THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 039/2025

In the matter between:

THE DIRECTOR ANIMAL HEALTH, DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT **FIRST APPELLANT**

MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT **SECOND APPELLANT**

and

GEORGE MOERASRIVIER BOERDERY (PTY) LTD **RESPONDENT**

and

SOUTH AFRICAN POULTRY ASSOCIATION **AMICUS CURIAE**

Neutral citation: *The Director Animal Health, Department of Agriculture, Land Reform and Rural Development and Another v George Moerasrivier Boerdery (Pty) Ltd* (039/2025) [2026] ZASCA 144 (28 October 2026)

Coram: MATOJANE ADP and UNTERHALTER and NORMAN JJA and MBHA and REINDERS AJJA
Unterhalter JA (first judgment) [01] to [41]
Norman JA (dissenting judgment) [42] to [93]

Heard: 11 September 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 28 October 2026

Summary: Animal Diseases Act 35 of 1984 – control measures – destruction of an animal or thing – avian flu – fair amount of compensation – interpretation – fair market value – the subject of valuation – valuation based on the condition of the infected or healthy animal or thing – remittal with directions in terms of s 8(1)*(c)*(i) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

ORDER

On appeal from: Western Cape Division of the High Court (Cloete J, sitting as the court of first instance):

1 The appeals of the first appellant and the second appellant are dismissed with costs, including the costs of two counsel, where so employed;

2 Deleting the reference to s 8(2)*(b)* in paragraph 2 of the high court's order and substituting it with s 8(1)*(c)*(i).

JUDGMENT

Unterhalter JA (Matojane ADP and Reinders AJA)

Introduction

[1] The respondent, George Moerasrivier Boerdery (Pty) Ltd (GMB), farms and sells chickens (layer hens and free-range hens) and eggs. In May 2021, Highly Pathogenic Avian Influenza (avian flu) was detected on one of GMB's farms. The state veterinarian, Dr Malan, gave notice to GMB to apply a number of animal disease control measures, in terms of the Animal Diseases Act 35 of 1984 (the Act). These measures included the destruction of all infected and in-contact birds on the premises, and their safe disposal by burial or incineration. GMB promptly complied. GMB destroyed a considerable number of hens, free-range chickens, and eggs. In addition, GMB was required to clean and disinfect the farms that were subject to the notice.

[2] In terms of s 19(1) of the Act, on 26 August 2021, GMB submitted an application for compensation. Its submission sought compensation for the birds and eggs it had been required to destroy, the costs incurred by their disposal, and the cleaning and disinfection of the poultry houses. The quantum of the compensation

sought for the destroyed birds and the eggs was calculated on the basis of fair market value.

[3] The first appellant, the Director Animal Health, Department of Agriculture, Land Reform and Rural Development (the Director), decided on GMB's application on 4 November 2021. The Director reasoned that avian flu has a high mortality rate; it is highly transmissible; and, as a result, there was a high probability that infected and in-contact chickens would have died. They also could not have been used or traded. The Director concluded that the compensation was zero (R0.00). I shall refer to this as the Director's first decision. In terms of s 23(1) of the Act, GMB lodged an objection with the Director General of the Department of Agriculture, Land Reform and Rural Development (the Department) against the Director's first decision. GMB requested the second appellant, the Minister of Agriculture, Land Reform and Rural Development (the Minister), to set aside the Director's first decision and award a fair amount of compensation.

[4] Following the procedure set out in s 23, the Director General appointed a panel of senior officers in the Department to investigate the objection. The panel's finding was not complimentary of the Director's first decision and her reasoning. The panel recommended to the Minister that she set aside the Director's first decision; that the Director, in her reconsideration of GMB's submission, consult with GMB with a view to settling the claim at an acceptable compensation value; and, in addition, that the Director develop and publish criteria in terms of s 19(2)*(a)* of the Act for the determination of fair market value. The Minister upheld GMB's objection, set aside the Director's first decision, remitted the claim for the Director's reconsideration, and in doing so, required the Director to consult with GMB, 'in order to settle at an acceptable compensation value'.

[5] The Director did meet with representatives of GMB. On 30 January 2023, the Director rendered her decision (the Director's second decision). The Director decided that 'no value above zero is acceptable for these animals and things'. The basis of this decision replicated the reasoning of the Director's first decision: chickens infected with avian flu, in-contact chickens, and eggs have no value.

[6] GMB brought proceedings to review and set aside the Director's second decision. It also sought an order substituting the Director's decision with an award of the compensation sought by GMB or such amount as the court may order. The review served before the Western Cape Division of the High Court (the high court). Cloete J upheld the review, set aside the Director's second decision, remitted GMB's claim for compensation to the Director, and, in terms of s 8(2)*(b)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), directed that 'the Director shall take into consideration that the applicant's destroyed "animals or things" shall be valued on the basis that they were in a "healthy" state'. With the leave of the high court, the Director and the Minister appeal to this Court.

The interpretation of s 19(2)

[7] The purpose of the Act, as its preamble makes plain, is to provide for the control of animal diseases. Among the ways this is done is by recourse to control measures. Section 9 provides the Minister with wide-ranging powers to prescribe general control measures or particular control measures in respect of particular animal diseases. Among these measures is the control of the slaughter of animals on land where a controlled animal disease occurs. It is common ground that Dr Malan, the State Veterinarian, gave notice to GMB in terms of the Act to apply control measures that required GMB to destroy all its infected and in-contact birds and eggs on two farms: Onderplaas and Moerasrivier.

[8] Section 19 of the Act provides for the owner of any animal or other thing which has been destroyed or otherwise disposed of pursuant to any control measure to submit an application for compensation for the loss of the animal or thing. It is not contested that GMB was entitled to submit an application for the loss of its birds and eggs that it was required to destroy in compliance with the control measures issued by Dr Malan. The central issue in this appeal is whether the Director enjoyed the power to fix compensation at zero, as a fair amount of compensation, for the loss of the animals and things sustained by GMB.

[9] Section 19 reads as follows:

'19 Compensation

(1) The owner of any animal or other thing which has been destroyed or otherwise disposed of pursuant to any control measure, or any provision of section 17(3) or (5), or any other provision of this Act, by the director or on his authority, may submit an application for compensation for the loss of the animal or thing to the director.

(2) The director may, taking into consideration-

(a) the applicable compensation, based on a fair market value of the animal or thing, which has been prescribed for purposes of this section or, where no compensation has been so prescribed, any amount fixed by him in accordance with any criterion deemed applicable by him;

(b) the value of anything which has in connection with the animal or thing been returned to the owner;

(c) any amount which is due by the owner pursuant to any provision of this Act in respect of the animal or thing to the State; and

(d) any amount which may accrue to the owner from any insurance thereof,

fix a fair amount as compensation.

(3) Notwithstanding the provisions of subsection (2), the director shall, in the case where a carcass has been disposed of in terms of section 17(5), fix the nett income accruing from such disposal, against which any amount payable by the owner concerned by virtue of any provision of this Act in respect of the carcass to the State is to be set off, as compensation in respect of the carcass, if –

(a) the owner is otherwise entitled in terms of this section to compensation; and

(b) that nett income exceeds the amount prescribed in respect of any such carcass.

(4) No compensation shall be payable in respect of any animal or thing which has been used in connection with the commission of an offence in terms of this Act or in respect of which such offence has been committed, as the case may be, and which has been destroyed or otherwise disposed of by the director or by his order pursuant to the provisions of this Act.'

[10] What power the director of the Directorate of Animal Health (the director) enjoys to fix a fair amount of compensation in terms of s 19(2) is a question of interpretation. Statutory interpretation is engaged by recourse to the triad of the text, context and purpose of the legislation. The power of the director in s 19(2) is formulated in the following way: 'the director *may*, taking into consideration . . . fix a fair amount as compensation'. (My emphasis.) What does this mean? Once an owner submits an application for compensation, the owner is entitled to have the application considered by the director on its merits. While the director cannot decide not to entertain the application, the application may fail to disclose a basis to award compensation. That may be the case if there are no facts that show the applicant to be an owner of any animal or thing, or that their destruction took place pursuant to any control measure. Absent such a showing, the director would decide to award no compensation. And in this narrow sense, the power conferred on the director does not require the director to award compensation simply by reason of an owner's submission of an application in terms of s 19(1). To capture this possibility, the power is cast by recourse to what the director may decide. What the power does require is that once an owner's animals or things have been destroyed pursuant to any control measure, the director must fix a fair amount of compensation by taking into consideration the matters set out in s 19(2)*(a)*-(*d)*, though the matters in s 19(2)*(b)-(d)* may not find application in a particular case.

[11] Since the director must take into consideration what is set out in s 19(2)*(a)*, the meaning of this provision matters. And it was at the heart of the dispute between

the parties. The Director and the Minister interpret s 19(2)*(a)* as follows. The provision is constituted by two parts. The first part is applicable compensation that has been prescribed, that is by regulation. Where no compensation has been prescribed, then the second part of the provision permits the director to fix any amount of compensation 'in accordance with any criterion deemed applicable by him'. I shall refer to this as the binary interpretation. The binary interpretation posits the consideration of compensation under the constraint of regulation. But absent such regulation, it is for the director to decide upon the criterion to be applied and then fix compensation in accordance with this criterion. Counsel for the Director described the amplitude of this discretion to be an unfettered discretion.

[12] The logical starting point is to understand the relationship between the considerations set out in s 19(2)*(a)-(d)* and the power of the director to fix a fair amount as compensation. The compensation that derives from the consideration set out in s 19(2)*(a)* is an amount of compensation from which adjustments are made, in virtue of the considerations in s 19(2)*(b)-(d)*. So, for example, if an amount will accrue to the owner from insurance paid against the risk of the destruction of the animal or thing, that amount must be taken into account and will figure in the ultimate determination of a fair amount of compensation. It is only possible to make adjustments of amounts or values in virtue of the considerations in s 19(2)*(b)-(d)*, if an amount of compensation is determined in terms of s 19(2)*(a)*. This amount, which I will call the base amount, is the compensation that is due, before the considerations in s 19(2)*(b)-(d)* are taken into account so as to fix a fair amount as compensation. Expressed as an equation: FC (the fair amount of compensation) = F (the foundation amount) – A (the adjustments in s 19(2)*(b)-(d)*).

[13] How then is the foundation amount to be arrived at in terms of s 19(2)*(a)*? The parties do not agree as to how to parse the sentence. And, in particular, what is the subordinate clause and, as Cloete J observed, how we should attribute meaning

by observing the use of commas in the sentence. The Director and the Minister read s 19(2)*(a)* to mean that the director takes into consideration 'any amount fixed by him in accordance with any criterion deemed applicable by him' to be the self-standing consideration by reference to which an amount of compensation is determined, where no compensation has been prescribed. So read, the director need not deem fair market value to be the criterion to fix the base amount. As a matter of syntax, such a reading is not excluded. But nor must the text be read in this way.

[14] The binary interpretation, however, must contend with what I shall refer to as the unitary interpretation. The unitary interpretation is informed by the following. First, what does the 'or' qualify? What comes before 'or' is a particular means by which applicable compensation is formulated, that is to say, as 'prescribed for purposes of this section'. This is defined to mean by regulation. What comes after the 'or' is the means to be used in the event that no compensation has been prescribed. In that event, it is any amount fixed by the director in accordance with any criterion deemed applicable by the director. What the director fixes, substitutes for what is otherwise done by the Minister by regulation. So understood, the common starting point in s 19(2)*(a)* is 'the applicable compensation based on a fair market value of the animal or thing'. And this starting point qualifies both means by which the applicable compensation is arrived at by the Director.

[15] Second, the unitary interpretation makes sense grammatically. It also makes better sense of the text of s 19(2)*(a)*. If the applicable compensation is the common starting point, it also provides the basis for arriving at such compensation – fair market value. This is a well-known concept for determining compensation, predicated on the construct of the price arrived at by a willing buyer and seller in the relevant market. The applicable compensation in terms of s 19(2)*(a)* is *based* on a fair market value, and proceeding from this basis, the Minister may prescribe the applicable compensation, or the Director may fix an amount of the applicable

compensation. In both instances, they may broaden the factors, beyond fair market value, by reference to which the applicable compensation is determined, as long as the compensation is based on fair market value. How this is to be done by the Minister or the director is left to them, save that it is stipulated, in the case of the director, that this must be by recourse to 'any criterion deemed applicable by him'. In other words, there must be an articulated criterion which makes sense so as to decide upon applicable compensation, provided such compensation is *based* on fair market value. There is also some internal textual coherence that the unitary interpretation brings. A criterion must be 'deemed applicable'. How is the director to deem it so? A coherent answer is by keeping in mind that she needs to arrive at 'the applicable compensation', and to do so she would have in mind any criterion that assists to arrive at such compensation, given the starting basis of fair market value.

[16] Third, the unitary interpretation resolves another incongruity to which the binary interpretation gives rise. On the binary interpretation, the Minister may prescribe applicable compensation but cannot avoid the statutory requirement that such compensation is based on fair market value. However, the director, a subordinate official, is at large to deem any criterion applicable and then fix any amount, without in any way having to ensure that the applicable compensation is based on fair market value. Apart from the incongruity of investing such a wide power in a subordinate functionary, while constraining the Minister, it is hard to understand s 19(2)*(a)* to mean that if the Minister decides to promulgate a regulation, fair market value becomes the basis of applicable compensation. But if the Minister does not do so, then the director is at large to decide what criterion to adopt and then to fix 'any amount' of compensation. This is a binary construct of such glaring disparity to arrive at the foundation amount that it is difficult to attribute this to what the Legislature intended. The unitary interpretation does not

suffer this incongruity or the investiture of a power in the Minister that is constrained, but in the Director is minimally so.

[17] Fourth, although the Act is old order legislation, it must be interpreted to promote consistency with the founding provisions of the Constitution, and in particular the rule of law. One aspect of the rule of law is that those made subject to the exercise of administrative power must have reasonable clarity as to how it may be exercised and its limits. In *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others (Dawood)*,[1] O'Regan J said this: 'Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers . . .'. At common law, Baxter observed, the notion of an unfettered discretion is a contradiction in terms.[2] We must privilege an available interpretation of legislation that better chimes with the rule of law. The unitary interpretation allows both the Minister and the Director discretionary power to decide upon the measure of compensation, but under the constraint that it is based on fair market value – an objective measure of value. The binary interpretation would accord to the Director a wide discretion to fix an amount of compensation, under the weak constraint of 'any criterion deemed applicable by him'. The values that animate the rule of law favour the unitary interpretation, which interpretation is plainly available on the basis of the language used in s 19(2)*(a)*.

[18] Fifth, s 19(2)*(a)* must be interpreted contextually. Other provisions of s 19 provide such context. I have already observed that the adjustments that might come

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[1] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 47.
[2] L Baxter *Administrative Law* 1984 at 409.

about by reason of s 19(2)*(b)*-*(d)* presuppose that the foundation amount has a value against which adjustments may take place. More importantly, these adjustments make more sense if the foundation amount is based upon fair market value so that there is an amount of some value against which deductions or set off will be commercially meaningful. For example, if the owner has insured against the risk of the destruction of animals or things from the disease that has actuated the control measure, s 19(2)*(d)* prevent double compensation. That would likely arise if the foundation amount, based on fair market value, approximates the value of the insurable interest. In addition, s 19(4) provides that no compensation shall be paid when the animal or thing has been used in the commission of an offence in terms of the Act. This is an exception to the fair amount of compensation that would otherwise be fixed in terms of s 19(2). The Act thus stipulates when no compensation is payable and this stipulation fits uncomfortably with an interpretation of s 19(2) that understands the Director to enjoy a discretion of such breadth as to permit of the same outcome, without the commission of an offence.

[19] Lastly, there is the purpose of the Act. This Court in *Minister of Agriculture and Others v Bluelilliesbush Dairy Farming (Pty) Ltd and Another* (*Bluelilliesbush)*[3] considered the meaning of regulation 30 which the Minister promulgated in terms of s 19(2) (Animal Diseases Regulations).[4] The parties differ as to whether this authority has value beyond its interpretation of regulation 30, which regulation has since been repealed.[5] Cameron JA said this of the Act: '. . . the departmental policy inadequately takes account of the Act's objectives, which are designed to elicit the voluntary co-operation of farmers . . . To give infected or suspect dairy cows their slaughter value for compensation purposes offers no incentive to farmers, small-scale or large-scale, to participate in disease control

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[3] *Minister of Agriculture and Others v Bluelilliesbush Dairy Farming (Pty) Ltd and Another* [2008] ZASCA 60; [2008] 4 All SA 81 (SCA); 2008 (5) SA 522 (SCA).
[4] Animal Diseases Regulations published under GN R2026 in GG 10469 of 26 September 1986.
[5] Regulation 30 was substituted by GN R558 of 22 May 2009.

measures'.[6] This passage plainly references the objects of the Act, and I concur with what it has to say. If the powers of the Minister or the Director is predicated upon the fixing of compensation based upon fair market value then not only is an important measure of certainty secured, but this would also incentivise compliance, as *Bluelilliesbush* recognised. It was submitted on behalf of the Director and the Minister that the Act secures compliance by criminal sanction. That is so, but this does not oust the additional value of compliance by proper compensation, and not only by coercion. There can be little doubt that compliance is likely to be better served, as an object of the Act, on the unitary interpretation.

[20] *Bluelilliesbush* concerned a voluntary scheme for the control of bovine tuberculosis, as Cameron JA noted and as Cloete J observed in the high court. The control measures in this case were compulsory. That difference does not, in my view, diminish the force of what was said. Even where compliance with a control measure is compulsory, the Act depends upon owners reporting disease promptly and cooperating with the state veterinarian. An owner who knows that the destruction of infected and in-contact animals will attract no compensation has reason to delay reporting, and delay is the very harm the Act seeks to prevent. The incentive to which Cameron JA referred is as relevant to a compulsory regime as to a voluntary one.

[21] The objects of the Act are not confined to issues of compliance. The Act confers wide powers to take control measures. These measures will often be taken in circumstances of urgency to prevent the spread of disease. The exercise of the power may be actuated by prudential considerations under the precautionary principle to order the destruction of animals and things, beyond the destruction of animals known to be infected. In this case, Dr Malan required the culling of free-

[6] Ibid para 18.

range birds that had not been in contact with infected birds. This was done to ensure that there was a prudential margin of error. The control measures are taken, and compliance is required, to secure a public good. The public good is to prevent animal disease spreading. The spread of highly infectious animal diseases, such as avian flu, can cause great harm to the livelihoods of farmers, who farm at scale or more modestly. This in turn can impose considerable costs upon consumers, and, in the case of an essential food source, to food security.

[22] The point of compensation in terms of the Act is to ensure that owners of animals and things, compulsorily destroyed in compliance with a control measure, do not bear the private cost of securing a public good. Compensation renders the public good a social cost. And that social cost is determined by an objective benchmark – fair market value. Once the public good to be secured by the Act is properly understood, this too better supports the unitary interpretation because compensation is based upon an objective standard of social cost. The binary interpretation, by contrast, comprehends no such standard because compensation is a function of the Director's broad discretion which may be based on a narrow conception of private loss.

[23] For these reasons, taken together, the unitary interpretation is the better interpretation of s 19(2). Under the unitary interpretation, the foundation amount of compensation in terms of s 19(2)*(a)* is based on fair market value. Provided that basis is respected, the Minister may prescribe by way of regulation further considerations that permit of the determination of applicable compensation. So too, where the Minister does not do so, the Director may fix an amount of applicable compensation by recourse to any applicable criterion, provided also that it is based on a fair market value. Once the applicable compensation has been fixed, then any adjustments as required by s 19(2)*(b)*-*(d)* will be made, to arrive at a fair amount of compensation.

[24] It is plain that the Director did not comprehend that her decision to fix a fair amount of compensation requires that applicable compensation must be based on a fair market value. The Director, in her answering affidavit, stated the basis of her understanding of the power conferred upon her by s 19(2). She said this: 'I am empowered to determine compensation by fixing any amount in accordance with the criteria deemed applicable by me. The Act does not prescribe compensation based on "*fair market value*" '. (Her emphasis.) The Director's written argument is quite explicit on this score: 'Fair market value did not play a role at all when the Director's decision was made in the current application'. Curiously, the Director, in the second decision, states that, 'the value of the destroyed animal or thing should be based on a realistic assessment of the animal's fair market value in the state they are in when they are destroyed…'. This reference to fair market value is at odds with the Director's explicit disavowal of this standard. This contradiction need not be resolved because on any basis the Director failed to comprehend the discretion she enjoyed, and its limits, in terms of s 19(2). Her appeal, and that of the Minister, is predicated upon an interpretation of s 19(2) that is incorrect. This is a reviewable error. The high court was correct to come to this conclusion. The Minister did raise the question of prematurity, but wisely abandoned this point in oral argument before us. The appeal of the Director and the Minister must accordingly fail.

[25] A further matter must be addressed. The present regulation 30, as substituted in 2009, provides: 'When compensation is payable to a responsible person in terms of s 19 of the Act, the applicable compensation shall be determined by the Director'. The Director relied upon it as confirming that she may fix any amount by any criterion of her choosing. The regulation fixes no amount, formula or criterion. It returns the determination to the Director, which is what s 19(2)*(a)* already provides where no compensation has been prescribed. A regulation cannot enlarge a power that the Act confers subject to a limit. The regulation therefore leaves the Director's

power where s 19(2)*(a)* places it: the Director fixes an amount in accordance with a criterion deemed applicable by her, and that amount must be based on a fair market value.

The subject of valuation

[26] There is a further issue that requires our consideration. What did figure large in the Director's decision was that 'no value above zero is acceptable for these animals and things'. Relying upon the advice that the Director received from an expert, Professor Brown, the Director came to her decision of zero compensation on the basis of the following reasoning: 'Therefore, when I decided the compensation rate for the Applicant at 0% it was partly based on me having considered the professional advice from Professor Brown. This is primarily that the chickens in contact or infected with HPAI [avian flu] were ultimately going to die and that, due to the infectious and highly contagious nature of the eggs and carcases of the birds in contact or infected by HPAI, such eggs and chickens were of no value'. In her second decision, the Director explained, as I have observed, that compensation should be based on 'the state they [that is, the animals and things] are in when they are destroyed i.e., when the regulation or the order in terms of the Act . . . deprived the owners of them'. The Director thus decided that because chickens infected with avian flu and in-contact chickens and eggs have no value, zero compensation is the fair amount of compensation.

[27] This reasoning raises the very conceptual issue that exercised this Court in *Bluelilliesbush*. There the issue was to interpret regulation 30 (now repealed) that the Minister had prescribed for the determination of applicable compensation in terms of s 19(2). Cameron JA[7] pointed out the important distinction between the adoption of a standard of value and the subject of such valuation. I have found that

[7] Ibid para 10.

properly interpreted, s 19(2) requires the Director, in the absence of Ministerial prescription, to base her determination of applicable compensation upon a fair market value. That then is the standard of value that the Director was required to adopt. Such adoption does not however determine the subject to which this standard of value is applied. In particular, it does not decide whether a fair market value is applied to the condition of the animal or thing at the time that the control measure is ordered and their destruction takes place. If this is the subject of valuation, then valuation is predicated upon the fair market value of the infected animal or an animal or thing in contact with an infected animal. I shall call this the infected subject. The alternative, posited in *Bluelilliesbush*, is that the subject of valuation is a fair market value of the animal before it became infected or came into contact with an infected animal. I shall call this the uninfected subject. The Director considered compensation on the premise of the infected subject.

[28] Was the Director, as a matter of law, correct to adopt this premise? Section 19(1) provides that the owner of any animal or thing disposed of pursuant to any control measure may submit an application '*for compensation for the loss of the animal or thing*'. (My emphasis.) This provision clearly makes the compensation payable to an owner by reason of the control measure that was taken and resulted in the disposal of the animal or thing. What s 19(1) does not make clear is the relevant counterfactual that is of application. Had the control measure not been taken, what then? The Director and the Minister understand the compensable loss to be the value the animal or thing would have had but for the taking of the control measure. And since the control measure was required because the chickens were infected or in contact with infected chickens, it is their value in this state that signifies. And hence the adoption of the infected subject.

[29] The opposed position is this. The relevant counterfactual is not to decide what state the animal or thing was in at the time that the control measure was taken.

Rather, the loss to the owner of the animal or thing that must be destroyed by reason of the disease is the value of the animal or thing as a productive asset. That is, as a healthy animal or thing untainted by the disease. The counterfactual is not to ask what value the animal or thing would have had if the control measure had not been taken, but rather, what state would the animal or thing have been in had the disease not befallen them. This is to adopt the uninfected subject.

[30] The text of s 19 is ambiguous as between these two positions. I am inclined to think that the uninfected subject is the correct interpretation for two principal reasons. First, if the infected subject is adopted, then it is difficult to conceive of when fair compensation would ever be payable to an owner. If an animal is infected with a highly infectious disease that warrants its destruction, it would either have no value, or it might have a slaughter value at a considerably diminished selling price. In either event, why would compensation be payable to the owner on any basis? Either the diseased animal has no value, as the Director found in this case, or the owner can go to market to secure whatever slaughter value the market will bear. There is no need for fair compensation at public expense. And the same logic would apply to an animal or thing that has been in contact with the infected animal.

[31] There may be instances in which the control measure is applied on a prudential basis that required the destruction of animals or things that might otherwise have escaped any risk of infection or value destruction by reason of proximity to an infected animal. Although the scope of the power, as I have observed, to impose a control measure can extend to animals or things in this class, this would only allow for any compensation in this special class, leaving uncompensated the greater part of the loss suffered by an owner. That would be a strained interpretation of what fair compensation consists of.

[32] In *Bluelilliesbush*,[8] Cameron JA set out what s 19(2) makes clear, that the Director must take into consideration the applicable compensation prescribed for purposes of s 19, where such compensation is prescribed, and that prescribed compensation must be based on a fair market value of the animal. The judgment of Norman JA, which I have had the pleasure of considering, relies upon this passage. The Court was concerned with a case in which compensation had been prescribed, and it said nothing about the position where none had been. The passage does not decide the question that arises here, and it is not inconsistent with the unitary interpretation.

[33] Second, proper regard must be paid to the purpose of the Act. I have explained that the purpose of the Act is to permit the use of a broad power to take control measures for the public good, and to make the required destruction a compensable social cost. The Act seeks to limit the wide-ranging harms that can occur if control measures are not taken to contain animal disease. The public good thereby secured for all is a social cost borne by all. And hence fair compensation is better understood as compensation that restores the productive assets that have been lost to the owner as a result of their destruction by the imposition of control measures.

[34] Section 19 of the Act should thus be interpreted to mean that the compensation that is due to an owner for the loss of an animal or thing is the loss of value by reason of its destruction as against its uninfected value. This is an interpretation based on the uninfected subject. It avoids an emaciated concept of fair compensation and better accords with the objects of the Act.

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[8] *Bluelilliesbush* fn 3 para 8.

[35] It follows that the Director's adherence to the infected subject as the basis for exercising her power to award compensation was also a reviewable error, predicated upon an incorrect interpretation of s 19. On this basis also, the Director's decision to award zero compensation was correctly reviewed and set aside by the high court.

[36] In addition, the control measure, as interpreted by Dr Malan, required GMB not only to destroy infected and in-contact chickens, but also chickens on the two farms that were neither infected, nor in contact with infected chickens. I shall refer to these chickens as uninfected chickens. Even on the Director's (incorrect) understanding of her power to award a fair amount of compensation, the Director failed in the second decision to give any consideration to the value fairly attributable to the destruction of the uninfected chickens. It is difficult to comprehend, even on the incorrect legal premises from which the Director exercised her power, how the Director arrived at an award of zero in respect of the uninfected chickens. The second decision wants for rationality on this score, and is a further basis upon which the second decision was correctly reviewed and set aside by the high court.

Remedy

[37] The Director did not correctly understand the power she was required to exercise in terms of s 19(2) to arrive at a fair amount of compensation. The Director's second decision was vitiated by reviewable errors. And the high court was correct to so find. The appeal of the Director and the Minister must therefore be dismissed.

[38] Two qualifications should be noted. First, the uninfected subject identifies what is to be valued. It does not require the Director to award the full value so determined. It was accepted on behalf of GMB that the Act makes no provision for

compensation at replacement value. The fair market value of an uninfected animal is not necessarily the cost of replacing a flock. Section 19(2)*(a)* empowers the Director to fix the applicable compensation, provided such compensation is based on fair market value. The repealed regulation 30 paid 80 per cent of fair market value for infected animals. Under that regime, compensation yielded less than replacement value. Second, s 19(1) provides for compensation for animals and things 'destroyed or otherwise disposed of pursuant to any control measure'. Birds that died of avian flu before any control measure was applied to them were not so destroyed, and no compensation is payable for them under s 19.

[39] It is something of an oddity that the Minister sought to oppose GMB's review in light of the fact that she set aside the Director's first decision after consideration of the Department's panel report and the Director General's recommendation. The panel report was cast in unusually robust terms, describing the Director's first decision as 'absurd and completely illogical' and 'fatally illogical and irrational', not least because it failed to give expression to s 19 and the determination of a fair market value for the animals and things destroyed. The Minister having joined the Director in opposing the review, and then pursuing this appeal, is liable, with the Director for the costs of the appeal.

[40] The Director submitted that the order of remittal made by the high court which required the Director to take into consideration the value of GMB's animals or things 'on the basis that they were in a "healthy" state', amounted to an impermissible order of substitution. That is not so. The high court made the order in terms of s 8(2)*(b)* of PAJA. That provision applies to proceedings for judicial review in terms of s 6(3), where an administrator has failed to take a decision. Section 8(1)*(c)*(i) permits a court that sets aside administrative action to remit the matter for reconsideration 'with or without directions'. A direction that the administrator apply the correct legal standard is a direction of that kind. It does not

substitute the court's decision for that of the administrator, who must still fix the amount of compensation. The order should be corrected to refer to s 8(1)*(c)*(i). The high court found that the valuation must be undertaken on the basis of the uninfected subject. That finding is correct. And hence it was permissible for the high court to make an order that requires the Director, upon remittal of the matter to her, to apply the law.

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

1 The appeals of the first appellant and the second appellant are dismissed, with costs, including the costs of two counsel, where so employed;

2 Deleting the reference to s 8(2)*(b)* in paragraph 2 of the high court's order and substituting it with s 8(1)*(c)*(i).

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D N UNTERHALTER

JUDGE OF APPEAL

Norman JA- Dissenting (Mbha AJA concurring)

[42] I have read the judgment penned by my colleague, Unterhalter JA, and I am grateful for the narration of the facts and the law. I differ with him on the findings and the order proposed in his judgment (the first judgment). I readily accept that the high court was correct in reviewing and setting aside the decision of the Director. I differ on the costs order. It follows that paragraph 1 of the order of the high court, bar the costs order, must stand and the appeal in relation thereto must fail. Where I part ways with the first judgment is that the appeal is dismissed in its entirety, thus leaving the remittal order, in its present form, intact.

[43] As a starting point I wish to refer to the relief sought in the notice of motion, only where it is relevant for the purposes of this judgment, namely the part referred to by the high court as the substitution order, which reads:

'That the administrative action be declared an exceptional case and that the First Respondent be ordered to settle the claim for compensation by the Applicant on the basis that the chickens culled and the eggs destroyed had its fair market value as if they were alive and well and the eggs not destroyed at the time of the culling and destruction, respectively, alternatively, that the administrative action by the First Respondent be remitted for consideration by the First Respondent;

That the First Respondent be ordered to pay to the Applicant compensation in the amount of R31 892 847.63, alternatively such an amount as ordered by the Court, within 10 (ten) days of the date of this Order.'

[44] In the first judgment it is found that there is no substitution order made by the high court. I disagree. GMB submitted before the high court that the Director had made a nil compensation award and even after the Minister had set aside her decision, she continued to make again a nil compensation award. Therefore, it was submitted, remitting the matter to the director, will not yield a different result. That submission was rejected by the high court.

[45] Having rejected that submission, the high court correctly remitted the matter to the Director. However, it placed its reliance on the provisions of s 8(2)*(b)* of PAJA and directed the Director to take into consideration a criterion set by it that:

'the Director shall take into consideration that the applicant's destroyed ''animals or things'' shall be valued on the basis that they were in a "healthy state''.'

[46] Section 8(2)*(b)* of PAJA provides:

'**8 Remedies in proceedings for judicial review**

(1) . . .

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3) may grant any order that is just and equitable, including orders –

(a) . . .

(b) declaring the rights of the parties in relation to the taking of the decision.

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or. . .

Section 8(2) applies to proceedings under section 6(3), where an administrator has failed to take a decision. The director took a decision here. Section 8(2)*(b)* therefore did not avail the high court, and its order falls to be assessed under section 8(1)*(c)*.'

[47] The high court made the following significant findings: that there was a factual dispute regarding the quantification of the applicant's claim for compensation; that substitution is not an appropriate remedy where a factual dispute is not resolved; and that a substitution order will not, in all circumstances, be just and equitable. Thereafter the high court made the following order:

'1. The decision by the first respondent made on 30 January 2023 to award the applicant nil compensation in terms of section 19(2) of the Animal Diseases Act 35 of 1984 (the Act) is reviewed and set aside.

2. The applicant's claim for compensation in terms of section 19(1) of the Act is remitted to the first respondent for reconsideration; and in terms of section 8(2)*(b)* of the Promotion of

Administrative Justice Act 3 of 2000, the Director shall take into consideration that the applicant's destroyed "animals or things" shall be valued on the basis that they were in a "healthy state".

3. Save as aforesaid the application is dismissed; and

4. Each party shall pay their own costs.'

[48] This order mirrors the substitution relief that was sought by GMB, although it used the term 'on the basis that the chickens culled and the eggs destroyed had their fair market value as *if they were alive and well* and the eggs not destroyed at the time of the culling and destruction, respectively'. (My emphasis.) It is an order envisaged in s 8(1)*(c)*(ii) of PAJA, which provides that:

'The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

(a) . . .

(b) . . .

(c) Setting aside the administrative action and-

(i) remitting the matter for reconsideration by the administrator, with or without directions; or

(ii) in exceptional cases –

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) directing the administrator or any other party to the proceedings to pay compensation.'

[49] It may be said that s 8(1)*(c)* permits a court to remit a matter 'with or without directions', and that the high court's order was a direction of that kind. A direction that requires the administrator to apply the law correctly is permissible. But the 'healthy state' direction rests on an interpretation of s 19 that, for the reasons I give below, is incorrect, and it prescribes the very criterion that s 19(2)*(a)* entrusts to the director. It is for that reason that it cannot stand.

[50] The high court, in fashioning its order, included the contents of paragraph 7 of the notice of motion, which was a substitution order. The order it made is contrary to its finding that a substitution order would be an inappropriate, unjust and inequitable order to make. That constitutes a misdirection.

[51] The high court failed to declare that this was an exceptional case which warranted substitution. In *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* (*Trencon*),[9] the Constitutional Court stated that an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances. It shall be observed that GMB sought such a declarator in the relief sought. The high court purportedly resolved a factual dispute relating to the method of quantification of compensation by setting out the criterion to be considered by the Director, without engaging and occupying its mind on how it sought to resolve disputes of fact based on the *Plascon-Evans* rule.[10] Further, it ordered the Director, in peremptory terms, to take into consideration that GMB's destroyed animals or things shall be valued on the basis that they were in a 'healthy state'. This is an issue that is inextricably linked to the disputed issue of quantification as found by the high court. The discrepancies in GMB's own figures, which I set out below under the heading 'GMB's claim', illustrate the nature of the dispute. Without resolving that dispute, the high court imposed a criterion to be employed by the Director. By so doing, it usurped the powers of the Director.

[52] The substitution order presents a fundamental difficulty: it is not sanctioned by the Act. There is one repository of the power to decide or determine a criterion deemed applicable, and that is the Director. Having cautioned itself against making

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[9] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) para 35.
[10] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A), 1984 (3) SA 623 at 634E-635C.

a substitution order, but proceeded to make the very order of substitution, the high court exceeded its powers contrary to the provisions of the Act, particularly the provisions of s 19(2)*(a)*.

[53] That order tampered with the discretionary powers that the director has in terms of the Act. By so doing, the high court 'crossed the line' in breach of the separation of powers doctrine. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[11] the Constitutional Court, following *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,[12] cautioned as follows:

'(w)here the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'

[54] For all the above reasons, this Court's power to interfere with a remedy granted under s 8 of PAJA depends on the nature of the discretion that the high court exercised.[13] In this case, the high court exercised a discretion in the true sense; however, it impermissibly accorded to itself the power to determine the 'criterion'. It correctly remitted the matter for reconsideration. By setting a criterion, the high court misdirected itself, and this Court is at large to interfere with its decision. My interpretation of the section below shows why a 'healthy state' criterion finds no support in s 19 of the Act.

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[11] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) para 6.
[12] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 para 95.
[13] *Trencon* fn 9 para 83.

GMB's claim

[55] Before I engage in the interpretation exercise, for context, the following facts are relevant.

[56] GMB claimed compensation in the amount of R31 892 847.63. It called upon the Director to make a determination on the fair market value of all chickens culled and eggs destroyed. It referred to the amount claimed as a 'replacement value' of the total hens culled and eggs destroyed. GMB, in its claim for compensation annexed to the founding affidavit, deposed to by Mr Stephanus Lamprecht, stated, among others:

'In an email dated 8 June 2021, we informed the responsible state veterinarian that chickens in house 1 and 2 of the farm Moerasrivier have died and tested positive to for HPAI and that we started the killing of the chickens in the infected houses as soon as we noticed the symptoms. We further inform the responsible state veterinarian that chickens in houses 3 ,5 ,6 and 7 did not show any symptoms of the disease and that houses 4 and 8 were empty.'

[57] There are factual discrepancies in the founding affidavit that appear in the following paragraphs:

'5.4 The Applicant's means of production were approximately 387 352 (three hundred and eighty-seven thousand three hundred and fifty-two) layer and free-range hens (also referred to as ''chickens'' or ''birds''). The Applicant was ordered to destroy its entire flock due to the outbreak of Avian Flu.

5.5 The Applicant was also ordered to destroy 5 386 332 eggs for the same reason.'

[58] GMB set out its loss as follows:

'6.15 As a result of the outbreak and the destruction notice we adhered to, we suffered the following losses at Onderplaas:

6.15.1 Total loss on site

6.15.2 Hens: 195,648;

6.15.3 Eggs: 3,199,536. . .

6.29 As a result of the outbreak and the destruction notice we adhered to, we suffered the following losses at Moerasrivier:

6.29.1 Total loss in site:

6.29.2 Hens: 181 704;

6.29.3 Free range chickens: 10,000;

6.29.4 Eggs: 2,186,796'.

[59] The Western Cape Government referred to an email from Dr Malan dated 27 May 2021, in granting permission to GMB for the burial 'of approximately 200 000 infected carcasses and possibly additional material such as bedding in order to contain the outbreak of avian flu on the farm Onderplaas of the GMB.'

[60] It also granted permission in respect of the Moerasrivier Farm, for the burial of '249 984 infected carcasses and possibly additional material such as bedding'. The request referred to an email sent to GMB by Dr Malan dated 8 June 2021. There is no explanation where the 68 280 hens in addition to the 181 704 in Moerasrivier, came from given the fact that the 181 704 was regarded by GMB as the total loss for Moerasrivier.

[61] If one considers the two permissions to destroy carcasses granted by the Western Cape Government, a total of 449 984 chickens were destroyed. That number differs from 'the approximately 387 352 means of production of (layer and free-range hens or hens or chicks)' referred to in paragraph 5.4, quoted above. At least 62 632 carcasses are unaccounted for on the papers. A permit to bury 'approximately' a number of carcasses and possibly additional material such as 'bedding' is not a count of birds destroyed.

[62] In the first judgment the Director is criticized for not attaching value to the free-range chickens that were 'uninfected'. I wish to raise two related matters in that regard. First, those free-range hens are included in paragraph 5.4 of the

founding affidavit, quoted above. Second, there is a dispute between GMB and the veterinarian, Dr Leana Janse van Rensburg, who went with Dr Malan to inspect the site. She stated that:

'11. The 'free range' houses, close to the Moerasrivier site, consist of two houses where laying hens are kept loose within the houses and are approximately 400 metres away from the Moerasrivier site. The hens are not truly free range in the conventional sense in that they do not go outside.'

[63] She concluded that those hens were susceptible to HPAI for the same reasons as other chickens, and therefore were not free-range. These are all matters that have a bearing on the method of quantification of compensation.

[64] This case is distinguishable from the *Bluelilliesbush*[14] case in the following respects. First, when the *Bluelilliesbush* case was decided, the repealed regulation 30 was extant, and it specifically prescribed applicable compensation. That regulation has since been replaced by the current regulation 30, which provides that 'when compensation is payable to a responsible person in terms of s 19 of the Act, the applicable compensation shall be determined by the director'. It simply reinforces the powers of the director in s 19.

[65] Second, the culling applies to animals or things related to cattle, not chickens. That difference is significant because, with cattle, hides, carcasses, hooves, and horns may survive an infection depending on the disease, and some value may be derived from them. Unlike poultry, as seen in this case, where nothing could be salvaged from those that were infected or in contact with the infected ones. The repealed regulation 30 took all those matters into consideration.

[66] Third, the repealed regulation 30 also determined compensation as follows:

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[14] *Bluelilliesbush* fn 3.

'When compensation is payable to a responsible person [defined as a manager or owner of land or an owner of animals] in terms of section 19 of the Act, the applicable compensation shall -

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

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

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

This is critical because the lawmakers had prescribed the applicable compensation, which is not presently the case. I now proceed to deal with the interpretation to be accorded to s 19 as I see it.

Interpretation of s 19 of the Act

[67] The Act is intended to provide for the control of animal diseases and parasites for measures to promote animal health and for matters connected therewith. The Act provides for instances where animals or things are destroyed due to a disease or have to be destroyed or disposed of because they have been in contact with the infected animals. In such instances their owners have a right to claim compensation from the State. The director is enjoined to determine a criterion and to fix a fair compensation in accordance with the provisions of s 19 of the Act.

[68] In *Bato Star*,[15] Ngcobo J, in a separate concurring judgment, stated that '[t]he Constitution is now the supreme law in our country [and] it is therefore the starting point in interpreting any legislation . . . [t]hat is the commanded of s 39(2)'. That reminds us that any interpretation of a legislative provision must not trample any entrenched rights, including the separation of powers as a constitutional principle. The binary interpretation referred to in the first judgment seems to be consistent with the principles set out in *Jaga v Dönges* (*Jaga*).[16]

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[15] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 72.

[16] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) 1950 (4) SA (*Jaga*).

[69] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[17] this Court held:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision. . ..'

The question in this appeal is what result this approach yields when applied to s 19(2)*(a)*. In my view, it yields a binary reading, for the reasons that follow.

[70] In the first judgment, it is contended that the unitary interpretation should be preferred to the binary one. It is also noted that s 19 may yield two different interpretations. The binary interpretation describes the result of reading s 19(2)*(a)*. It is not a separate method of interpretation; the method remains the one set out in *Endumeni*. *Jaga*[18] remains instructive for its caution. Schreiner JA in *Jaga* recognised the following:

'"the context". . . is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. . . the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together.

[71] Schreiner JA also alerted us to the 'peculiar dangers' that are attendant to interpretation. He found that while the textualist approach risks 'verbalism' and a

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[17] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.
[18] *Jaga* fn 16 at 662G-H.

consequent failure to discover the intention of the law giver, the unitary approach may lead to a situation where the context in a particular case receives an exaggerated importance so as to strain the language used.

[72] That risk looms large in this matter if the unitary reading of s 19(2)*(a)* is adopted. I say so for these reasons: The control measures introduced during a disease outbreak are put in place to protect, inter alia, against the spread of the disease within a particular community of formal and informal farming enterprises. They also aim to protect employees from the disease and to curtail its spread to other animals. It is also designed to protect the general public and animals. They are also used to encourage animal owners to voluntarily disclose to the State that their animals are affected by the disease. That is the public good aspect. That aspect cannot be overemphasised, as the State is not responsible for the emergence or outbreak of a disease. It is responsible for taking measures to curtail the spread of the disease and to advance animal health, within its limited resources.

[73] What is intended to be compensation for loss due to a disease cannot be turned into a damages claim. That is not the purpose of the Act. Being alert to these factors, the language of the Act is carefully crafted. The words that an owner '*may* submit an application for compensation' a claim and the Director in considering it '*may* . . . fix a fair amount as compensation'. (My emphasis.) Claiming replacement value of diseased animals is not consistent with the compensation envisaged in the Act and for the advancement and protection of the animal health as a purpose of the Act.

[74] My view in this regard is fortified by the fact that s 19(1) refers to a destroyed or disposed of animal pursuant to any control measure or those destroyed due to

criminal activities (s 17(3) or (5)).[19] These are animals that are infected, have been in contact with infected animals, or are susceptible to the disease. It must follow that consideration of such infected or diseased animals cannot lead to an interpretation of a 'healthy state'. The Act provides tables of how these categories of animals are to be treated. The tables describe the nature, organism, and symptoms of animals with certain diseases, including avian flu in poultry, as in this matter. Those considerations do not fit in with an interpretation of 'in a healthy state'.

[75] GMB in its heads of argument acknowledged that the compensation will, of necessity, relate to infected, contaminated or in-contact (and thus at risk) birds. The tables in the Act create different categories of affectedness and a blanket 'healthy state' determination is not consistent with the purpose of the Act. The interpretation of s 19(2) must take into account the following common cause facts: there is no prescribed applicable compensation, there are no regulations mimicking the repealed regulation 30 to use as a guide, it is common cause that the HPAI is a deadly and contagious disease; that affected chickens died as a result thereof; and that some chickens had to be culled for control measures.

[76] The appellants contend that chickens that were affected by the disease had no value because of how contagious and deadly the disease was. In the first judgment it is found that the contemplation was that the compensation was intended to compensate the owner for his or her loss of his chickens in their 'healthy state'. I disagree. First, s 19(1) does not provide for compulsory compensation in relation to animals or things that have been destroyed or otherwise disposed of pursuant to any control measure or any provision of, inter alia, s 17(3) or (5) of the Act.

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[19] Sections 17(3) or (5) relate to seizure of animals or things by the Director, which are believed, on reasonable grounds, to be concerned or suspected in the commission of any offence; and s 17(5) deals with disposal or destruction of the carcass of such animal and its forfeiture to the State. The provisions of section 17 are not relevant for the purposes of this appeal.

[77] Two jurisdictional factors must be present before compensation in s 19(1) is activated. First, there must have been control measures put in place by the director or on his authority. Second, an animal or a thing belonging to someone must have been destroyed or disposed of pursuant to those control measures (the second category). There are two scenarios contemplated in the second category: first, animals that were destroyed because they were infected by the disease; second, animals that were destroyed not because they were infected by the disease but had come in contact with the infected animals (the in-contact animals). Once those factors are met by the owner, he or she may apply for compensation for the loss of the animal or thing.

[78] The reading of s 19(1) does not permit a 'healthy state' reading, as in the first judgment. Were that to be the case, there would be no need at all to take into account the considerations listed in s 19(2). Further, that would mean that if the infected animals die and are destroyed or disposed of, they must still be treated as if they were in a 'healthy state'. That, in my view, would lead to absurd results. The Animal Diseases Regulations[20] define 'destroy' in relation to a controlled animal or thing as meaning: 'to kill such animal and to bury, incinerate or otherwise dispose of such animal or thing'. The destruction and the disposal must be read with 'to kill'. In other words, chickens that died because they were infected, as those in houses 1 and 2 did, were not killed for control purposes.

[79] The Animal Diseases Regulations distinguish between infected animals, contact animals and susceptible animals. *Infected animal* is defined as: meaning 'a susceptible animal that is infected, or is on reasonable grounds suspected to be infected with the controlled animal disease concerned'; *contact animal*: '. . . means a susceptible animal that was in contact with or is on reasonable grounds suspected

[20] Fn 4 above.

of having been in contact with an infected animal or the progeny or products thereof; and *susceptible animal*: '. . . means an animal of a kind specified in column 3 of the said Table opposite the controlled animal disease in question'.

[80] To complete the definitions, regard must be had to Column 1 of Table 2 of the regulations (referred to in the definitions of infected, contact and susceptible animals) and Column 3 of Table 2 in relation to susceptible animal. The regulations provide for controlled veterinary acts to be performed in respect of animals in those three categories. Such measures relate to, inter alia, immunization of susceptible animals; isolation, immunization and prohibited movement of contact animals into a controlled area without the permission of the Director; and isolation and prohibited movement of infected animals.

[81] When it comes to poultry, which is what this case is about, Table 2, lists avian influenza, causal organism and symptoms, lists poultry as susceptible animals and states that all contact and infected animals shall be isolated and dealt with as determined by the director.

[82] In the case where chickens died as a result of avian flu, their dead status cannot be revived by a blanket 'healthy state'. An interpretation that would alter a true positive fact (that of the animals that were diseased and died) would be a distortion of the context and the purpose of the Act. The compensation envisaged in the Act is for a loss (of a diseased or infected animal) that has been disposed of or destroyed pursuant to the control measures. Their value is to be determined in the state in which each animal was when it was destroyed or disposed of, namely infected, in-contact or susceptible.

[83] On the GMB's interpretation of a 'healthy state', even chickens that clearly died (in houses 1 and 2) before they were destroyed or disposed of, must be valued

as if they were in a 'healthy state'. That would not advance the purpose of the Act. To interpret the provisions of the Act as affording compensation and valuation of animals that are diseased, as being in a heathy state, would, for example, encourage farmers not to report the state of their animals or discourage them from taking out insurance for their businesses because they would receive replacement value for their animals. In the GMB claim, replacement value is claimed in circumstances where such claims are not authorised by the Act. Moreover, the claim is based on financial and capital losses. That is certainly not how compensation is to be determined. The claims by GMB place the claims under this Act within the law of damages. In my view, that is certainly not the purpose of the Act.

[84] The repealed regulation 30 does not affect this Court's reading of s 19(2) in *Bluelilliesbush*. On the fair market value issue, the interpretation of s 19(2) that I contend for is consistent with that which this Court made in *Bluelilliesbush*, at paragraph 8, where it stated, *inter alia*;

'Section 19(2) of the Act makes clear that:

(i) the power to fix compensation is vested in the director;

(ii) the compensation must be "a fair amount";

(iii) in addition to the factors set out in subparagraphs *(b) – (d)*, the director is obliged to take into consideration in terms of *(a)* the applicable compensation prescribed for purposes of s 19, where such compensation is prescribed; and

(iv) when compensation is prescribed, it must be "based on a fair market value of the animal".'

[85] The provisions of s 19(1) do not distinguish between infected, in-contact, or susceptible animals. They focus on an animal being destroyed or disposed of pursuant to any control measure. They afford the owner the right to apply for compensation, if he or she wishes (s 19(1)). Section 19(2)*(a)* caters for two scenarios. The first scenario is where there is applicable compensation which has been prescribed. That applicable compensation is based on a fair market value. The first scenario does not find application since there is no prescribed compensation.

The second scenario is where there is no prescribed compensation. In that instance the director may fix any amount in accordance with any criterion deemed applicable by him or her. The director may take into consideration the value of anything which has in connection with the animal or thing been returned to the owner (s 19(2)*(b)*); any amount which is due by the owner pursuant to any provision of the Act in respect of the animal or thing to the State (s 19(2)*(c)*; and any amount which may accrue to the owner from any insurance thereof (s 19(2)*(d)*). The Director and the Minister contend for a disjunctive interpretation of the words up to 'or' of the remainder of the subsection after 'or' in s 19(2)*(a)*. GMB, on the other hand, contends for compensation at a fair market value of an animal in a healthy state.

[86] The two scenarios cater for two different situations. They are not capable of being interpreted in unison as suggested in the first judgment. They call for a dual interpretation, with each scenario interpreted independently of the other. Such interpretation is not capable of leading to absurdity because the two scenarios are not in conflict with one another but simply provide for different situations. This result follows from reading the text of s 19(2)*(a)* in its context and with regard to its purpose, as *Endumeni* requires. Section 19(2) does not compel the director to award a positive amount in every case. A fair amount, fixed under a disclosed criterion, might on some facts be nil. What the provision does not permit is a decision on compensation reached without any criterion.

[87] The contention by the Director is that based on, among others, the advice received from Professor Brown, she decided that the chickens had no value. The chickens that died before control measures were put in place would have had no value for the purposes of compensation because they were not destroyed pursuant to the control measures. Once control measures were put in place, the Director had to consider the different categories set out in the Tables and the resultant destruction or disposal of those chickens. By lumping all the chickens together, including those

with no value, in light of the evidence that Dr Malan authorised the implementation of the control measures, the Director failed to take into account relevant considerations. In the absence of prescribed compensation by regulation, she was obliged to consider compensation 'in accordance with any criterion deemed applicable by him or her' and fix a fair amount as compensation. She failed to do so. What that means is that she exercised her discretion *in vacuo* with no criterion. It is not sufficient to explain a criterion in an answering affidavit.

[88] The members of the public and the industry stakeholders must know what the criterion is. This, in my view, would not be a static criterion but a disease-animal based criterion. For instance, avian flu is a highly contagious disease that affects poultry, whereas Foot and Mouth Disease affects cattle, and other hooved animals. Furthermore, the Minister directed the Director to consult with GMB to settle on an acceptable compensation value. The Director was enjoined to consider the Minister's instruction or directive meaningfully, as provided in s 2(2) of the Act, which provides: 'The director shall exercise his powers and perform his duties with due regard to any instructions issued by the Minister'. This provision does not support the contention by the Director that she has unfettered discretion in her decision-making.

[89] What is contemplated in s 19(2) is that the director must consider a criterion that will consider, for example, the nature of the disease, the animals affected thereby or those unaffected but culled for control and prevention purposes, their breed, ages, or importation, the conduct of the owner etc. The director must set the criterion and consider it. She would of course take into consideration matters set out in subsection 19(2)*(b)* to *(d)*; namely, the value of anything that has been returned to the owner (e.g. the carcass), any amount due by the owner in respect of the animal or thing to the State (where the disposal is in terms of s 17(3) or (5)); and any amount which may accrue to the owner from any insurance. Thereafter,

she may then fix a fair amount as compensation. On the facts, the Director was faced with a replacement claim, a claim that is not contemplated in s 19.

[90] In the first judgment and in the interpretation of s 19, it is found that the binary interpretation may give rise to some incongruity as it invests a wide power in a subordinate functionary, the Director. As a Member of the Executive, the Minister has the power to make regulations. He may issue instructions to the director as contemplated in terms of s 2(2) of the Act. A director, on the other hand, is an administrator entrusted with administering the implementation of the Act. There is therefore no comparison between the two as their mandates are completely different but complementary. The powers are conferred on the director by the Act and thus by design. In any event, there is no challenge to the powers of the Director in this appeal.

[91] Lastly, it seems to me that what the South African Poultry Association (SAPA), the *amicus*, intended to convey was that whatever interpretation is to be given to the Act, it must have regard to the property rights of GMB. Unfortunately, it perceived the enquiry to be about deprivation of property, when it was not.

[92] In the circumstances I would dismiss the appeal in so far as it relates to the review order but uphold it in relation to the remittal order. On the issue of costs, I would order that each party is to bear its own costs on appeal for these reasons. GMB brought a replacement value claim contrary to the provisions of the Act. Counsel for the GMB conceded, correctly in my view, that the Act makes no provision for compensation for the replacement value. The Director exercised her powers without setting out the criterion she applied. The Minister has not prescribed applicable compensation in the amended regulation 30. This matter is important, not only to the respondent, but to the appellants as well; therefore, pursuing the

appeal was a responsible step. Lastly, the high court had also directed each party to bear their own costs.

[93] In the result, and had I commanded the majority, I would have made the following order:

1 The appeal against the order of the high court reviewing and setting aside the decision of the Director is dismissed.

2 The appeal against paragraph 2 of the high court order (the remittal order) is upheld, and the order of the high court is varied in the following terms:
'The applicant's claim for compensation in terms of s 19(1) of the Act is remitted to the first respondent, the Director, for reconsideration.'

3 Each party shall bear their own costs of the appeal.

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T V NORMAN

JUDGE OF APPEAL

Appearances

For first appellant:	C Puckrin SC (with R Jaga SC and P Loselo)
Instructed by:	State Attorney, Cape Town
	State Attorney, Bloemfontein
For second appellant:	K Pillay SC (with him T Monene)
Instructed by:	State Attorney, Cape Town
	State Attorney, Bloemfontein
For respondent:	P B J Farlam SC (with him A Knoetze)
Instructed by:	Martins and De Lange Attorneys, George
	Lovius Block Inc., Bloemfontein
For *amicus curiae*:	M De Beer
Instructed by:	Edward Nathan Sonnenbergs Inc., Cape Town
	Lovius Block Attorneys, Bloemfontein