



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 1031/2024

In the matter between:

THE REGISTRAR OF ANIMAL IMPROVEMENT

APPELLANT

and

**THE CHIANINA CATTLE BREEDERS’
SOCIETY OF SOUTH AFRICA**

FIRST RESPONDENT

THE MINISTER OF AGRICULTURE, LAND REFORM

AND RURAL DEVELOPMENT

SECOND RESPONDENT

ADVOCATE TSHIFHIWA TSHITEREKE N O

THIRD RESPONDENT

MR P M MOLAPO N O

FOURTH RESPONDENT

DR L E MATJUDA

FIFTH RESPONDENT

Neutral citation: *The Registrar of Animal Improvement v The Chianina Cattle Breeders’ Society of South Africa and Others* (1031/2024) [2026] ZASCA 117 (9 September 2026)

Coram: NICHOLLS, MBATHA, UNTERHALTER and BAARTMAN JJA
and NORMAN AJA

Heard: 08 May 2026

Delivered: 9 September 2026

Summary: Animal Improvement Act 62 of 1998 (the Act) – Promotion of Administrative Justice Act 3 of 2000 (PAJA) – whether the high court was correct in granting declaratory relief and an order of substitution in a review application relating to the registration of the first respondent as an animal breeders’ society under the Act – whether the first respondent was obliged to exhaust the internal appeal process provided for in s 23 of the Act before approaching the court – whether it was entitled to rely on PAJA without seeking exemption under s 7(2) of the Act – whether the Act confers a specialist, discretionary power on the Registrar.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Jacobs AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Nicholls JA (Mbatha, Unterhalter and Baartman JJA concurring):

Introduction

[1] This appeal concerns the registration in South Africa of an ancient Italian breed of cattle known as Chianina, specifically the registration of the Chianina Breeders' Society. On 16 February 2024, the Gauteng Division of the High Court, Pretoria (the high court) ordered the Registrar of Animal Improvement (the Registrar) to register the Chianina Cattle Breeders' Society (the Breeders' Society) as an animal breeders' society in terms of the Animal Improvement Act 62 of 1998 (the Act). The central issue is whether the high court was correct to grant an order of substitution or whether, by doing so, it usurped the powers of the Registrar.

[2] The Registrar appeals the high court decision with the leave of this Court. The second respondent is the Minister of Agriculture, Land Reform and Rural Development (the Minister). The third to fifth respondents are cited in their capacity as members of the Chianina Appeal Board (the Appeal Board) appointed by the Director General of the Department of Agriculture. The third respondent is Mr Tshifhiwa Tshitereke, chairperson of the Appeal Board and a practising advocate; the fourth respondent is Mr Molapo, a businessman and the fifth respondent is Dr Matjuda, a veterinarian with

expertise in the field of animal improvement. No relief is sought against these three respondents, except in the event of opposition.

[3] The first issue to be dealt with is the Registrar's application for condonation for the late filing of his heads of argument and the re-instatement of the appeal. Although the State Attorney, Pretoria alerted the State Attorney, Bloemfontein that the heads of argument had to be filed by 28 April 2025, it was only on 26 September 2025 that they were filed. As was pointed out by the Breeders' Society, they were filed five months late with no adequate explanation. The reasons provided were vague and contradictory: the State Attorney, Pretoria was on leave; she was in court attending to another matter; there were no photocopiers available; she was involved in the shortlisting of procurement panels; she was sick for a week, to name but some. This hardly justifies the assertion of the State Attorney, Bloemfontein that 'the delay was caused by a series of events outside the Applicant's control but is reasonable and should be accepted by this Honourable Court'. However, despite the serial failures of the State Attorney, this matter has dragged on for far too long and it is the interest of justice that the delay be condoned so that the merits can be addressed and the matter finally resolved. This should not be understood as encouragement of professional laxity. Condonation is granted and the appeal is re-instated, with costs to be paid by the Registrar, as tendered.

[4] Registration under the Act ensures the breeding, identification and utilisation of genetically superior animals to improve their performance and production.¹ An 'animal' is defined as 'a kind of animal or an animal of a specified breed of such kind of animal which has in terms of section 2 been declared as an animal for the purposes of this Act'.² A 'breed' 'means a population of animals which produces progeny possessing a high degree of genetic stability as evidenced by identifiable uniformity in breed standards and performance'.³ When animals are declared to be a breed, s 2 of the Act

¹ The preamble of the Animal Improvement Act reads: 'to provide for the breeding, identification and utilisation of genetically superior animals in order to improve the production and performance of animals in the interest of the Republic; and to provide for matters connected therewith'.

² Section 1 of the Animal Improvement Act.

³ Section 1 of the Animal Improvement Act.

is applicable, and the breed is closely regulated and monitored. Section 2 provides that the Act shall apply to any animal or breed of animal as gazetted by the Minister, on request. In respect of foreign breeds the Minister is obliged to consider international law and comments of interested parties.

[5] A 'stud book animal' is one recorded in the herd book kept by the registering authority.⁴ The Stud Book and Livestock Improvement Association (the Stud Book) is the registering authority which performs the role of a breeders' society until the applicable breeders' society is recognised.⁵ An animal breeders' society promotes a specific breed and records and registers animals of that breed. It promotes the genetic improvement of the animal and applies breed standards.

[6] The definition of an animal breeders' society is 'a group of persons promoting the breeding, the recording or registration, the genetic improvement and the use of a kind of animal or an animal of a specified breed of such kind of animal, determining and applying breed standards, recommending in its sole discretion the recording or registration of an animal or a specified breed of a kind of animal bred in or imported into the Republic, and who is registered in terms of section 8(7)(a)(i)'.

[7] Section 7 sets out the requirements for registration, as a semen collector, while s 11 sets out the requirements for registration as an animal breeders' society. It provides that a group of people may be registered as an animal breeders' society if an animal has been declared as such in terms of s 2, no breeders' society exists for that animal and it has a compliant constitution.⁶

[8] The Act confers upon the Registrar discretionary powers by virtue of s 4(1) and 4(2). In terms of s 4(1) it provides that 'any discretionary power conferred on the registrar in terms of this Act, other than those conferred by section 16 or 17, shall not be exercised by him or her to the prejudice of any applicant or any other person who

⁴ Section 1 of the Animal Improvement Act.

⁵ Section 29 (3) of the Animal Improvement Act.

⁶ Section 11(1) (a)–(d) of the Animal Improvement Act.

appears to the registrar to be an interested party, without giving such applicant or such other person an opportunity to be heard within such period as may be prescribed or, if no period has been prescribed, within such reasonable period as the registrar may determine'. The Registrar is given the power to extend such period either before or after its expiry.

Background

[9] The presence of the Chianina breed in South Africa has a long history. The breed is reportedly one of the oldest pure breeds in the world, originating in Italy and recorded as far back as Roman times. It has several attributes that make it ideal to cross with locally adapted breeds. It is docile, very fertile and its carcass yields lean meat substantially above the industry norm. It has been registered in Namibia since 2018.⁷

[10] The Chianina Breed was recognised under the Livestock Improvement Act 25 of 1977 (the Livestock Act), the precursor to the present Act. In 2001, Mr Christiaan Daniel de Jager (Mr De Jager), a Chianina breeder, obtained a permit from the former Registrar to import 120 Chianina embryos. When the draft regulations were published before the promulgation of the present Act, Chianina was recognised under the heading 'Breed of Animals' under the subcategory of 'Cattle'. When the new Act came into operation on 21 November 2003, the Chianina breed was included in Table 7 annexed to the regulations which were promulgated by the Minister in the Government Gazette.⁸ All stud animals kept the status that they had under the Livestock Act.

[11] On 12 September 2006, the present Registrar also approved Mr De Jager's application for the importation of 250 straws of semen and 27 embryos of Chianina bulls and cows, respectively. The deponent to the founding affidavit in this matter, Mr Jan Gerhardus Klopper, a Chianina cattle farmer and Deputy President of the Chianina Society, states that after having participated in Phase C testing at the Department's

⁷ Chianina Cattle Breeders' Society of Namibia.

⁸ Animal Improvement Regulations GN 25732, GG 461, 21 November 2003.

Agricultural Research Council (ARC), the Registrar registered two Chianina bulls as semen donors with over 10 000 doses of bulls' semen having being sold in South Africa.

[12] On 25 May 2007, the Minister amended the regulations,⁹ but inadvertently omitted any reference to the Chianina breed and various other breeds of cattle. It is agreed by all parties that this was an oversight on the part of the Minister. Nothing was done to rectify this error.

[13] On 11 July 2007, Mr Charl Hunlun of the South African Stud Book advised the Registrar of a number of mistakes in the regulations under the heading of 'Cattle Breeders'. He noted that 'The following breeds, for which transactions had been effected for some time on INTERGIS do not appear in the tables: Tuli; Charbray; Chianina; Salers; Wagyu.' The Integrated Registration and Genetic Information system (INTERGIS) is a computer system which stores all pedigreed animals, the prefixes and suffixes and individual records of registered animals, as well as details of the stud and the breeder's name. A response from the Registrar a week later indicated that they 'were still working on the new list of breeds to be declared plus re-instate those breeds that we inadvertently omitted in the previous publication...'.

[14] Eighteen months after the 2007 regulations, in October 2009, the Minister instead of amending Table 7 referring to declared animals, amended Table 1 dealing with fees and inserted declared animals on this table. While Wagyu and Tuli were reinstated, no reference was made to the Chianina breed.

[15] In 2012, applications were made by Keman Beleggings CC (Keman) and by Mr De Jager for permits to import Chianina semen straws and embryos from Italy. Keman was in the business of farming stud Chianina cattle. The Registrar, on 20 August 2012, approved the application of Mr De Jager to import 78 frozen embryos. However, the application by Keman was refused in October 2012 on the basis that the Chianina

⁹ Animal Improvement Regulations, GN 29840, GG 503, 25 May 2007.

breed was removed from the table of recognised breeds in South Africa. This was despite the fact that the Registrar had declared two Chianina bulls as official artificial insemination bulls for the selling of semen straws to any interested persons in South Africa, during 2007.

[16] This prompted Keman to approach the high court for a declarator that the Act is applicable to the Chianina breed. Murphy J made the following order of court, dated 24 February 2014, by agreement between Keman and the Registrar:

- '1. The exclusion of the Chianina breed from table 7(b) annexed to the Regulations published in terms of Section 2 of Act 62 of 1998 as contained in Government Notice R935 dated 2 October 2009 is hereby declared invalid and set aside.
2. The decision of the [Registrar] to refuse the Appellant's application for an official permit to import semen and embryos of Chianina is declared invalid and set aside...
3. The matter is referred to the [Minister] to consider whether the removal of the Chianina breed as an animal or breed of animals should be reversed.
4. The [Minister] is ordered to reach a decision within a period of 6 months from 24 February 2014.
5. That each party is to pay its own costs'.

[17] Notwithstanding the court order's express declaration that the Registrar's refusal to allow Keman to import semen straws and embryos of Chianina was invalid and set aside, in October 2017, Keman's application for an import permit was again refused. The reason given for this was that 'Chianina is not recognised as a breed in terms of the Animal Improvement Act (Act 62 of 1998)'.

[18] This refusal was taken on appeal by Keman. Despite delays occasioned primarily by the Registrar, a decision by the relevant internal appeal board at that time, was made on the 8 October 2018. The appeal board found that 'the Chianina breed was a listed breed as at the date of the application...and a recognised breed under the Animal Improvement Act' and that the Registrar had 'misdirected himself and erred' in finding to the contrary. It held that it was common cause that before October 2009 the Chianina breed was listed under the Act and that on the Minister's and

Registrar's own version, the removal of the Chianina breed was a procedural flaw. Further, the effect of Murphy J's order was to re-instate the breed. The appeal board in that matter was of the view that it was not within its remit to grant a permit as this was a power specifically reserved for the Registrar. It thus set aside the Registrar's decision of 30 October 2017 and remitted the issue of the permit back to the Registrar to be reconsidered on the basis that the Chianina breed is a listed breed under the Act.

[19] Once again on 26 November 2018, the Registrar refused Keman's import application and indicated that an impact study assessment was currently being undertaken, and the application for a breeders' association would only be considered once the assessment was complete. The Registrar stated that South Africa did not have an agreed veterinary import protocol with Italy for the import of bovine embryos from Italy to South Africa and the two countries were in discussions. Italy had apparently disclosed the existence of a genetic defect in the Chianina breed. The issue of the defect was never alluded to again.

[20] On 17 May 2019, the Minister finally restored the status of the Chianina breed by publishing 'regulations relating to amendment of table 7 of the regulations'.¹⁰ Chianina was included in the additional list to Table 7 under 'locally adapted and regularly introduced breeds'

[21] While Keman was making its various applications for import permits, the Breeders' Society was attempting to get recognised as a breeders' society in terms of the Act. It applied on three occasions to be registered as a breeders' society. In order to be registered various requirements have to be met as contemplated under s 11 of the Act which provides:

'11 Animal breeders' society

(1) A group of persons may be registered as an animal breeders' society if-

(a) the kind of animal or a specified breed of such kind of animal with which such a group of

¹⁰ Animal Improvement Regulations, GN 42464, GG 647, 17 May 2019.

persons is concerned, has been declared in terms of section 2 to be an animal for the purpose of this Act;

(b) no other such registration has been granted in respect of an animal breeders' society which is concerned with the same breed of such kind of animal;

(c) the constitution of such group of persons specifically provides-

(i) for the promoting, breeding, recording or registration, genetic improvement and use of a kind of animal or an animal of a specified breed of such kind of animal;

(ii) for the determination and the application of breed standards, and for the recommendation, in its sole discretion, to a registering authority of the recording or the registration of an animal or of a specified breed bred or imported into the Republic;

(iii) for the continued commitment to animal improvement;

[...]'.

[22] The Breeders' Society made its first application in 2014. No decision was made in respect of the first application and it seems this application was not pursued. In October 2018, in light of the order of Murphy J in February 2014 as well as the Appeal Board decision in the Keman matter in October 2018, another application was made to the Registrar to approve the Breeders' Society registration. The Registrar responded on 26 November 2018 in the same letter in which the Registrar refused Keman's import permit. He stated that he could not approve the registration as an impact assessment study was being undertaken. It was therefore premature for the Registrar to consider the application for a Breeders' Society until the impact study was complete. All the more reason, said the Registrar, because Chianina was a foreign animal.

[23] The third, and final, application for registration was sent on 27 May 2019, approximately two weeks after the Minister had amended the regulations to include Chianina in Table 7 of the Regulations. No response to this application was forthcoming. The Breeders' Society sent reminders to the Registrar on 30 September 2019, 31 October 2019, and 1 November 2019, requesting a reply. The response of the Registrar, dated 6 November 2019, merely stated that the Registrar was applying his mind and in the process of making a decision.

[24] When no response had been received by 25 March 2020, the Breeders' Society served its notice of appeal in terms of s 23(1)¹¹ of the Act on the Registrar's office in which it sought an order directing the Registrar to register the applicant as a breeders' society. This was premised on the Registrar's failure to decide whether to register the Breeders' Society. The notice of appeal elicited the response that the Registrar would revert at the end of the 2020 Coronavirus Disease lockdown. Very little transpired over the next couple of years, apparently as a result of the lockdown.

[25] Two years later, on 4 April 2022, the Minister appointed the third, fourth and fifth respondents as members of the Chianina Appeal Board. It is apt to tabulate the various attempts the attorneys of the Breeder's Society made to get the appeal under way:

- '(i) On 10 May 2022 they addressed a letter to the Chairperson of the Appeal Board, the State Attorney and the Registrar stating that in terms of s 23(10) of the Act, the Appeal Board was obliged to deliver judgment within 90 days of its appointment, namely before 4 July 2022. They requested Board directives and pointed out that in the two years since they had served their notice of appeal, no opposition had been received.
- (ii) On 12 May 2022, an electronic copy of the appeal documentation was sent to the fourth respondent, Mr Molapo.
- (iii) On 13 May 2022, a hard copy of the appeal documentation, was served on the Chairperson of the Appeal Board.
- (iv) On 19 May 2022, Chairperson of the Appeal Board (the Chairperson) telephonically informed the attorney of the Breeder's Society, that the directives had been sent to the State Attorney three weeks ago. Thereafter a directive was issued on the same day, directing the Breeders' Society to file and serve its founding papers within 20 days and the Registrar its

¹¹ Section 23 sets out the appeal procedure and the powers of the appeal board. Section 23 provides that:

'Appeals

...

(10) An appeal board-

- (a) shall within 90 days of its appointment in terms of subsection (1) come to a decision;
- (b) may confirm, set aside or amend the decision or direction concerned which is the subject of the appeal; and
- (c) may make such order in connection therewith as it may deem fit.'

defence within 20 days on receipt of the founding papers.

(v) On 25 May 2022, the Breeders' Society's attorneys advised the members of the Appeal Board and the Registrar that the notice of appeal constituted its founding papers. In the same letter a request was made that the Chairperson consider abridging the time limits by requiring the Registrar to file by 2 June 2022 with their reply by 7 June 2022, in order to ensure that a decision could be made within the prescribed 90 days.

(vi) On 26 May 2022, the state attorney, requested the Breeders Society's attorneys to file their papers as per the directive. (It should be noted that hard copy of the notice of appeal and supporting documents had been delivered to the State Attorney on 25 March 2020, more than two years prior.) An electronic copy of the documentation had also been delivered on 25 May 2022, the day before.

(vii) On 30 May 2022, a hard copy of the appeal documents was again served on the State Attorney.

(viii) On 1 June 2022, the Breeders Society's attorneys sent an email to the State Attorney confirming that the hard copies had been delivered and asking who she represented as no one had come on record from the State Attorney's office. The email was copied to all the parties and attached to it was an electronic copy of the index and paginated papers.

(ix) On 9 June 2022, the appeal bundle was served on the State Attorney and she was requested to come on record to indicate who she represented.

(x) On 22 June 2022, the Breeders Society's attorneys again alerted the Chairperson that no opposing papers had been served within the time frame of the directive. The chairperson was asked to urgently convene a session of the Appeal Board and provide a date, time and venue of the appeal.

(xi) On 27 June 2022, a week later, the Chairperson of the Appeal Board issued a directive that the appeal would be heard on 29 June 2022 at his chambers in Sandton.

(xii) On 29 June 2022, the Appeal Board did not proceed but instead the Chairperson interviewed the parties on his own. Mr Shangisa who appeared for the Registrar stated the Registrar was unwell and due to the death of Mr Dukada, the previous counsel for the Registrar (whose death had taken place during February 2022), the Registrar was not in a position to proceed. But, added Mr Shangisa, the Registrar intended filing 'something as soon as possible'. After discussion the parties agreed to truncated time periods with the appeal to be heard on 2 July 2022. The Chairperson said he would confirm this with other members of the Appeal Board.

(xiii) Upon resumption of the meeting the Chairperson informed the parties that the other

two board members were not available on such short notice. The view was that the Registrar should be afforded an opportunity to be heard and therefore the parties should agree to reasonable time periods and liaise with the Minister to appoint another appeal board.

(xiv) On 30 June 2022, the Chairperson issued a 'written ruling' removing the matter from the roll and setting out what had transpired on the 29 June 2022. He stated that while he sympathised with the appellants regarding the delay, he could not close the door on the Registrar who 'had signalled its intention to participate in the appeal proceedings.'

[26] None of the above is disputed. Having been unable to procure a hearing of the Appeal Board, the Breeders' Society approached the high court for judicial review under s 6(2)(g) and 6(3)(a)¹² of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). These sections provide for judicial review where an administrator has failed to make a decision.

[27] The Breeders' Society sought the following relief:

- (i) The approval of application of the Breeders' Society to be registered as an animal breeders' society;
- (ii) That the Breeders' Society be issued with a registration certificate within five days;
- (iii) That the Breeders' Society's particulars be recorded in the register and this be gazetted
- (iv) That the Registrar of Companies be notified so as to record the name of the Breeders' Society as an animal breeders' society in the register of companies as provided for in terms of s 7(8)(c) of the Act;
- (v) Costs against the Registrar on an attorney client scale with no cost sought

¹² Section 6 of PAJA provides that:
'Judicial review of administrative action

...

(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

- (a) (i) an administrator has a duty to take a decision;
- (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or'.

against the other respondents except in the event of opposition.'

The high court granted the order in its totality but did not grant punitive costs against the Registrar. It is this judgment and order which is on appeal before this Court.

In this Court

[28] The Registrar raised several defences in his heads of argument. In the main, these relate to whether a judicial review was permissible in these circumstances. He contends that s 23 of the Act provides for internal remedies and the Breeders' Society impermissibly abandoned the appeal process set out in s 23 by refusing to participate further. An internal appeal process must be followed to finality, unless a court exempts a party from exhausting internal remedies prior to litigation. In addition, argued the Registrar, the high court misconceived the discretionary powers of the Registrar when it held that the registration of a society does not require any specialised skill. A declarator and order of substitution was inappropriate and usurped the statutory powers of the Registrar.

[29] On the merits of whether the Breeders' Society should have been registered, the Registrar's argument is twofold. First, it was premature to register the Breeders' Society until an impact study assessment had been finalised, and second, that the Chianina breed was not registered on the INTERGIS system.

[30] The latter submission is puzzling in view of the fact that Chianina had been registered as an 'animal' on the INTERGIS system since 1998. This fact was confirmed by Mr Jacob van der Westhuizen (Mr van der Westhuizen), the general manager of the South African Stud Book (the Stud Book) and Animal Improvement Association, in his affidavit dated 4 May 2023. Mr van der Westhuizen's duties from June 1997 to November 2004 were to establish and implement the INTERGIS system. From November 2004 to January 2009 his job description was Team Leader: Animal Recording and Improvement and Manager of the INTERGIS. Documentary proof of the Chianina breed's registration on the system was attached to his affidavit.

[31] This notwithstanding, the Registrar pursued the defence of non-registration on INTERGIS right up until the hearing, despite irrefutable proof to the contrary. There can be no doubt that the Registrar was aware of this information, if not immediately, then over the years. But he apparently thought fit to state this as a ground of appeal and advance it in his heads of argument. To persist with a defence knowing it to be false, is something that this Court considers grave conduct. It is an abuse of process. Counsel for the Registrar correctly conceded that this defence was unsustainable and relied only on the absence of an impact assessment study.

[32] Regarding the lack of an impact study, the Registrar declined to consider the Breeders' Society's second application until the environmental impact study was complete. In his letter dated 26 November 2018, already referred to, the Registrar said, 'at present an impact study assessment is currently being undertaken and it would be premature to approve breed standards at this stage'. In his answering affidavit in this appeal, the Registrar stated that where an animal is not recorded on the INTERGIS system, a breeders' society cannot be approved. The reasoning appears to be that because there was no recordal on INTERGIS, there was no impact assessment study done, and thus no locally approved standards of the Chianina breed. To date, there is no indication of the progress, if any, of the impact assessment study.

[33] Once again this is a factually incorrect assertion. Chianina has been registered on the INTERGIS system since 1998, with the applicable breeding standards. The unique computer system records pedigrees, individual records of registered animals, the prefixes and suffixes, and the particulars of the stud and breeders' names. Since 2017 the INTERGIS system has been in the sole control of ARC and since 3 April 2019, the ARC has had all the details of the Chianina breed to update on the system. These updates take place annually. In the absence of a breeders' society, the Stud Book acts as the registering authority and registered Chianina and their pure-bred offspring.

[34] Mr van der Westhuizen explained that the Stud Book, in consultation with Chianina breeders, determines the application of the breeding standards. Due to the fact that the Chianina is a 2000 year old pure-bred animal, the breeding standards of the country of origin, Italy, were used. The relevant breeding standards are annexed to his affidavit. He also states that no impact studies are required where a breed has already been recognised as such in terms of the Act.

[35] The Registrar criticises the Breeders' Society for referring to breed standards originating from Italy. The impact assessment study, says the Registrar, is applied to breeds which are not indigenous to South Africa to evaluate whether they would add value and their impact on the South African environment, in line with s 24 of the Constitution which seeks to protect the environment.

[36] It is hard to fathom what effect an impact assessment study could possibly have on the breeding standards or what the value of it would be some 28 years after the Chianina breed was first registered on the INTERGIS system, and after it had been registered as an animal. The breed is already in the country and the Italian breeding standards have been accepted for decades. If, for example, the study were now to find that the Chianina breed was environmentally unsound because it drank too much water, this is an issue that should have been addressed before it was registered as an animal in the Livestock Act. An impact assessment study is not a requirement to register a breeder's society.

Was the Breeders' Society obliged to exhaust internal remedies

[37] The Registrar contends that the Breeders' Society cannot refuse to participate in an internal appeal process envisaged by s 23 of the Act, while simultaneously invoking PAJA, an exemption would first have to be sought. Further, submits the Registrar, a new appeal board was constituted to hear the appeal, but the Breeders' Society had refused to attend.

[38] There can be no doubt that PAJA requires a party to exhaust all internal

remedies before resorting to litigation.¹³ The internal mechanisms of administrative bodies are designed to be speedy and cost-effective. Approaching a court for relief before the administrative body is given the opportunity to decide the matter under its appellate process is subversive of what the legislature requires, in a standard case. This Court has held that to insist on exhausting internal remedies first, is not merely a technical requirement. A person seeking an exemption from this, must show that there are exceptional circumstances and it is in the interests of justice to grant an exemption.¹⁴

[39] However, the duty to exhaust internal remedies should not be rigidly imposed or be used by administrators to frustrate the aggrieved litigant and shield the administrative process from judicial scrutiny.¹⁵ The Constitutional Court has held that the requirement to exhaust internal remedies is not absolute, and where to pursue an internal remedy would be futile or ineffective, PAJA permits an aggrieved party to approach the courts directly, upon a showing of exceptional circumstances that justify the failure to exhaust internal remedies.¹⁶ The internal remedy must be capable of providing effective redress for the complaint. If it does not, the required threshold of exceptional circumstances is met.¹⁷ The question is whether the administrator, the Registrar, has conducted himself in such a manner so as to frustrate the Breeders' Society and render the internal remedy futile and ineffective.

¹³ Section 7 of PAJA provides that:
'Procedure for judicial review

...

2(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

¹⁴ *Pine Glow Investments (Pty) Ltd v Minister of Energy and Others* [2025] ZASCA 75; [2025] 3 All SA 314 (SCA); 2025 (6) SA 474 (SCA) para 61.

¹⁵ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) para 38 (*Koyabe*).

¹⁶ *Ibid* para 38.

¹⁷ *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) para 18.

[40] The Breeders' Society utilised the internal remedy available to them and lodged an appeal in terms of s 23(1) of the Act on 25 March 2022. This was after no response was forthcoming in respect of the third application they had lodged almost three years earlier on 27 May 2019. The attorneys of the Breeders' Society did their utmost to ensure that the internal appeal was heard within the 90 day period prescribed by the Act, once members of the Appeal Board were appointed. They were met with a resounding silence. To now suggest that an internal remedy is available to the Breeders' Society because the Director General has appointed a new appeal board in August 2023 does not withstand scrutiny. By that date, the Breeders' Society had launched their present application. The newly constituted appeal board's term would have expired after 90 days. Only two members were appointed to the appeal board, when three are required by the Act.¹⁸ Even more importantly, based on past experience, there is no guarantee that any new appeal board would complete their mandate in the required 90 day period. This would result in further delays of a matter that has taken 12 years since the first application was launched in 2014.

[41] In my view, having been confronted with obfuscation and dilatoriness, the Breeders' Society was well within their rights to approach the high court for a decision which, the administrative functionaries appeared either unable or unwilling to make. In view of the 12 year delay from the time the first application was made in 2014, the internal remedy cannot be considered to be effective redress. Failure to make an application for an exception under s 7 of PAJA does not disqualify the courts from entertaining the matter, where exceptional circumstances exist and it is in the interests of justice to do so.¹⁹ Here the facts make it plain that exceptional circumstances do exist. Indeed, it is hard to imagine a case that might more readily constitute exceptional circumstances.

Was an order of substitution warranted?

[42] PAJA permits a court to grant any order that is just and equitable, including, in

¹⁸ Section 23(3)(a) and (b) of the Animal Improvement Act.

¹⁹ Koyabe para 73.

exceptional circumstances, an order to substitute or vary an administrator's decision.²⁰ Our courts have acknowledged that this is an exceptional remedy and the default position should be remittal to an administrative body.²¹ The power to substitute must be exercised with circumspection and in accordance with the requisite degree of judicial deference to constitutionally-ordained administrative bodies.²²

[43] The Registrar complains that the order of substitution amounts to usurpation of the powers vested in him as a specialist functionary. He is the custodian of the Act and oversees its implementation which is to 'provide for the breeding, identification and utilisation of genetically superior animals in order to improve the production and performance of animals in the interests of the Republic; and to provide for matters connected therewith'.²³ He contends that the evidence before court was that an impact study assessment into the animal was necessary in order to preserve the environment.

[44] The Constitutional Court in *Trencon Construction*²⁴ and this Court in *Makhanya N O v Goede Wellington Boerdery (Pty) Ltd*²⁵ stated the factors to be considered when determining whether a substitution order is justified. The first is whether the court is in as good a position as the administrative authority to make the decision. The second is whether the end result will be a foregone conclusion and remittal would be waste of time. The third is whether the decision maker has exhibited bias or incompetence to such a degree that it would be unfair to expect the applicant to submit to its jurisdiction. Finally, the further consideration is whether a further delay will cause unjustifiable prejudice to the applicant.²⁶ All these factors are of application in this matter.

²⁰ See s 8(1)(c)(ii)(aa) of PAJA provides that: 'substituting or varying the administrative action or correcting a defect resulting from the administrative action; or'.

²¹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 42 (*Trencon Construction*).

²² *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 47.

²³ Preamble of the Animal Improvement Act.

²⁴ *Trencon Construction* para 40.

²⁵ *Makhanya N O v Goede Wellington Boerdery (Pty) Ltd* [2012] ZASCA 205; [2013] 1 All SA 526 (SCA); 2012 JDR 2323 (SCA) para 42.

²⁶ *Trencon Construction* paras 51-59.

[45] Whether the court is in as good a position as the administrative decision-maker often depends on the extent of specialised knowledge and expertise required to make the decision. The Registrar relies on s 8(2) of the Act which provides that the Registrar determines the form and the prescribed manner in which the application for registration of a breeders' society should be submitted. He contends that this affords him the discretion to require an impact study assessment before registration can be approved. As the Breeders' Society has failed to conduct such a study it does not qualify to be registered because breed standards cannot be formulated without one.

[46] This is another factual inaccuracy. As pointed out above there are breed standards which have been registered on the INTERGIS system. If the Registrar is of the view that the breed standards are insufficient, in terms of s 16(3)(c) of the Act, he can request the Breeders' Society for an evaluation and recommendation.²⁷ At present the Stud Book is the registering authority with the breeding standards, and has been since the Chianina was first registered as an 'animal'. The Registrar has not raised any concerns with them regarding inadequate breeding standards.

[47] What the Registrar fails to comprehend is that he has taken no decision on any of the three applications for registration for a breeders' society since the first application in 2014. Therefore, no reasons have been provided for his decision. The Registrar seems to conflate the requirements for registration of an 'animal' with those of a breeders' society. Breeding standards are required for the registration of an animal, but not for the registration of a breeders' society.

[48] Based on the evidence, the decision is indeed a foregone conclusion. Once an animal has been registered, which requires specialised knowledge, no scientific expertise is required for the purposes of registering a breeders' society. Section 11 of the Act which has been quoted above sets out the requirements for the registration of

²⁷ Section 16(3)(c) of the Animal Improvement Act provides as follows: 'If the registrar is of the opinion that the breed standards are not consistent with a provision of this Act or that it is undesirable for some or other reason, he or she may refer such standards to the animal breeders' society concerned with a written request to make a recommendation thereon on the grounds set out in the request'.

a breeders' society. To reiterate, these include that the animal has been declared to be an animal under s 2 of the Act; no registration for a breeders' society of same breed exists; and, the constitution of the breeders' society contains certain provisions. These are to specifically provide for promoting the breed and ensuring genetic improvement, to determine and apply breed standards, and for the continued commitment to animal improvement.

[49] The Registrar has not suggested that the Constitution is lacking in any way nor that there is a breeders' society previously registered for the Chianina breed. Instead, the Registrar relies solely on the lack of an impact assessment study which is not a requirement for the registration of a breeders' society. He states that because there were no local breeding standards, the Chianina was not recorded on INTERGIS and therefore he could not approve the application to be registered as an animal breeder's society. As has been shown this is factually incorrect.

[50] From the facts set out above, it is incontrovertible that the Registrar has exhibited a stubborn refusal, over years, properly to consider the applications before him. Therefore, it would be unfair to expect the Breeders' Society to submit to his jurisdiction again. In the face of court orders, the findings of the internal appeal body and the amendment of regulations, this ought, at the very least, to have compelled the Registrar to consider the applications by the Breeders' Society. Instead, he has remained obdurate in his refusal to do so.

[51] Aligned to this conduct is the delay which has resulted in considerable prejudice to the Breeders' Society. The Chianina were registered as a breed in the old Livestock Act and have been recorded on the INTERGIS system since 1998. Their omission in the current Act was an acknowledged error. The first application was brought in 2014, a second in 2018 and the application which is the subject of this appeal, in 2019, without a decision ever having been made by the Registrar. Even when an internal appeal was brought as a result of his failure to decide, the Registrar and the other administrative functionaries made it impossible for the appeal to be heard within the

prescribed time limits. The ineluctable conclusion is that the inexplicable and inexcusable delays were designed to frustrate the registration of the Breeders' Society.

[52] This case is a manifestation of disgraceful administrative conduct (and a recurring failure to act), with indifference to time limits and the consequences for the Breeders' Society. Fully accepting that courts are loathe to grant orders of substitution, there are times when the regulatory body is so incompetent and so indifferent to the effects of its obdurate attitude, that courts are obliged to step in. This is one such case. Farming is an important industry that employs thousands of people and on whom South Africa's food security depends. Courts ask no more than that administrative functionaries perform the duties entrusted to them. Constant obfuscation and delays do not serve the country and amount to an abdication of duty.

The second judgment

[53] The judgment of my colleague, Norman JA, (the second judgment) is premised on what she considers to be fundamental errors of fact and law on my part. The major criticism seems to be that I misconceived the application as one for the registration of the Chianina breed as an animal as opposed to the registration of the Chianina Breeders' Society. This is an incorrect characterisation. The reason for the focus on the registration as an animal is the Registrar's conflation of the requirements for registration of an animal with those of an animal breeders' society.

[54] Scientific expertise is necessary for the registration of the animal, including the requirement for an impact assessment study. This view seems to have been shared by the Registrar whose complaint regarding the order of Murphy J was that 'it was premature to register the Chianina breed as an animal in the absence and the conclusion of an impact study into the Breed'. He goes on to say that he nonetheless complied with the court order because he was 'advised that an order of court stands and must be obeyed whether it is right or wrong.' However, instead of applying to have the court order appealed, the Registrar has seen fit to instead transpose the impact assessment study requirement on the registration of the Breeder's Society.

[55] On whether the internal remedies had been exhausted, the second judgment finds that the Breeders' Society abandoned the appeal. I disagree. As stated earlier and in light of the facts set out above, I am of the view that the Appeal Board did not fulfill its administrative duties within the requisite time limit, despite the Breeders' Society's best efforts to have the appeal hearing completed within the statutory term of office of the Appeal Board. My finding is that a further delay would have been unconscionable and warranted the court's intervention.

[56] The second judgment holds that the failure to apply for an exception as envisaged in s 7(2)(a) and (c) of PAJA²⁸ is fatal to the Breeders' Society's case. These sections provide that no court shall review administrative action in terms of PAJA unless any internal remedy has been exhausted or an application is made, in exceptional circumstances, to exempt a party from this obligation. The second judgment holds that because the Minister was responsible for the delay by not correcting his omission to recognise the Chianina breed in the regulations, there is no justification for my finding of exceptional circumstances and the concomitant relief sought against the Registrar.

[57] This position cannot be sustained on the facts. The Regulation was amended to include the Chianina breed on 17 May 2019. Nevertheless, the Registrar remained supine. This was five years after the court order of Murphy J specifically set aside, and declared invalid, the removal of the Chianina breed from the regulations, on 24 February 2014.

[58] The second judgment apparently criticises the veracity of Mr van der

²⁸ Section 7 of PAJA provides that:

'Procedure for judicial review

...

2(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

...

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

Westhuizen's affidavit on the basis that he does not mention that he gave the Registrar access to all the data. This is a surprising contention in light of the fact that since the settlement agreement dated 16 November 2017 between the Department of Agriculture and the Stud Book, ARC has had the sole right to operate INTEGRIS. It is unthinkable that the Registrar would not have had access to the Department's own data. Mr van der Westhuizen is further criticised for not dealing with the issue at hand, namely whether the Breeders' Society has a constitution which deals with breed standards, and whether it had been issued with the necessary prefixes and suffixes. This was not his role. Mr Van der Westhuizen pertinently states that he has been asked to indicate whether the Chianina was registered on the INTERGIS computer system. This was in response to the Registrar's assertion that 'not a single Chianina cattle was ever recorded in the Integrated Registration and Genetic Information System 'INTERGIS' which is the system used by the Department in terms of the Act to record all animals on its database for the purposes of improvement'. Mr Van der Westhuizen responded in the affirmative, saying that the breed had been registered since 1998 and the unique prefixes and suffixes are stored on the system.

[59] The focus of the second judgment is that I erred by ordering the registration of the Breeders' Society when the peremptory requirements of s 11 were not met. As such this is said to be a clear case of judicial overreach. Section 11 which has been quoted above provides that a group of persons can be registered as breeders' society where a breed has been declared an animal, there is no other registration as a breeders' society for this breed and the constitution specifically provides for the promotion of the breed, the continued animal improvement and the determination and application of breed standards.

[60] The reliance on s 11 to find that specialised scientific expertise was required for registration of a breeders' society is misplaced. Once again this fails to distinguish the requirements for registration as an animal and those for the registration of the Breeders' Society. Section 11(1)(c)²⁹ does nothing more than require the constitution

²⁹ Section 11 of the Animal Improvement Act provides that:

of a breeder's society to provide for the determination and application of breeding standards in order that a specified breed be registered or imported into South Africa. In this instance the Chianina breed had been registered as an animal or breed of animal and had been imported into South Africa for decades. There is no indication that the Italian breeding standards used at the time for the registration as an animal did not meet requirements for the African environment. Today the Chianina breed are imported without restriction into Botswana, Zambia, Mocambique and Namibia, the latter using Chianina cattle that originated from South Africa.

[61] The point that the second judgment seems to miss is that the cumulative effect of the delay and incorrect insistence on an impact study for purposes of registering an animal breeders' society has resulted in the society being denied an effective internal remedy. For these reasons, I cannot accept the findings and conclusion reached in the second judgment.

[62] In my view the appeal falls to be dismissed. Had costs been sought on a punitive scale, I would have awarded these too.

[63] In the result, the following order is made:
The appeal is dismissed with costs.

C E HEATON NICHOLLS

JUDGE OF APPEAL

'Animal breeders' society

(1)...

(c) the constitution of such group of persons specifically provides-

- (i) for the promoting, breeding, recording or registration, genetic improvement and use of a kind of animal or an animal of a specified breed of such kind of animal;
- (ii) for the determination and the application of breed standards, and for the recommendation, in its sole discretion, to a registering authority of the recording or the registration of an animal or of a specified breed bred or imported into the Republic;
- (iii) for the continued commitment to animal improvement;
- (iv) for the manner in which the constitution may be amended; and.'

Norman AJA (dissenting):

[64] I have read the well-reasoned judgment penned by my colleague Nicholls JA (the first judgment). I am grateful to her for the narration of the facts. I do not agree with the findings and the orders made in the first judgment. Where I rely on facts that have not been set out in the first judgment, I shall incorporate those herein for context.

[65] As a starting point, I wish to set out the nature of the appeal. The appeal is directed against the order of Jacobs AJ, which reads as follows:

‘1. It is hereby declared that the application of The Chianina Cattle Breeders’ Society of South Africa submitted to the first respondent for its registration as an animal breeders’ society in terms of Act 62 of 1998 be approved;

2. The first respondent is ordered to, within 10 days from the date of this order:

2.1 register the applicant as an animal breeders’ society in terms of the said legislation and to issue the applicant with a registration certificate as contemplated by sub-section 8(7)(a)(ii) of Act 62 of 1998;

2.2 record the applicant’s prescribed particulars in the register kept in terms of sub-section 8(7)(b) and s 5(1) of Act 62 of 1998; and

2.3 cause notice to be given in the Gazette of the registration of the applicant and to notify the Registrar of Companies to record the name of the applicant as an animal breeders’ society in the register as provided for in terms of s 8(7)(c) of Act 62 of 1998.

3. The first respondent shall pay the applicants costs of this application.’

[66] The orders of the high court are directed at the Registrar of Animal Improvement, who is the appellant herein (the Registrar). This appeal does not relate to the registration of the Chianina cattle as a breed as found in the first judgment. It lies against the order declaring the approval of the registration of the Chianina Breeders’ Society (the Breeders’ Society) as an animal breeders’ society and the ancillary orders mentioned above.

[67] It is so that the Registrar relied on PAJA in defending the application. I shall deal with the preliminary legal objections raised by the Registrar based on PAJA because they have been addressed in the first judgment. Before doing so, I revert to the nature of the appeal before us and what it entails. Reference to the order granted by Murphy J is a relevant starting point.

Murphy J's order

[68] The Keman case, in my view, is only relevant as background facts but not for the resolution of this appeal. The order of Murphy J is recorded in the first judgment. Murphy J's order related only to the Keman application and no other. I highlight this because in the first judgment it is stated that '*[t]his appeal concerns the registration in South Africa of an ancient Italian breed of cattle known as Chianina, and specifically the registration of the Chianina Breeders' Society.*' (Emphasis added.) This appeal is, with respect, not about the registration of the Chianina breed because the high court's order before us made no orders relating to the registration of the Chianina breed because it was not seised with that issue.

[69] Murphy J, referred the matter to the Minister to consider whether the removal of the Chianina breed as an animal or breed of animals should be reversed. In the first judgment it is found that the effect of Murphy J's order was that '[o]nce this was so, the old regulations which included the Chianina breed would have been operative. There is no reason why the Registrar had to wait for the amendment of the regulations, particularly as all parties were in agreement that the omission of the Chianina breed was an error.'

[70] I disagree with the statement for two reasons. First, this statement does not take into account the referral of the matter back to the Minister, for him or her to consider whether the removal of the Chianina breed is to be reversed. That order amounted to the remedy that a court would make after a declaration of invalidity where it allows the competent authority to consider and or correct the defect as envisaged in s 172(1)(ii) of the Constitution. Second, without knowing the intention of the parties, one is left to speculate that the order may have had the effect of suspending the invalidity order pending the decision of the Minister; or that its operation was delayed until after the expiry of six months that was given to the Minister, or that it was operative immediately. However, lack of knowledge of the intention of the parties does not permit an interpretation that ignores the referral order. Both the first judgment and the high court do not deal with the referral order.

[71] The Constitutional Court stated that '[i]n the Supreme Court of Appeal, Cameron JA in *De Kock* [...] held that "[t]he effect of a declaration of invalidity must

rather depend on the terms and context of the order the Court . . . issues". The order must be interpreted on the terms and the context of the order together with the judgment as a whole.³⁰

[72] Section 12(2)(a) of the Interpretation Act 33 of 1957 provides that repeal does not 'revive anything not in force or existing' when the repeal takes effect, unless a contrary intention appears. Thus, this indicates that new regulations may need to be promulgated, unless legislation or a court order expressly preserves or revives the previous regime.

[73] A court's remedial powers under s 172(1)(b) flow from a declaration of constitutional invalidity under s 172(1)(a) of the Constitution, which in and of itself does not revive the previous regulations. Instead, a court has remedial powers under s 172(1)(b) to fashion a just and equitable remedy, for example by: (a) suspending the declaration of invalidity; (b) ordering those existing regulations remain in force for a specified period; (c) reading words into the regulations (in exceptional circumstances); or (d) directing the Minister to promulgate fresh regulations. Absent such an order, the consequence is often a regulatory vacuum.

[74] Again, because that was not the issue before the high court or an issue before us, it ought not to detain us. It has limited relevance to the consideration of whether the Registrar is responsible for the delay attributed to him, an issue I turn to below.

The 12-year long delay

[75] The Breeder's Society accepts that on 25 May 2007, it is the Minister who inadvertently left out any reference to the Chianina breed and various other breeds when he was amending the regulations. Again, on 2 October 2009, the Minister, instead of amending Table 7, amended Table 1 dealing with fees. On 24 February 2014, Murphy J granted the order discussed above. The Breeders' Society filed its first application for registration as a breeders' society on 24 October 2014. The Breeders' Society alleged that it was not possible to apply earlier due to the inadvertent removal of the Chianina breed from the Act. On

³⁰ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12; 2015 (5) SA 370 (CC); 2015 (7) BCLR 761 (CC) para 22.

8 June 2018, the Breeders' Society filed its second application for registration.

[76] On 17 May 2019, the Minister published regulations wherein the Chianina breed was included in Table 7. A period of some 12 years had lapsed from 2007, when the Chianina breed was inadvertently omitted from the regulations, until it was reinstated (the Minister's error). Subsequent thereto and on 27 May 2019, the Breeders' Society filed a third application for registration. There are no details given as to why the Breeders' Society needed to file the second and third applications and yet rely on the first application on its delay ground.

[77] The Registrar stated under oath that he complied with Murphy J's order on 4 June 2016. The Minister only published the regulations where the Chianina Breed was included in Table 7 on 17 May 2019. Among the correspondence directed by the Registrar to the Breeders' Society was a letter dated 26 November 2018, which was only responded to by the Breeders' Society on 30 September 2019.³¹ The relevant portion reads:

'6. I can take you into my confidence and disclose that the country of origin being Italy of the Breed has indicated that there is a genetic defect in the breed. In this regard I am awaiting written confirmation of the above and shall share it with you to enable us to work together.

7. As regards also the Breeders Association wherein you the writer of the letters are serving as attorneys and are proposed as a members in the association. Only Mr De Jager is in possession of Chianina cattle in the country. Could you kindly indicate the circumstances in which the other members obtained the breed?

8. As you already know the breed standard comes from the country of origin which form the core of an association of a breed. At present an impact assessment is currently being undertaken and it would be premature to approve breed standards at this stage.

9. That being the case your application for breeders association will properly be considered once an Impact Study Assessment has been completed. All the more reason for the latter since the breed in question is a foreign animal.'

[78] The Breeders' Society responded on 30 September 2019 and served its notice of appeal in terms of s 23(1) of the Animal Improvement Act on 25 March 2020. What transpired before the Appeal Board resulted in the appeal being removed from the roll. Details of what transpired between the parties and the Appeal Board are dealt with in the first judgment. At the time the application was brought before the high court, the Director-General had approved the request for the re- appointment of the Appeal

³¹ Some 10 months later.

Board on 6 March 2023, to deal with the appeal of the Breeders' Society. In response to these allegations, the Breeders' Society contends that it has lost all confidence in the respondents (the Minister, the Registrar, and the Appeal Board). On 20 April 2023, the Breeders' Society advised the Chairperson of the Appeal Board, the third respondent, that it would not participate in the appeal proceedings. The preliminary legal objections relating to non-compliance with certain provisions of PAJA that are raised by the Registrar are set out in the first judgment.

The impact assessment study

[79] In his answering affidavit, the Registrar gave detailed reasons why he required an impact study assessment alluded to in his correspondence exchanged with the Breeders' Society. I shall summarise his reasons as follows:

(a) That the Registrar complied with the order of Murphy J on 4 June 2016; the court had already pronounced that the Chianina is an animal but that is not the end of the matter; the Registrar must still take the matter further by ensuring that the animal is conducive to the South African eco-system and would not harm it, to have the necessary prescribed standards for the Chianina so as to assist the breeding association to stay true to the mandate of safely dealing with and breeding the animal; all principles relating to what qualifies a breeders society have not been met; the suitability of the animal to the environment and to other animals and indigenous livestock resources; to scientifically study the animal and its patterns, to conclusively see how it reacts to South African conditions and territory, how to protect our grass and water resources against huge foreign bred animals such as Chianina which consume large natural resources and take up a lot of terrain.

(b) To investigate its rate of reproductive production; possibility of the new breed converging and interbreeding with indigenous breeds; to investigate possible loss of indigenous breed diversity; to investigate possible erosion or disappearance of local genotypes and sustainability of local breeds for the benefit of present and future generations; the Breeders' Society has not fulfilled the conditions for registration as a breeders association as contemplated in the Act; that animal improvements shall take place by means of INTERGIS in order to integrate pedigrees and performance of animals as provided in s 5 of the Act.

(c) The impact study assessment on the Chianina breed had not been completed, and as a result, there were no locally approved standards of the Chianina breed. As a

foreign animal, he contended, South Africa could not rely on standards from the animal's country of origin. South Africa has to determine the environmental impact of the Chianina breed within our environment. He stated that the Breeders' Society had not done this. He further stated that the Chianina breed is not recorded on the INTERGIS. He stated that an impact assessment study is applied to breeds that are not indigenous to South Africa for the purposes of ensuring that the breed will add value to existing animals and their impact on the environment. In this regard, he relied on the provisions of s 24 of the Constitution. He contends that as per s 5 of the Act, Chianina cattle data recorded by the breeders on the INTERGIS is incomplete.

(d) The Act requires animals to be recorded and registered on INTERGIS, as animal improvement and tracking can only be done through recording on INTERGIS. If the animal is not recorded on INTERGIS, the society concerned or association cannot be approved; Section 11 of the Act makes it peremptory for a breeder's society constitution to incorporate breeding standards. Breeding standards are the performance characteristics of the animal, they are vital in determining the genetic superiority of the animal. The standards that the Breeders' Society relies on are from Italy, where the Chianina breed originated.

(e) At the end of 2018, the impact assessment on the Chianina breed had not been completed and was therefore not recorded on the INTERGIS. In deciding that an impact assessment study was required, he exercised his discretion. The provisions of s 5 of the Act expressly provide that the animal improvements shall take place by means of INTERGIS in order to integrate pedigrees and performance of animals.

[80] The Breeders' Society disputes the allegations on breeding standards and impact assessment studies on the basis that the stud Chianina cattle and their offspring had historically been registered and are being registered on the INTERGIS computer system. The Chianina cattle are, in the sole discretion of the SA Stud Book, evaluated in terms of the Italian breeding standards and therefore impact assessment studies are irrelevant. It further contends that the Animal Improvement Act does not require an impact assessment study before a cattle breeders' society can be registered. It contends that the determination and application of breeding standards is the sole discretion of the breeders' society, presently the SA Stud Book.

[81] Once the Breeders Society is registered, that discretion will vest in it. It does

not lie within the Registrar's powers to evaluate the Chianina's breeding standards and the adequacy thereof. The allegation made by the Registrar that not a single Chianina cow was ever recorded by the breeders on the INTERGIS is false.

[82] In its application the Breeders' Society agrees with some of the contentions made in the Keman appeal. I shall refer to the portions where there is reference to breeding standards:

'[By] excluding the breed from the Act, the Registrar loses his right of control to ensure that *the herd's breeding standards are maintained and that the breed is improved*. The legal position as set out above, creates a dichotomy: the registered Chianina herd is subject to the prescripts of the Act, but newcomers can undermine the purpose of the Act by importing substandard genetic material or *by implementing incorrect breeding standards*. If this position is allowed to continue it will in the long run undermine our industry and it will adversely affect the country's food security.' (Emphasis added.)

[83] It seems to me that the Breeders' Society, on the one hand, recognises the control that the Registrar has on breed improvement and maintenance of breeding standards, when it relies on the Keman application but disputes the obligations that the Registrar has, when convenient.

[84] It is found in the first judgment that: it is hard to fathom what effect an impact assessment study could possibly have on breeding standards; or what value it would have some 28 years after the Chianina breed was first registered on the INTERGIS system; the registration of a breeders' society is concerned with whether *the purpose of the Act is best served by having the Stud Book administer and promote the breed or the individual breeders who farm in competition with other breeds in the country*; and that an impact assessment study is not a requirement to register a breeder's society. (Emphasis added.)

[85] Section 11(1)(d) provides that a group of persons may be registered as an animal breeders' society if 'such group of persons complies with such requirements as may be prescribed'. The Registrar commissioned an impact assessment study for the reasons he advanced.

[86] The Act defines 'breed standards' to mean: 'a written set of phenotypic or genotypic standards of excellence determined and applied in terms of the constitution of an animal breeder's society for a kind of animal'.

[87] Mr van der Westhuizen deposed to the affidavit in his capacity as a General Manager of the SA Stud Book. What is apparent from his affidavit is that the INTERGIS system is accessed by or operated on the SA Stud Book and Agricultural Research Council (ARC). They had managed the INTERGIS system as a joint venture prior to October 2011. He explains the role that SA Stud book played as a registering authority and as an animal breeders' society. Nowhere in his long explanation about registration of new breeders does he mention that he or SA Stud Book gave all that data to the Registrar.

[88] In fact, he deals with the upload of the data between SA Stud Book and ARC, and that ARC has supplied the SA Stud Book with a username and password to access its file protocol transfer (FTP), computer server. There is no mention of that information being loaded on the departmental INTERGIS or access being given to the Registrar.

[89] According to Mr Van der Westhuizen, SA Stud Book, a registration authority that also acts as an animal breeder's society, has, in consultation with the Chianina breeders, determined the application of breeding standards. He confirmed that the Italian standards have been applied.

[90] In a letter dated 11 October 2012, written to the legal representatives of Keman relating to importation of the embryos, the Registrar stated, amongst others:

'4. The Department did not issue the registration certificates you attached. However, investigation into attached registration certificates is on – going.

[...]

7. *We do not have control over SA Studbook*, as such we do not have any official information that you require.' (Emphasis added.)

[91] The explanation given by Mr van der Westhuizen suggests that it is SA Stud Book that applies for the issuance of prefixes and suffixes by ARC. After the ARC has

approved them, SA Stud Book will supply other particulars of the participants to ARC. ARC will then record them on the INTERGIS.

[92] Mr van der Westhuizen does not deal with the case at hand whether the Breeders' Society has a constitution that deals with the breed standards, whether it has been issued with the prefixes and suffixes or the necessary certificates necessary for its registration.

[93] In any event, for as long as the Registrar's decision to commission an impact assessment study has not been challenged frontally before the high court, either by way of review or declarator, or before the internal Appeal Board, it stands.

Registrar's competence

[94] One of the requirements of the Act is for the Minister to designate an officer in the department who has an appropriate tertiary qualification in the field of animal improvement as the Registrar of Animal Improvement, who shall exercise the powers and perform the duties conferred or imposed upon the Registrar under this Act.³²

[95] The record indicates that the current Registrar, who is the appellant herein, is a scientist. According to the judgment of the high court, the Registrar authored and contributed to some of the textbooks relied upon by the high court. There is no doubt that the Registrar is duly qualified to make any inquiry in connection with the Breeders' Society as he deemed necessary³³, which would include, as in this case the impact assessment study.

Failure to exhaust internal remedies

[96] The Registrar had raised, as a point *in limine*, the Breeders' Society's failure to exhaust internal remedies and relied in this regard on the provisions of s 23(1) of the Act. He also relied on the provisions of s 7(2)(a) and (c) of PAJA and contended that the Society failed to apply for exemption from compliance with s 7(2)(a), failed to show that there were exceptional circumstances and that it was in the interests of justice to exempt it from compliance with the provisions of s 7(2)(a).

³² Section 3(1) of the Animal Improvement Act.

³³ Section 8(4) of the Animal Improvement Act.

[97] The Breeder's Society made an election to abandon the appeal process. When it made that election, it subjected itself to the provisions of PAJA read together with the Animal Act. An appeal is an internal remedy built into the Act to cater for aggrieved persons who operate within the agricultural or animal sector. The Act provides in s 23(3) how an Appeal Board should be constituted. It provides that the Appeal Board shall consist of a person who has legal knowledge³⁴ and two persons who, in the opinion of the Director-General, have 'expert knowledge' of the subject of the appeal.³⁵ The first judgment has found that the internal remedy could not have been found to be effective redress after 12 years. It is also stated in the first judgment that failure to apply for exemption does not disqualify the courts from entertaining the matter. I disagree for these reasons:

[98] The Appeal Board that was appointed by the Director-General consisted of three persons as provided in terms of the Act. They are cited as third to fifth respondents and described by the Society as: Advocate Tshifhiwa Tshitereke, an advocate and the Chairperson of the Appeal Board, Mr P M Molapo, a major businessman, and Dr L E Matjuda, a veterinarian and an expert in the field of animal improvement.

[99] The Animal Improvement Act sets out the procedure to be followed by the Appeal Board and the powers of the Chairperson thereof in s 23(7). The Appeal Board has powers that may be summarized as follows: to subpoena any person who may give material information concerning the subject matter, to produce that document, to be interrogated, to appear before him or her at a time and place specified in the subpoena; and the chairperson may retain for examination any document so produced;³⁶ administer an oath to or accept an affirmation from any person called as witness;³⁷ call any person present at the hearing as a witness and interrogate him or her or even require him to produce any document under his or her control;³⁸ it also

³⁴ Section 23(3)(a) of the Animal Improvement Act.

³⁵ Section 23(3)(b) of the Animal Improvement Act.

³⁶ Section 23(7)(a) of the Animal Improvement Act.

³⁷ Section 23(7)(b) of the Animal Improvement Act.

³⁸ Section 23(7)(c) of the Animal Improvement Act.

permits legal representation.³⁹

Appeal process

[100] On 29 June 2022, two members of the Appeal Board were not present due to the fact that they were not provided with sufficient time to attend the appeal proceedings. Counsel who represented the Registrar indicated that the Registrar's erstwhile counsel had passed away, and the counsel that took over had not had an opportunity to consult with the Registrar, who was reported to be sick. In the end, the appeal was removed from the roll.

[101] Once an appeal was lodged against the Registrar's decision or direction on 25 March 2020, the matter fell squarely within the powers of the Director-General, who must appoint members to serve on it. The Registrar wrote to the Breeders' Society, six days after the lodgment of the appeal, on 31 March 2020, and indicated that they would revert to the Breeders' Society after lockdown. The Director-General appointed the members to the Appeal Board on 4 April 2022. On the day of the hearing of the appeal, the Registrar was legally represented. There are broad sweeping allegations made by the Breeders' Society against the Appeal Board that the Breeders' Society has lost all confidence in it, without stating facts demonstrating how the Appeal Board failed to conduct itself in a proper manner. The fact that two members of the Appeal Board could not attend due to short notice cannot be regarded as an indication of bias and would not lead to an inference of bias by a reasonable person based on reasonable grounds. The procedure at the hearing of the appeal is determined by the Chairperson.⁴⁰ The dates for the hearing of the appeal were dates that the Breeders' Society's counsel proposed to the Chairperson, who issued directives accordingly. The allegations that the Appeal Board played into the hands of the Registrar are not supported by any facts, and the high court ought to have dismissed them out of hand.

[102] The Breeders' Society decided not to participate further in the appeal process, which was a remedy available to it. It abandoned the appeal process and brought the application to the high court. The Appeal Board has very wide powers on appeal, including the power to confirm, set aside, or amend the decision or direction of the

³⁹ Section 23(9) of the Animal Improvement Act.

⁴⁰ Section 23(8) of the Animal Improvement Act.

Registrar which is the subject of the appeal;⁴¹ and may make such order in connection therewith as it may deem fit.⁴²

[103] In *Nichol and Another v Registrar of Pension Funds and Others*,⁴³ this Court, when faced with a similar issue, stated:

‘The Appeal Board therefore conducts an appeal in the fullest sense – it is not restricted at all by the Registrar’s decision and has the power to conduct a complete rehearing, reconsideration and fresh determination of the entire matter that was before the Registrar, with or without new evidence or information. This is not disputed by Nichol. It has also never been suggested that the Appeal Board has been tainted by any of the alleged procedural or substantive irregularities of which Nichol complains. I therefore cannot agree with the argument advanced by counsel for the appellants to the effect that the Appeal Board would be unable to give effect to their constitutional rights to fair administrative action and would not be able to ‘make a declaration of invalidity’ in respect of the impugned decisions of the Registrar, as opposed to ‘simply setting aside’ such decisions. As detailed in the previous paragraph, the powers of the Appeal Board are certainly extensive enough to afford Nichol the same relief (if justified) as that sought by him in the main application, namely an order ‘reviewing and setting aside’ the relevant decisions of the Registrar, in particular the issue of a certificate in terms of s 14(1)(e) of the PF Act in respect of the transfer of business from the Sage Schachat Fund to the Sage Group Fund.’⁴⁴

[104] The remarks expressed in *Nichol* apply equally herein. The Appeal Board that is appointed in terms of the Animal Improvement Act has extensive powers. It is trite that s 7(2) of PAJA places a procedural obstacle in the way of a person wishing to review an administrative action. It provides:

‘(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person

⁴¹ Section 23(10)(b) of the Animal Improvement Act.

⁴² Section 23(10)(c) of the Animal Improvement Act.

⁴³ In *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA); [2006] 1 All SA 589 (C) (*Nichol*).

⁴⁴ *Ibid* para 22.

concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.’

[105] Section 7(2) of PAJA requires that all internal remedies be exhausted unless exceptional circumstances exist and the person concerned brings an application to be exempted from the requirement. Courts have consistently confirmed the importance of complying with this requirement.⁴⁵ The Breeders’ Society complains that its attorneys attended the ‘purported’ appeal proceedings. There are no facts to support the allegation that it was a ‘purported’ appeal. It complained that the Chairperson interviewed the parties on his own. There was nothing untoward with the process followed by the Chairperson, where the other members of the Board were not available. There were three appointed Appeal Board members in terms of the Act. It has also never been suggested that the Appeal Board was tainted by any of the alleged procedural concerns of which the Breeders’ Society complains. Instead, it appears that the Breeders’ Society was not happy with the pace at which the appeal was handled. The Breeders’ Society’s disappointment as a result of the appeal not proceeding does not constitute sufficient reason to bypass the Appeal Board. The Breeders’ Society will be able to obtain the relief it sought before the high court, if justified, before the Appeal Board. The issue of whether the Breeders’ Society meets the requirements for registration as a Breeders’ Society and the reasons for the impact assessment study will be interrogated efficiently by the Appeal Board, given its wide powers and the expertise of its members.

[106] The Constitutional Court held (per Mokgoro J) that ‘[i]nternal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilize its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation.’⁴⁶ And, further that ‘approaching a court before the higher administrative body is given the opportunity to exhaust its own existing

⁴⁵ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) (2009 (12) BCLR 1192; [2009] ZACC 23) (*Koyabe*); *Basson v Hugo and Others* 2018 (3) SA 46 (SCA) ([2018] 1 All SA 621; [2018] ZASCA 1) (*Basson*); *Member of Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Another v Platz NO and Another* [2017] ZASCA 175; 2017 JDR 1964 (SCA); *Pine Glow Investments (Pty) Ltd v Minister of Energy and Others* 2025 (6) SA 474 (SCA); [2025] 3 All SA 314; [2025] ZASCA 75.

⁴⁶ *Koyabe* para 35.

mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and functions.’⁴⁷

Only the Minister is empowered to amend or pass regulations

[107] The Breeders’ Society relied on the provisions of ss 6(2)(g) and 6(3)(a) of PAJA. It contends that the Registrar is incompetent and had acted with malice because it took him 12 years to rectify the error. The 12-year delay is also put at the doorstep of the Registrar in the first judgment.

[108] There is only one person who is empowered to make regulations in terms of the law, and that is the Minister. The Registrar does not have those powers in terms of the Animal Act. It follows that there is no basis in law to blame the Registrar for the errors or omissions of the Minister. I find that the acceptance by the Breeders’ Society that the Minister omitted the Chianina breed from the regulations is not consistent with its persistent blame directed at the Registrar. The 12-year period that is being used to justify the exemption from exhausting internal remedies may have been justifiable if the relief before the high court was sought against the Minister and not the Registrar. The Registrar does not have powers to declare any kind of animal or an animal of a special breed of such kind of animal to be an animal in terms of s 2 of the Animal Act. The blame of the 12-year delay levelled against the Registrar is, with respect, misplaced.

[109] I find that the failure by the Breeders’ Society to apply for exemption as envisaged in s 7(2)(a) and (c) of PAJA is fatal to its case. With the 12-year delay correctly placed at the Minister’s doorstep, there are no exceptional circumstances to warrant the relief sought against the Registrar.

[110] The only way to rectify an omission or an error in the regulations is to publish amended regulations by the Minister as is enjoined by s 28 of the Animal Act. Regulations are subordinate legislation, and they must be published and gazetted. I have addressed the finding in the first judgment that there was no need for the Registrar to wait for an amendment in the light of Murphy J’s order. I need not repeat

⁴⁷ Ibid para 36.

myself, save to state that Murphy J was empowered to make any order that is just and equitable as found in *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited*⁴⁸. Murphy J, directed the Minister to revisit the issue of whether the removal of the Chianina as a breed was to be reversed within six months. That in effect impacted on the same relief that was sought before Murphy J.

[111] The Breeders' Society did not take steps to compel the Minister to rectify the error for 12 years, as the only person empowered to make regulations in terms of the Animal Improvement Act and also directed by the order of Murphy J to take steps in relation to the issue.

[112] In *Minister of Finance v Afribusiness*, the Constitutional Court stated:

'It is trite law that subordinate legislation must be created within the limits of the empowering statute. If they are not, the exercise of the power is unlawful and may be set aside like an unlawful act of any other functionary who has acted outside the powers conferred upon her by the Legislature. This means any regulations promulgated by the Minister under the Procurement Act, including the impugned regulations, must be consistent with the Procurement Act. If they are not, the Minister acted beyond the scope of the powers conferred on him by the Legislature. No matter how clear the regulations are, *it is necessary to consider the empowering provision and the intention of the Legislature as reflected in the Procurement Act.*'⁴⁹ (Emphasis added.)

Non – compliance with the peremptory requirements for registration

[113] I now turn to the issue of registration of the Breeders' Society. The Animal Improvement Act defines an animal breeders society:

'means a group of persons promoting the breeding, the recording or registration, the genetic improvement and the use of a kind of animal or an animal of a specified breed of such kind of animal, determining and applying breed standards, recommending in its sole discretion the recording or registration of an animal or a specified breed of a kind of animal bred in or imported into the Republic and who is registered in terms of s 8(7)(a)(i).'

[114] The Registrar contends that the Breeders' Society has not yet fulfilled the

⁴⁸ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40; 2018 (2) BCLR 240 (CC); 2018 (2) SA 23 (CC) (*Gijima*) para 53.

⁴⁹ *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC) (*Afribusiness*) para 41.

conditions of registration as contemplated in the Act. The application by the Breeders' Society did not comply with some of the requirements provided for in the Animal Improvement Act. In terms of Regulation 7(1) an application for registration of a Breeders' Society shall:

- '(a) be submitted to the registrar on a form that is obtainable from the office of the registrar for this purpose;
- (b) be signed by at least seven persons who individually own animals of the breed and kind of animals to be promoted by the envisaged animal breeders society and each signature shall be confirmed by two witnesses; and
- (c) be accompanied by-
 - (i) the application fee specified in item 5 of Table1 in the Annexure;
 - (ii) a copy of the constitution of the society concerned;
 - (iii) certification by the organization referred to in section 15(3)(a) of the Act, that provision has been made for the registration of prefixes, suffixes and herd designation marks; and
 - (iv) certification by the organization referred to in subparagraph (iii) that the constitution makes provision for the recording of pedigree data in a manner that is in line with internationally acceptable specifications.'

[115] Section 15(3)(a) of the Animal Improvement Act provides:

'A certificate referred to in subsection (2)(a) or (b) shall only be issued if the registering authority concerned has registered on behalf of the breeder of the animal concerned a prefix or a suffix to indicate animals bred by him or her, with the organisation which is contracted by the Department to operate the integrated registration and genetic information system.'

[116] The Breeders' Society's application submitted to the Registrar dated 27 May 2019, was accompanied by a letter from its attorneys, Van Heerdens Incorporated, where they stated:

'In light of the aforesaid official recognition of the breed, and correction of its status, you are kindly requested to:

1. Recognise the Chianina Cattle Breeder's Society of South Africa as a Breeder Society in terms of Sections 8 and 11 read with Regulation 7 of the Animal Improvement Act, 62 of 1998.

In this regard we attach hereto for your attention the following documents:

- (i) Application for Registration as a Breed Society.
- (ii) Appendix with seven signatories of dedicated Chianina Breeders.

- (iii) Constitution of the Chianina Cattle Breeders Society of South Africa
- (iv) Prove(sic) of payment of fees in the amount of R1480 (as per item 14 on the tariffs issued by your offices on 5 June 2018 to our offices)

2. Again, consider the import application for semen and embryos by Keman Beleggings CC within the next day or two.

If you have any enquiries in the aforesaid regard kindly revert to this office before making your decision.'

[117] In the application by the Breeders' Society before the high court, the constitution of the Breeders' Society was omitted from the record. This Court was not favoured with a copy of the constitution. Apparent from the list above is that the certifications referred to in terms of regulation 7(1)(iii) and (iv) were not attached.

[118] Regulation 7 is couched in peremptory terms as the word 'shall' is used. It follows that if those documents were not attached to the application, there was no compliance with the regulation and s 15(3)(a) of the Animal Improvement Act. The Registrar's response that 'the applicant has not yet fulfilled the conditions for registration as a Breeders' Society as contemplated in the Act' was well made. The Breeders' Society, through its attorneys, had indicated that the documents were submitted in compliance with, among others, regulation 7, when it knew or ought to have known that not all the requirements were met. Nowhere in the application or the appeal is there mention of the certifications referred to in regulation 7, by the Breeders' Society. None were attached for the benefit of the high court or the Appeal Board. The high court failed to consider those requirements which are peremptory when it decided to step into the Registrar's shoes. Such failure constitutes a misdirection.

[119] The affidavit of Mr van der Westhuizen demonstrates that the SA Stud Book is also registered as both as registering authority and as an animal Breeders' Society. It is also concerned with the same Chianina Breed. Section 11(b) of the Act provides that: 'no other such registration has been granted in respect of an animal breeder's society which is concerned with the same breed of such kind of animal'. This requirement was not addressed by the Breeders' Society in its application.

[120] The finding by the high court that the approval of the application by the

Breeders' Society was a foregone conclusion, is not supported by the facts as demonstrated above. There was non-compliance with statutory provisions and the high court with its order approved an application that was not legally compliant. By so doing, the high court misdirected itself, and this Court is at large to interfere with its decision.

[121] Had I commanded the majority, I would uphold the appeal with costs; set aside the order of the high court, substitute it with an order dismissing the application with costs. That would be the end of the matter. However, the first judgment has dealt with the merits of the matter, and I am obliged to address its findings where I hold a contrary view.

The merits

[122] In the first judgment, it is found that it is not necessary to do an Impact Assessment Study. First, the Breeders' Society makes allegations of bias against the Registrar. It is trite that the test, on reasonable apprehension of bias, is objective rather than subjective. In *Turnbull-Jackson v Hibiscus Coast Municipality*,⁵⁰ the Constitutional Court indicated that:

'Whether an administrator was biased is a question of fact. On the other hand, a reasonable suspicion of bias is tested against the perception of a reasonable, objective and informed person. To substantiate, borrowing from *Sv Roberts*:

- (a) There must be a suspicion that the administrator might-not-would-be biased.
- (b) The suspicion must be that of a reasonable person in the position of the person affected.
- (c) The suspicion must be based on reasonable grounds.
- (d) The suspicion must be one which the reasonable person would-not might-have.'

[123] The allegation of bias is linked to the required impact assessment study by the Registrar. The Breeders' Society accused the Registrar of ignoring, among others, the advice of his predecessor, Mr Ramsay, that it has never been a requirement that the impact assessment study be undertaken.

[124] In response to the advice given to the Breeders' Society by Mr Ramsay, the

⁵⁰ *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) para 30.

Registrar stated that his view is not binding on him as a scientist because he is bound by the Act to bring to bear on this issue his professional view and exercise his discretion unfettered by his predecessor's views. He did not know what considerations Mr Ramsay took into account when he gave the advice to the Breeders' Society. The advice was contained in a screenshot from social media. The Breeders' Society, instead of engaging with the Registrar meaningfully on the impact assessment study, has instead found the very idea of such a study to be ridiculous. No one enquired from the Registrar how far he was with the study and how long it would take. He set out his reasons, which I recorded above.

[125] In the first judgment, it is found that the Registrar has not indicated that the Breeders' Society's constitution is lacking in any way. I disagree, because the Registrar made it clear in his letter dated 26 November 2018 that, among others, 'the breed standards come from the country of origin which form the core of an association of a breed. At present an impact study assessment is currently being undertaken and it would be premature to approve breed standards at this stage.' The breed standards would have been provided for in the constitution of the Breeders' Society as required by s 11(1)(c) of the Animal Improvement Act.

[126] Section 11(1)(c) of the Animal Improvement Act specifically provides that:

'(1) A group of persons may be registered as an animal breeder's society if—

[...]

(c) the constitution of such group of persons specifically provides—

- (i) for the promoting, breeding, recording, or registration, genetic improvement and use of a kind of animal of a specified breed of such kind of animal;
- (ii) *for the determination and application of breed standards*, and for the recommendation, in its sole discretion, to a registering authority of the recording or registration of an animal or of a specified breed bred or imported into Republic;
- (iii) for the continued commitment to animal improvement' (Emphasis added.)

[127] The Breeders' Society indicated that it will use Italian breeding standards. The Registrar made it clear that the impact assessment study is for developing South

African breeding standards. In my view, if the Chianina has been imported and bred in the country for many years as the Breeders' Society contends, it is not irrational for the purposes of animal improvement, to develop South African breeding standards. That would be for the benefit of the South African environment and its agricultural industry as stated by the Registrar. If the Breeders' Society is using Italian standards, it means that it has not determined any South African breeding standards but will simply apply Italian breeding standards.

[128] In any event, the Registrar is a scientist who has stated that he has expertise in this field and has been entrusted with the responsibility to safeguard the interests of the country. Mr Ramsay is not the repository of the power to discharge the purpose of the Animal Improvement Act, the current Registrar is.

[129] Mr van der Westhuizen, as stated earlier, did not engage with the reasons that the Registrar advanced, which are consistent with the purpose of the Act. For these reasons, I find that the criticism of the Registrar's requirement for an impact assessment study, without a proper consideration of his reasons, by the high court constitutes an error.

The Substitution Order

[130] The high court disagreed with the submissions of the Registrar that the decision to register or not to register the applicant as an animal Breeder Society involves specialist or scientific skills and that he or the Appeal Board would be more equipped to make that decision. The first judgment agrees with the high court in this regard. I disagree, with respect for these reasons:

(a) The reasons given by the Registrar for his insistence on an impact assessment study are detailed. Those reasons are not dealt with either by the Society, Mr Ramsay, or Mr van der Westhuizen.

(b) The Breeders' Society, in responding to the Registrar's letter of 26 November 2018 on 30 September 2019,⁵¹ where the Registrar indicated that he was not in a position to approve breeding standards, made the following remarks:

⁵¹ Almost nine months later.

‘With due respect Mr Registrar, this statement of you is utterly ridiculous. There is nothing premature about approving the breeding standards. [Chianina] has its origin in Italy and the breed standards are very specifically set down. Same can be obtained on the internet site of the Italian breeders association...*That is the standards we will be applying in SA.* Should the breeders in South Africa later on wish to make changes to these standards they will do so in accordance to the constitution of the breeders society.’ (Emphasis added.)

(c) What this means is that the Breeders Society lost sight of the obligations of the Registrar. The purpose of the Animal Improvement Act is to provide for the breeding, identification, and utilization of genetically superior animals in order to improve the production and performance of animals in the interest of the Republic, and to provide for matters connected therewith. The definition of ‘animal improvement’ means *the scientifically based identification of genetically superior animals by means of integrated registration and genetic information system or in a manner approved by the registrar* and the discerning use thereof to improve the production or performance ability of the animal population in the interest of the Republic.⁵² (Emphasis added.)

[131] Lastly, it is apt to mention that the Breeders Society delayed in instituting the proceedings that are the subject matter of this appeal. The reason for requiring reviews to be instituted without undue delay is to ensure certainty and promote legality: time is of utmost importance. *In Merafong*,⁵³ the Constitutional Court held:

‘A further and related reason to remit the matter to the High Court is this. Merafong accepts that the Minister’s ruling was administrative action. Whether under PAJA, or legality review, it was obliged to institute proceedings to review the decision without unreasonable delay. The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself. Had Merafong instituted a review application, as it ought, the Court hearing it would have had to consider whether the delay precluded its challenge.’ (My emphasis).

[132] The high court erred in granting a substitution order in a matter that fell within the remit of the Registrar. It, with respect, failed to follow the principles set out by the

⁵² Section 1 of the Animal Improvement Act.

⁵³ *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (*Merafong*) para 73.

Constitutional Court in *Gijima* ⁵⁴ in that it did not declare the decision of the Registrar to commission an impact assessment study which already underway, invalid or his failure to approve the Breeders' Society's application for registration pending such study to be invalid and provide a remedy, instead of making a decision about an issue that fell squarely within the powers of the Registrar. It failed to balance the interests of the Breeders' Society with those of the Registrar, who is enjoined to safeguard the interests of the country's animal improvement in terms of the Act.

[133] It approved an application of the Breeders' Society which was not compliant with regulation 7(1) and s 15(3)(a), which provisions are peremptory. It did not even have the constitution of the Breeders' Society and the certifications referred to in regulation 7(1) and thus did not possess the necessary and relevant material to impose its decision on the Registrar.⁵⁵ Having recognized the knowledge of the Registrar in the field for having authored some of the authorities relied upon by it, its finding that the Registrar's decision was unreasonable and procedurally unfair constitutes a misdirection. The high court failed to consider the cautionary principles applicable to prevent separation of powers harm.

[134] In the *Economic Freedom Fighters*,⁵⁶ judicial authority was a subject of litigation where the Constitutional Court stated:

'Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.'

⁵⁴ *Gijima* fn 50 above.

⁵⁵ The Constitutional Court in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at para 48 cautioned that '[a] court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it.'

⁵⁶ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) para 93.

[135] In *Intertrade Two*,⁵⁷ Plasket J (as he then was), cautioned as follows:

'It is not necessary to decide the issue because it is simply not possible for this court to take the decision to award the mechanical and electrical tenders to Intertrade, much as I sympathise with it for the shameful treatment it has had to endure at the hands of some functionaries in the Provincial Government over a protracted period of time. The availability of proper and adequate information and the institutional competence of the court to take the decision for the administrative decision-maker are necessary prerequisites that must be present, apart from 'exceptional circumstances', before a court can legitimately assume an administrative decision-making function. This, it seems to me, is a minimum requirement of rational decision-making, a fundamental requirement of the rule of law. In this case, because of the absence of proper estimates, because of the flaws in the evaluations of the tenders and because of the unknown consequences on the tenders of the inexcusable passage of time, both prerequisites are absent. If this court was to award the tenders to Intertrade, it would act arbitrarily and in conflict with the rule of law because it would not have a rational basis for concluding that the award of the tenders would be 'fair, equitable, transparent, competitive and cost-effective', as required by s 217(1) of the Constitution.

I am acutely aware that the appellant will, no doubt, feel that it has been robbed of the prize to which it considers itself entitled. After all, it is not to blame for the way in which the tender process has been handled. I understand that, but wider interests and principles are involved. Courts, like any other institutions that exercise public power in terms of the Constitution, are duty-bound to act in terms of the rule of law and its principle of legality.

Courts are, furthermore, duty-bound to respect the separation of powers, an important pillar of the Constitution. Indeed, administrative law is, itself, an incident of the separation of powers, a point made in the following terms by Chaskalson P in the *Pharmaceutical Manufacturers* case:

"Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them".'

⁵⁷ *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and Another* 2008 1 All SA 142 (CK); 2007 (6) SA 442 (CK) (*Intertrade Two*) paras 43-46.

[136] I find that for all the reasons set out this is a clear case of judicial overreach by the high court and its decision should not be allowed to stand.

Conclusion

[137] In conclusion, I find that the high court erred in granting the substitution order as it impermissibly usurped the powers of the Registrar. It follows that the appeal should succeed. On the issue of costs there is no reason to depart from the normal rule that costs should follow the result. Had I commanded the majority, I would have granted the following order:

- 1 The appeal is upheld with costs.
- 2 The order of the high court is set aside and is substituted with the following order:
'The application is dismissed with costs'

T V NORMAN

ACTING JUDGE OF APPEAL

Appearances:

For the appellant:

MZ Makoti with L Rakgwale

Instructed by:

State Attorney, Pretoria

State Attorney, Bloemfontein

For the first respondent:

HJ de Wet SC

Instructed by:

VHI Attorneys, Pretoria

Rosendorff Reitz Barry Attorneys,
Bloemfontein.