provided by the Commissioner in the answering affidavit, we know that this is the 'required building standard' referred to in the reason. Having had the attention directed to the regulation, we also now know that the 'premises/residence' is a reference to the first respondent's dwelling. Reasons must not be intelligible and informative with the benefit of hindsight however. They must from the outset be intelligible and informative to the reasonable reader thereof who has knowledge of the context of the administrative action. If reasons refer to an extraneous source, that extraneous source must be identifiable to the reasonable reader. The reason given to the first respondent does not, in this respect, pass muster. ...*

*...I conclude that the reason that the Commissioner gave to the first respondent did not constitute a reason in compliance with the provisions of s 33 of the Constitution as the latter was deemed to have read until PAJA came into effect." [Emphasis added.]*

91. In the present matter, RCL conflates the Minister's taking issue with Dr Davey's 9 October 2019 report in his answering affidavit with an attempt to bolster his reasons. The Minister, in terms, indicates that he considered all of the views of the State Veterinarians. RCL takes the view that because the Minister only referred to an initial email and indicated that Dr Davey did not support RCL's decision, means that he could not have considered the subsequent views of Dr Davey and Dr Roberts. Put differently, RCL contends that the decision is irrational because it bears no rational relationship to the information before the Minister. RCL further contends that there is no indication in the reasons to understand why the Minister declined to follow the State Veterinarian's recommendation having specifically requested the input.

92. However, the reasons why the Minister elected to dismiss RCL's internal appeal are set out in the appeal decision, and it is clear from that document that the Minister's reasoning was not predicated only upon the State Veterinarian's views.

93. The Minister is not bound by the views of the State Veterinarian, but was required to take into account all of the information which served before him in rendering a decision. He was not required to state why he disagreed with the State Veterinarian. It was sufficient to state that he disagreed with her conclusions. It is clear from a consideration of the appeal document what the bases for the dismissal of the internal appeal was. The elaboration upon those bases put up in the answering affidavit in the present matter does not amount to an impermissible armchair exercise in devising reasons after the fact.

#### The "no difference" principle

94. As a further leg to the first ground of review, RCL argues that the Minister asserts that, in any event, he was not bound by views of the State Veterinarian and they would have made no difference to his ultimate decision. The "*no difference principle*" has been rejected as having no place in administrative law (*Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of SASSA and others* 2014(1) SA 604 (CC) at paras [23] to [24]).

95. RCL contends that it is thus impermissible for the Minister to assert that, even had the reports been taken into account, he would not have changed the ultimate decision because he disagrees with them.

96. I do not read the particular section in the Minister's answering affidavit as merely stating that he would not have come to a different decision. In fact, he says that RCL's contention as regards his consideration of the views of the State Veterinarian is incorrect, and then proceeds to explain why that is so.

97. He justifies the decision that he had taken, but not on the basis, without more, that even had he taken the State Veterinarians' views into account, those views would

not have made any difference at all. He says that he did take them into account, together with other factors, and that based on the information as a whole he came to the decision that the appeal should be refused. He states further "... as clearly demonstrated by the Rule 53 Record, I had regard to the full views of Dr Davey. This is particular so given that I requested comments from a veterinarian in order to make an informed decision on the appeal. The fact that I disagreed with Dr Davey's views on the inherent risks posed by small poultry farmers does not mean that I did not take the views of Dr Davey into account."

98. He explains at a different juncture: "*Dr Davey in her report of 9 October 2019, states that she agrees with RCL's sentiments. She specifically stated that she had concerns, and noted a possible increased risk as a result of the proximity of the Vermikor farm to the RCL operation. She did not express an objection to the Vermikor development per se. However, even if this interpretation of Dr. Davey's comment is incorrect, which is denied, Dr Davey's comment would not have changed the outcome of the appeal in that (a) increased risk to another poultry producer was not the only aspect to consider in granting the EA; (b) Dr Davey incorrectly stated that the EMPr did not have a biosecurity plan, a vaccination plan, or provide for engagement with a poultry consultant when in fact the EMPr does contain appropriate risk mitigation measures. I reiterate that Dr Davey's comments are not decisive. She (and indeed the DALRRD) are not the decision makers. Her comments are but one of a number of factors to be taken into account in the decision making process ....*"

99. The Minister states that he had regard to Dr Davey's views, but that he was not bound by them. Her comments were amongst a number of factors to be taken into account.

100. In relation to *Allpay supra* on which RCL relies for its proposition that the Minister breached the "no-difference" principle, regard must be had to what the Constitutional Court held at paras [23] and [24]:

*"[23] To the extent that the judgment of the Supreme of Court of Appeal may be interpreted as suggesting that the public interest in procurement matters requires greater caution in finding that grounds for judicial review exist in a given matter, that misapprehension must be dispelled. So too the notion that even if proven irregularities exist, the inevitability of a certain outcome is a factor that should be considered in*

determining the validity of administrative action.

[24] This approach to irregularities seems detrimental to important aspects of the procurement process. First, it undermines the role procedural requirements play in ensuring even treatment of all bidders. Second, it overlooks that the purpose of a fair process is to ensure the best outcome; the two cannot be severed. On the approach of the Supreme Court of Appeal, procedural requirements are not considered on their own merits, but instead through the lens of the final outcome. This conflates the different and separate questions of unlawfulness and remedy. If the process leading to the bid's success was compromised, it cannot be known with certainty what course the process might have taken had procedural requirements been properly observed." [Emphasis added.]

101. In the present matter, the Minister does not state in his answering affidavit that the views of Dr Davey made (or would have made) no difference to his decision. A breach of the no-difference principle would have occurred if the Minister had, for example, stated that he did not have regard to the views of Dr Davey but that, in any event, those views would have made no difference and that, as such, his decision was justified. That is not what the Minister says in this matter. The Minister's position in his answering affidavit is that he disagreed with Dr Davey's views because of her erroneous reasoning, and that her views were not dispositive of the matter.

102. This is not a breach of the "no difference" principle.

Conclusion on the first ground of review

103. RCL argues that, in the circumstances, the Minister's reliance on reasoning that did not form part of his original assessment of the appeal demonstrates that the Minister's decision cannot be justified on the basis of the reasons that were given at the time of his decision. This is so because the decision not to rely on the subsequent reports by State Veterinarian, Dr Davey, and to ignore entirely the report of Dr Roberts was irrational, and means that material and relevant considerations were not taken into account.

104. On the affidavits filed of record, and on the approach to factual disputes in motion proceedings set out in *Plascon Evans*, I cannot find that the Minister ignored the relevant comments and reports. As indicated above, I do not agree that the Minister is guilty of *ex post facto* reasoning or that he transgressed the “no difference” principle.

105. In these circumstances, the first ground of review cannot succeed.

### **Second ground of review: irrational reliance on the audit checklist**

106. RCL’s second ground of review is that the decision was unlawful under section 6(2)(f)(ii)(aa), (bb), (cc) and (dd) of PAJA inasmuch as the Minister repeatedly in his reasons states that the mitigation measures in the environmental authorisation and the EMPr, including the audit checklist, were “adequate” and “sufficient. According to RCL, based on the information that was before the Minister, and within the context of the relevant legislation, this finding was irrational. The Minister asserts that on the basis of the audit checklist he was satisfied that biosecurity concerns had been adequately addressed, and that the Audit Checklist is enforceable. RCL argues that these assertions constitute further material errors in the decision, since the Audit Checklist is neither enforceable nor adequate.

107. Its challenge, in essence, is that the biosecurity measures which were imposed upon Vermikor when the environmental authorisation was granted are insufficient.

#### **The enforceability of the audit checklist**

108. The Minister asserts that the audit checklist is enforceable inasmuch as the designated environmental control officer (“the ECO”) is required to monitor the project, and to ensure compliance with the EMPr through quarterly inspections, amongst other measures. The Minister states that “*the ECO must report a failure to comply with the EMPr to the Department*” (original emphasis).

109. This, according to RCL, is incorrect. The EMPr to which the Minister refers places no mandatory reporting obligation on the ECO. The EMPr specifically states that the ECO “*can*” report non-compliance with the EMP to the Department, and that this

"may" result in certain penalties being imposed.

110. The audit checklist is in any event incapable on its own terms of being enforced. It is clear from an examination thereof that the standards on the audit checklist are vague, subjective and not measurable. Others are simply factually incorrect. RCL refers to a few examples:

110.1 The audit checklist states that *"No overcrowding of the houses will be tolerated"*. One would have expected that the audit checklist should have specified the maximum stocking density in birds per square meter. But there is no such specification. In the premises, it is impossible to audit whether or not the houses are overcrowded or not since there are no standards against which to measure compliance.

110.2 The audit checklist states that poultry farming activities must comply with the regulations as stipulated in the Meat Safety Act 40 of 2000. The Meat Safety Act relates to meat safety specifically in abattoirs and the regulations do not refer to poultry farming but to abattoirs only. The standard is accordingly inapplicable.

110.3 The audit checklist states *"rodents travel up to 900m and as such as a threat to the adjacent farms"*. Notwithstanding this acknowledgement, there is no auditable requirement that is required to be implemented to prevent rodents from infecting the relevant farms.

110.4 With reference to the disposal of infected carcasses, the audit checklist does not make provision for the disposal of the carcasses infected with notifiable diseases as determined by the Director of Animal Health, and merely states that infectious carcasses will be *"treated before disposal"*. RCL's concerns as to the distinction between infectious and non-infectious material is nowhere addressed in this checklist.

110.5 In relation to *"poultry litter"*, the audit checklist states that *"poultry litter shall be removed at the end of the cycle"*. Considering that a typical cycle for layer birds is 12 to 18 months, there will be a significant build-up of pathogens such as bacteria and viruses during this time, and this requirement is wholly inadequate.

111. RCL argues that the audit checklist is based on "*recommendations*"; statements that certain activities should be performed on an "*ad hoc basis*" or "*in appropriate circumstances*"; that "*good housekeeping*" must be followed; that rodent traps "*may be used if necessary*"; that feed should "*preferably [be] located off the ground*"; that "*high levels of hygiene*" must be followed, that there must be "*regular maintenance*", and so forth. None of these are auditable standards.

112. The audit checklist is accordingly vague and incapable of enforcement (in support of this contention RCL relies on expert evidence of Andrew van Wijk, a Divisional Veterinarian at RCL, and Mr Richard Trollip, the Agricultural Executive at RCL, confirming that the EMPr and environmental authorisation insufficiently address the risks associated with poultry farming and reducing the likelihood of flocks becoming infected. These opinions were not before the Minister at the time of the taking of the decision, but were obtained in 2020 for the purposes of this litigation.)

113. RCL contends that the Minister's reliance on the audit checklist as mitigating risk for RCL, or justifying the granting of the approval, is misplaced. Accordingly, the Minister's decision was made the basis of a further material error, namely that RCL's concerns were addressed by the audit checklist and that the checklist was enforceable. For these reasons, the dismissal of the internal appeal on the basis that the mitigation measures that were provided were adequate and sufficient was irrational, unreasonable and contrary to law.

114. One must have regard to what the Minister stated in relation to the enforceability of the checklist. He pointed out that the EMPr audit checklist is not a wish list. The purpose and legal implications of an EMPr are detailed in NEMA and in the 2014 Environmental Impact Assessment ("EIA") Regulations promulgated under NEMA (in GN R982, *Government Gazette* 38282 of 4 December 2014). He also took the view in his reasons that "*compliance with the approved EMPr is a condition of the EA. As such, the EMPr and the checklist must be audited by the ECO. The findings of such an audit are submitted to the Department. The entire audit checklist is part of a management plan and it does address the vectors, water removal etc.*"

115. RCL's complaint in relation to the audit checklist is mainly that it is not enforceable

or mandatory and that it therefore does not mitigate RCL's risk is not borne out by the Minister's decision.

116. RCL also takes the view that the EMPr and the audit checklist are discretionary because of the use of the word "can" in the EMPr, and seeks to create the impression that the Minister misquoted the EMPr when indicating that the requirement to report was peremptory. The Minister, however, expressly states in the answering affidavit that the *"ECO must report a failure to comply with the EMPr to the Department which may result in the suspension of the EA, or criminal charges against Vermikor. The contention that the EMPr and Audit Checklist are not enforceable is factually incorrect."*

117. The fact that the EMPr document provides that the ECO "can" report a failure to comply with the EMP to the Department is not the end of the matter. Regulation 34 of the EIA Regulations specifically requires auditing of an EMPr and the submission of such audits to the relevant competent authority. It provides in relevant part as follows:

*"(1) The holder of an environmental authorisation must, for the period during which the environmental authorisation, EMPr, and the closure plan in the case of a closure activity, remain valid-*

*(a) ensure that the compliance with the conditions of the environmental authorisation, the EMPr, and the closure plan in the case of a closure activity, is audited: and*

*(b) submit an environmental audit report to the relevant competent authority."*  
[Emphasis added.]

118. The fact that the EMPr erroneously uses the word "can" is not a basis upon which to contend that the reporting requirement is discretionary. It does not, and cannot, override the Regulations. The EMPr, NEMA and the EIA Regulations place a number of mandatory reporting obligations onto the holder of an environmental authorisation. The Environmental Control Officer ("ECO") must ensure compliance. As indicated in the EMPr, the *"ECO must then undertake monthly Environmental Audits on the site for the duration of the construction phase of the project. ... Thereafter, quarterly audits must be*



*undertaken for the operational phase of the project. Particular attention must be paid by the ECO to the applicant's biosecurity compliance during the operation. ... Strict record keeping must be undertaken by the ECO in the form of minute taking with the project team, photographic evidence and compliance with this EMP must be documented in a report and submitted to the authorities each month."*

119. Given these provisions, I accept the Minister's argument that the checklist and the EMPr are enforceable. In any event, RCL does not seek to review the audit checklist or the EMPr. Its complaint is that the Minister erred in placing reliance upon it. It is apposite to refer at this stage to what was stated in *Clairisons CC supra* at paras [17] to [20] in relation to the weight given by a decisionmaker to factor taken into account in the consideration of an application such as one for environmental authorization:

*"[17] ... if there is one thing that is clear from the evidence it is that the MEC pertinently took account of each of the factors – indeed, the application was refused precisely because he took them into account. The true complaint ... is instead that he attached no weight to one of the factors, and in the other cases he weighed them against granting the application, whereas Clairisons contends that they ought to have weighed in favour of granting it, which is something different.*

*[18] ... the learned judge blurred the distinction between an appeal and a review. It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted. Clearly the court below, echoing what was said by Clairisons, was of the view that the factors we have referred to ought to have counted in favour of the application, whereas the MEC weighed them against it, but that is to question the correctness of the MEC's decision, and not whether he performed the function with which he was entrusted.*

*[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to*

making up a decision, is that of the decision-maker. As it was stated by Baxter: “The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker’s discretion.” [Emphasis added.]

120. The weight of the checklist and EMPr in favour of or against the approval of the application for environmental authorization therefore fell within the ambit of the Minister’s functions.

121. As to whether the checklist is vague or insufficient, RCL's selective quotation of the audit checklist is unhelpful. The document should be considered holistically. There are various material measures which are imposed upon Vermikor and with which it must comply. There are, admittedly, also measures in the audit checklist which are not hard and fast rules, for example, the recommendation that rodent traps may be used “*if necessary*”. This is framed as condition because it falls to be implemented in the event of rodents being a problem. And if rodents are a problem, that is an issue that the ECO will have to report on in the course of the required regular audits and record-keeping. In such a case, the condition might well become enforceable. Given the nature of the operation, a form of flexibility - subject to regular inspection – is necessary.

122. RCL similarly complains, for example, that “*good housekeeping*” is not an auditable standard, The full provision in the checklist provides as follows: “*Good housekeeping must be undertaken by all members of staff to ensure no littering on the site takes place.*” This is not a vague requirement – it stipulates that no littering may take place on the site. I am not going to traverse all of the examples cited by RCL in their heads and in the course of argument. The question, ultimately, is not whether the audit checklist accords with RCL's views, but whether the Minister’s reliance thereon as a risk mitigation factor is so unreasonable that no reasonable decisionmaker could have relied upon it.

123. I cannot, on the facts of this matter, come to such a conclusion. It is not for RCL to impose biosecurity measures upon Vermikor. That is the Minister’s prerogative. The Minister had regard to the checklist and came to the conclusion that it constituted an appropriate balance in the circumstances of the matter. That RCL disagrees with the Minister's

decision as to what biosecurity measures are appropriate is not a ground of review.

Further *ex post facto* reasoning

124. The second leg to RCL's second ground of review is, as in the first ground, that the Minister makes himself guilty of *ex post facto* reasoning. In the answering affidavit, the Minister states that "small-scale" operators such as Vermikor simply cannot be expected to comply with the same biosecurity standards as RCL because they are not economically viable. The Minister uses this reasoning to justify why more stringent measures were not imposed on the erf 1[...] operations.

125. This reasoning, so RCL contends, appears nowhere in the Minister's appeal decision, and constitutes a further impermissible attempt to shore up the original decision in circumstances where nowhere in the reasons document does the Minister state that (one of) the reasons he was not imposing additional biosecurity measures was because they were unaffordable.

126. The contention that the economic impact on small-scale farmers in respect of biosecurity measures was an argument only advanced in the answering affidavit is not correct. The Minister stated as follows in the appeal decision: *"The biosecurity measures that will be undertaken at the farm were detailed including enclosing the outside roaming areas, limited access due to the nature of the business being run by family. water and food to be located inside the houses, etc. However, it was explained that the level of biosecurity which is undertaken at a commercial farm can only be implemented to a certain level at a small-scale operation due to cost constraints"*

127. The issue of *ex post facto* reasoning therefore does not arise.

128. The realities faced by small-scale farmers nevertheless do not mean that the measures implemented are not enforceable. Regulation 34 of the EIA regulations requires compliance. I have already referred to Regulation 34(1), but it is informative to refer to the whole of the regulation:

"(2) *The environmental audit report contemplated in subregulation (1) must –*

- (a) *be prepared by an independent person with the relevant environmental auditing expertise;*
- (b) *provide verifiable findings, in a structured and systematic manner, on–*
- (i) *the level of performance against and compliance of an organization or project with the provisions of the requisite environmental authorisation or EMPr and, where applicable, the closure plan; and*
- (ii) *The ability of the measures contained in the EMPr, and where applicable the closure plan, to sufficiently provide for the avoidance, management and mitigation of environmental impacts associated with the undertaking of the activity;*
- (c) *contain the information set out in Appendix 7; and*
- (d) *be conducted and submitted to the competent authority at intervals as indicated in the environmental authorisation.*
- (3) *The environmental audit report contemplated in subregulation (1) must determine –*
- (a) *the ability of the EMPr, and where applicable the closure plan, to sufficiently provide for the avoidance, management and mitigation of environmental impacts associated with the undertaking of the activity on an ongoing basis and to sufficiently provide for the, avoidance, management and mitigation of environmental impacts associated with the closure of the facility; and*
- (b) *the level of compliance with the provisions of environmental authorisation, EMPr and where applicable the closure plan.*
- (4) *Where the findings of the environmental audit report contemplated in subregulation (1) indicate –*
- (a) *insufficient mitigation of environmental impacts associated with the undertaking of the*

activity; or

*(b) insufficient levels of compliance with the environmental authorisation or EMPr and, where applicable the closure plan; the holder must, when submitting the environmental audit report to the competent authority in terms of subregulation (1), submit recommendations to amend the EMPr or closure plan in order to rectify the shortcomings identified in the environmental audit report.*

*(5) When submitting recommendation in terms of subregulation (4), such recommendations must have been subjected to a public participation process, which process has been agreed to by the competent authority and was appropriate to bring the proposed amendment of the EMPr and, where applicable the closure plan, to the attention of potential and registered interested and affected parties, including organs of state which have jurisdiction in respect of any aspect of the relevant activity and the competent authority, for approval by the competent authority.*

*(6) Within 7 days of the date of submission of an environmental audit report to the competent authority, the holder of an environmental authorisation must notify all potential and registered interested and affected parties of the submission of that report, and make such report immediately available –*

*(a) to anyone on request; and*

*(b) on a publicly accessible website, where the holder has such a website.*

*(7) An environmental audit report must contain all information set out in Appendix 7 to these Regulations.” [Emphasis added.]*

129. Should it therefore appear in the future that there are measures that are insufficient and that impact on RCL’s operations, RCL will have the opportunity of commenting on the audit report and the recommendations contained therein.

Appeal as opposed to review

130. There is a further problem with RCL's contentions in relation to, in particular, the biosecurity measures. RCL contends that the fact that the Minister recognises and appears to accept that Vermikor will not be able to implement biosecurity measures necessary to mitigate the risk of contamination of RCL's facility is a factor which should have militated against the grant of environmental authorisation, and not in favour of it.

131. This contention raises issues closely linked to the distinction between a review and an appeal, raised by the Minister in the context of the application as a whole but with particular focus on the second and third grounds of review. As the Minister's counsel puts it: RCL is part of the "*regulated*" - it is "*not part of the regulator*" (with reference to *South African Poultry Association v Minister of Agriculture and others* 2016 ZAGPPHC 862 (21 September 2016) at para [15]).

132. RCL is not in a position to dictate which biosecurity measures ought to have been imposed on other poultry operations. It is also not appropriate for RCL to advance an argument that would require this Court to engage in a polycentric decision-making process: see the *dictum* of the Supreme Court of Appeal in *Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 at para [59]: "*It is not the province of Courts when judging the administration, to make their own evaluation of the public good, or to substitute the personal assessment of the social and economic advantage of a decision. We should not expect Judges therefore to decide whether the country should join a common currency or to set a level of taxation. These are matters of policy and the preserve of other branches of Government and Courts are not constitutionally competent to engage in them.*"

133. RCL's complaints, in essence, is that the Minister failed to address its appeal grounds to its satisfaction. Its complaint is not that there are no biosecurity measures, but rather, that the biosecurity measures that have been imposed on Vermikor, are insufficient and unenforceable, as discussed above. In essence, RCL seeks to contend that the stringent biosecurity measures which it employs in its commercial operations ought to have been imposed by the Minister on a small-scale farm like Vermikor.

134. It is already been pointed out that the decision as to which specific biosecurity

measures are appropriate for particular types of operations falls squarely within the remit of the Minister and the Department as decision-makers.

135. A review is not concerned with the merits of the decision, but with the process employed in reaching a decision. A disagreement with the decision of a decision-maker does not render the decision reviewable. In the words of Hoexter (*Administrative Law in South Africa* ((2ed) Juta) at 108), appeal and review are both ways of reconsidering a decision. While the reason for seeking the one or the other usually the same – dissatisfaction with the result – appeal and review perform different functions. Appeal is appropriate where it is thought that the decision-maker came to a wrong conclusion on the facts of the law. It is concerned with the merits of the case, meaning that on appeal the second decision-maker is entitled to declare the first decision right or wrong.

136. Review, on the other hand, is not concerned with the merits of the decision but with the matter in which it was reached (*Snyders v De Jager* 2016 (5) SA 218 (SCA) at para [13]). The focus is on process, and on the way in which the decision-maker came to the challenged conclusion. One can, of course, not entirely avoid scrutiny of the merits on review (Hoexter at 110 to 111 points out that the distinction is often regarded as artificial) but the distinction should at least be observed at the point of judicial intervention – where a Court should not, in a review, impose its own idea of what the right decision should be on the parties. RCL in the present matter squarely argues that the Minister's decision was wrong. This is the language of appeal, not review (see *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) at para [52]).

137. The fact that, as Hoexter indicates, the merits of the decision can be considered, particularly in the context of a reasonableness review (RCL contends, *inter alia*, that no reasonable decision-maker could have reached the conclusion that the Minister had come to), does not mean that the distinction between an appeal and a review may be blurred (*Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) at para [244]). In the context of a reasonableness review the Court considers the merits to determine whether or not a decision is so unreasonable that no reasonable decision maker could have come to the same conclusion. The Court asks whether a decision of the decision maker is defensible, not whether the best or the

correct decision was made (see, for example, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at para [45]).

138. It is particularly difficult for the Court to engage in reasonableness review, both from a conceptual and separation of powers perspective, in circumstances where the relevant issues are polycentric in nature, such as in the present matter: the issue goes to the question of which biosecurity measures ought to be imposed upon Vermikor. This is not a matter for either RCL or the Court to dictate. As was stated in *Bato Star* supra at para

[48]: *"In treating the decisions of administrative agencies with the appropriate respect, a court*

*is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts.* [Emphasis added.]

139. The present case is concerned with "*findings of fact and policy decisions*" taken by the governmental department with "*special expertise and experience in the field*", and involves, at its core, the balancing of rights of small-scale farmers with the rights of larger producers such as RCL. RCL's complaint is that the biosecurity measures imposed by the environmental authorisation are insufficient to mitigate the risk which RCL may face in the event of an Avian Influenza outbreak and that more stringent measures ought to have been imposed. Its case is not that there are no biosecurity measures imposed.

140. The reasonableness standard means simply that a Court is required to establish whether the decision taken falls within the range of decisions that a reasonable administrator could have taken. The reality is that a range of biosecurity measures can be imposed on small-scale farmers by a reasonable decision-maker. This is what occurred in



this case. It is not open to RCL in review proceedings to complain that better measures ought to have been imposed.

141. For RCL successfully to challenge the reasonableness of the decision it has to demonstrate on the evidence that the decision of the Minister "*was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached*" (see *Foodcorp (Pty) Ltd v Deputy Director General Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management & Others* 2006 (2) SA 191 (SCA) at para [12]). This it has not done. The Minister took into account the potential effect on RCL of granting the Environmental authorization to Vermikor, as well as the views of the parties, and came to decision that a reasonable decision-maker could have made.

#### Conclusion on the second ground of review

142. In all of these circumstances, I agree with the submission made on the Minister's behalf that the second ground of review must fail for the following reasons:

142.1 The provisions of the EMPr and the audit checklist are enforceable because of the relevant regulatory framework and requirements.

142.2 The fact that the EMPr may not be what RCL deems to be an ideal document does not render the Minister's decision reviewable.

142.3 The decision as to which biosecurity measures ought to be imposed upon a smaller scale poultry farm falls squarely within the remit of the decisionmaker; and

142.4 RCL fails to demonstrate that the Minister's reliance upon the audit checklist was unreasonable or irrational.

**Third ground of review: the Minister's failure to consider RCL's ZA status and the cumulative effect on RCL's operations of the grant of environmental authorisation to Vermikor**

143. RCL's third ground of the review is the failure of the Minister to consider the impact of the operation on RCL's ZA approval and veterinary approval, grounding a review under section 6(2)(e)(iii), alternatively section 6(2)(f)(cc) and (dd) of PAJA. RCL argues that the Minister failed to consider the impact on the environmental authorization on RCL's export and veterinary approval, and furthermore failed to consider the cumulative effect upon its operations.

144. The Minister stated in his reasons that RCL had failed to provide evidence that the RCL Hopefield facility site in question has compartmentalisation status or trades with parties in countries that require a 10km separation. RCL says that this finding was factually incorrect since such information had in fact been provided, and was accompanied by the report of the State Veterinarian Dr Roberts, which appears not to have been taken into account. As was set out in RCL's submission on appeal, if there is an outbreak of a notifiable disease at erf 1[...], RCL's Hopefield facility will be placed under quarantine. This will likely lead to movement restrictions and means that RCL cannot move rearing birds to the laying facilities in Malmesbury. The resultant loss will be of approximately 7,35 million eggs, or approximately 6,174 million broiler birds per one flock of 42 000 rearing pullets that are not transferred due to movement restrictions.

145. In addition, should an outbreak occur, RCL will lose its ZA (export) status at the Hopefield rearing sites and subsequently also at laying farms, hatcheries and broiler sites. This means that RCL will not be able to export meat. Food supply and security in other African countries such as Zambia, Zimbabwe and Malawi will also be affected.

146. The Minister dismissed these concerns on the basis that "*the risk already exists*", yet the Minister failed to consider the cumulative effect of the authorisation and the inherent increase in risk in having a free-range producer within 3km of the RCL Hopefield facility. The effect of the authorisation of the erf 1[...] operation (including the nature of the free-range farming operation to be conducted there) is to significantly increase the risk of a catastrophic event occurring which would cause irreparable harm to RCL and compromise food security in South Africa.

147. RCL points out that the additional risks posed by free-range poultry farms were

raised in the replying affidavit and the Minister has not disputed this: see *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) at para [51]: “As these averments were made in the replying affidavit the second respondent strictly speaking had no entitlement to respond to them and in the normal course they could not be denied or explained by the respondents. Nevertheless, if the allegations ... were untrue, or if an adequate explanation were possible, leave of the court could and should have been sought to answer them ... The respondents did not request to be given an opportunity to deal with these averments. Their failure to do so tilts the probabilities towards the applicant’s version...”

148. For all these reasons, RCL argues that the EMPr insufficiently addresses the risks associated with free-range poultry farming and reducing the likelihood of flocks becoming infected, and the appeal ought to have been upheld.

149. However, the distinction between an appeal and review raised in relation to the second ground of review is, in my view, also relevant in relation to the third ground of review. It must be kept in mind that the weight to be given to the various factors involved in the taking of the decision is for the Minister to determine, with reference to *Clairisons CC supra*.

150. As mentioned, RCL argues that it was factually incorrect for the Minister to find that RCL had failed to provide evidence that its site had compartmentalisation status or that it trades with parties that require a 10km separation distance. In the appeal decision the Minister remarks that “*even if their unsubstantiated allegations are correct, that risk already exists and cannot be a reason for objecting to the proposed development. Should RCL foods wish to attain this status or continue registering it is their duty to buy or lease property on which they can enforce this zone. It is not the burden of the neighbouring farmers to bear*”. In other words, the Minister proceeded on the basis that RCL’s contentions in relation to its compartmentalisation status and its trading partners were correct.

151. He continues that “[i]f RCL Foods has a policy of not establishing a farm within 10km of any other vector source of non RCL Foods farm then it should either purchase all the land within the 10km of this farm or enter into agreements with adjacent farm owners in which they agree not to farm chickens or allow disease vectors on their farms. RCL Foods

*cannot unilaterally impose the cost of maintaining a 10km buffer zone on third parties by expecting them to forgo their rights to farm chickens, without receiving any compensation."*

152. He indicates further that *"RCL Foods does not have any right under South African law to prevent private farm owners within 10km of RCL Foods' facilities from operating free range chicken farms"* and *"The only South African policy relating to biosecurity only requires a 400m exclusion zone between export facilities and free-range chicken farms. The applicant is located approximately 3km from RCL foods"*.

153. The prevailing Export Standard to which reference has been made earlier in this judgment, namely the Standard for Inspection of Poultry Farms for Export issued by DAFF's Animal Health Directorate, imposes a buffer zone of 400m, and is the only legislated buffer zone for obtaining approval as a poultry export establishment. RCL has not challenged the lawfulness of these regulations.

154. Vermikor's operations are 2,94 kms away from the RCL Hopefield facility. Consequently, as the Minister points out in the appeal decision (and as is mentioned by Dr Davey in her comments of 9 October 2019), in the event of an outbreak of Avian Influenza at Vermikor, RCL would be in the 3km quarantine zone enforced by DAFF (as was done during the 2017 outbreak, and conversely, in the event of an outbreak at RCL, Vermikor would also be in the 3km quarantine zone.

155. RCL conflates the decision to impose a quarantine zone when the need arises to do so as a consequence of an outbreak of a poultry disease with the Export Standard which requires a 400m buffer zone between export facilities and free-range farms. The Minister is of the view that there is no rational or lawful basis for imposing a buffer zone of more than 400m between RCL's large commercial export facility and Vermikor's small-scale free-range farm, and that was one of the reasons for his decision.

156. I agree with the submission made on the Minister's behalf that what RCL effectively seeks to achieve through its attempt to set aside the environmental authorisation granted to Vermikor, is to preclude any poultry farmers from operating within either a 3km radius, or within a 10km radius from RCL's operations because of the potential biosecurity risks that

any other poultry farm might pose to RCL's operations. It is not entitled to impose such a buffer zone based upon its own views: see, for example, *Petroleum Oil and Gas Corporation of South Africa and another v City of Cape Town and another* [2011] ZAWCHC 471 (8 December 2011) at para [35] in relation to the imposition of a separation distance between a residential estate and a major hazard installation as contemplated in the regulations to the Occupational Health and Safety Act 89 of 1993:

*“[35] The risk assessment is an assessment of the risk arising from the facility. It of course is not a determination of a separation zone. It provides the municipality with the details of the risk involved and it is the municipality concerned that determines the separation distance on the strength of the risk assessment report(s). .... the legislation does not remove this power from the local government and place it in the hands of an expert appointed by the operator of the hazardous installation or of even an expert appointed by it. Indeed different results will be obtained from a "risk assessment" depending on the assumptions made and methods used. For an example, Mr McFadden (Applicant's expert) reached two diametrically opposed conclusions when he used different assumptions. The experts stated that there are different ways of assessing risk. They chose a particular method as a matter of convenience because using that method they arrived at the same results. In truth that does not mean that the method chosen is superior to any other approach. I agree that the City's exercise of its judgment and discretion is not excluded at all. The City must have regard to the risk assessment and may take further advice (if necessary) and then determine an appropriate separation distance in deciding what buildings it will permit to be erected. I also agree with Mr Budlender that if that decision by the City cannot be justified and/or if the City fails to have regard to relevant circumstances, that decision can only then be taken on review.”* [Emphasis added.]

157. If RCL seeks to contend that it is unreasonable not to impose a 3km (or 10km) buffer zone between poultry farms, its remedy is to challenge the relevant legislative and regulatory scheme which, on its version, fails to provide for such a buffer zone. It is not entitled to seek an exclusion or buffer zone by way of the review of a decision to grant an environmental authorisation. The Minister himself is, in fact, not entitled simply to ban the establishment of small-scale farms within a 3km radius. He was alive to the risks, but considered, on the information before him, that manageable, and that the grant of the authorisation was reasonable under the provisions and requirements of NEMA.

158. I agree with the Minister's submission, further, that he did in fact consider the effect of the environmental authorization on RCL's export status. He decided however, that it did not fall to smaller farmers to be prejudiced as a result of RCL's export requirements. He accordingly placed less weight on those considerations than RCL would have liked him to.

159. RCL also contends that the Minister failed to consider the cumulative effect of a nearby farm and erroneously found that the risk of an outbreak of Avian Influenza already existed. Again, however, it appears from the appeal decision that the issue was considered, but that the parties differ as to the weight that should have been accorded to it.

160. The issue was raised at the outset of the appeal decision, with reference to a quote from the case of *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (10) SA BCLR 1059 (CC) at para [30]: "*This obligation requires the environmental authorities to assess, among other things, the cumulative impact on the environment brought about by the proposed filling station and all existing filling stations that are in close proximity to the proposed one.*"

161. Turning to the additional information provided in RCL's replying affidavit as to the additional risks posed by free-range poultry farms and its reliance on *Tantoush* for the submission that this Court should accept such evidence, the Minister argues that RCL misunderstands the decision in *Tantoush*, in particular the impact of paras [50] and [51] thereof. In that matter, the applicant made factual averments in his replying affidavit relation to issues that had not been addressed in the answering affidavit. The respondents therefore had not dealt with those averments at all, and they did not request the Court for an opportunity to do so. It was against that background that the Court held that the probabilities were tilted towards the applicant's version.

162. The question of whether the risk of Avian Influenza was greater in the context of small-scale poultry farming was, however, not raised for the first time in the answering affidavit. It was pertinently raised at various junctures in the appeal decision itself. The weight to be accorded thereto was for the Minister to decide.

163. What the Minister did point out in the answering affidavit was that the report prepared by RCL's veterinarian, Dr Van Wijk, was procured after the appeal decision had been given. The report focused on the purported insufficiency of the measures imposed upon Vermikor to detect and prevent the spread of Avian Influenza. The Minister indicated in his answering affidavit that the report of Van Wijk was unsupported by scientific evidence. It was, in any event, not relevant for the purposes of the review application because it had not formed part of the material placed before the Minister to enable him to take the appeal decision. Addressing the report in the answering affidavit was not an attempt to bolster the reasons for the appeal decision, but to respond to evidence put up by RCL after the decision had been made. The response to such report was that it proceeded from an unsupported scientific premise.

164. It was therefore not open to RCL to include yet more scientific evidence in the replying affidavit which had never been placed before the decision-maker and which had not been annexed to the founding affidavit, and then argue that the *dictum* in *Tantoush* means that its new scientific evidence must be accepted on the basis that it was undisputed. The current matter is not comparable to what occurred in *Tantoush*.

165. In all of these circumstances, the third ground of review does not pass muster.

#### **Fourth ground of review: procedural unfairness**

166. The fourth ground of review pertains to the procedural unfairness of the appeal process and the partisan attitude of the EAP which affected what information was sourced and placed before the Minister; and who had access to such information.

167. RCL argues that the EAP was not independent in the manner in which she sourced information from the State Veterinarian pursuant to the Minister's request, including by dismissing RCL's objection as RCL an attempt to "*prevent all competition in the industry*"; and by failing to disclose relevant information to the interested and affected parties, notably the State Veterinarian's comments that she agreed with RCL's submission.

168. By failing to follow a fair and transparent process, the EAP failed to give effect to the requirements of administrative fairness in NEMA and PAJA, and this taints the outcome of the appeal. It renders the appeal decision susceptible to review under section 6(2)(c) of PAJA.

169. I agree, however, with the submission made on the Minister's behalf that the EAP is not under the control of the Minister or the Department. The EAP is not the decisionmaker and her conduct in the present matter has no bearing on the procedural fairness of the Minister's decision. This is because RCL addressed a nine-page letter to the Minister during October 2019 in which it addressed the EAP's conduct and attached the correspondence which the EAP had allegedly failed previously to place before the Minister. Therefore, although RCL avers that the EAP did not place the correspondence before the Minister which indicated that Dr Davey had agreed with RCL, RCL itself placed this information before the Minister long before the appeal decision was taken. It forms part of the Rule 53 record. RCL's concerns were thus before the Minister at the time that he considered the appeal.

170. In these circumstances, I cannot find that the decision of the Minister was procedurally unfair on the basis advanced by RCL. This ground of review must fail.

### **Conclusion and costs**

171. It follows from what is set out above that none of the grounds of review upon which RCL relies succeeds.

172. There is no reason to depart from the general rule that costs follow the result. I do not regard this matter as falling within the ambit of what is known as the principle in *Biowatch Trust v Registrar Genetic Resources and others* 2009 (6) SA 232 (CC) at para [43]. The litigation was driven principally by commercial interests, notwithstanding the fact that the application was necessarily based upon the constitutional imperative of just administrative action.

### **Order**



173. I accordingly grant the following order:

**The application is dismissed, with costs.**

**P. S. VAN ZYL**  
**Acting judge of the High Court**

**Appearances:**

**For the applicant:** S. Pudifin-Jones,

instructed by Evershed Sutherland (KZN) Inc.

**For the first respondent:** M. Adhikari,

instructed by the State Attorney, Cape Town