



REPORTABLE

CASE NO: SA 37/2016

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SOUTH AFRICAN POULTRY ASSOCIATION	First Appellant
ASTRAL FOODS LIMITED	Second Appellant
SUPREME POULTY (PTY) LTD	Third Appellant
CROWN CHICKENS (PTY) LTD t/a SOVEREIGN FOODS	Fourth Appellant
AFGRI POULTRY (PTY) LTD	Fifth Appellant
RAINBOW FARMS (PTY) LTD	Sixth Respondent

and

MINISTER OF TRADE AND INDUSTRY	First Respondent
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	Second Respondent
NAMIB POULTRY INDUSTRIES (PTY) LTD	Third Respondent
MEAT BOARD OF NAMIBIA	fourth Respondent

Coram: SMUTS JA, MOKGORO AJA and FRANK AJA

Heard: 8 November 2017

Delivered: 17 January 2018

Summary: The first appellant is the South African Poultry Association (SAPA). The other appellants are South African concerns engaged in the poultry industry and are members of SAPA. They approached the court *a quo* to set aside a trade measure, embodied in Government Notice No 81, entitled 'Restrictions on

importation of poultry products into Namibia's Import and Export Control Act, 1994' published in Government Gazette No 5167, on 5 April 2013. This measure restricts the importation of poultry products into Namibia and was issued by the Minister of Trade and Industry. This measure is aimed at protecting Namibia's fledgling poultry industry. The appellants applied to the court *a quo* to declare that the measure *ultra vires* and unlawful by reason of the failure to comply with or consider international treaty obligations. They also challenged the measure on procedural and substantive grounds and contend that the measure amounts to an illegality.

The application was opposed by the Minister and the Government of Namibia as well as by Namibia Poultry Industries (Pty) Ltd (NPI), the beneficiary of the measure. The respondents raised preliminary points against the appellants' application. These included attacking the appellants' standing and contending that the appellants had unduly delayed in bringing the review application. The court *a quo* decided to hear argument on the preliminary issue of delay without hearing argument on the merits. It upheld the delay point and dismissed the application with costs.

The appellants appealed against this judgment and invited this court to deal with the merits if this court were to find that the court *a quo* misdirected itself on the delay question.

The question of delay - The period of the delay in question spanned from the date of publishing of the Government Gazette on 5 April 2013, to 17 April 2014 when the appellants served their review. The appellants attended a consultative meeting arranged by the Permanent Secretary of the Ministry of Trade on 17 January 2013

regarding NPI's infant industry protection (IIP) application under the Southern African Customs Union (SACU). A notice to restrict import quantities under the Act was instead issued on 5 April 2013. SAPA contended that the process was procedurally unfair and the granting violated both the protocol of the SADC Agreement and the SACU treaty.

Diplomatic intervention was sought through the South African Department of Trade and Industry on the issue in October 2013. SAPA was informed by Department officials that bilateral discussions would take place in early November 2013 between Namibia and South Africa. The quantitative measures were not discussed at that meeting, but a task team was appointed during the talks to investigate the objections. SAPA was advised that this investigation would take at least until the end of March 2014 at the earliest. The appellants then took advice and prepared the application from late November 2013.

The appellants argued that the preparatory steps leading up to the instituting the review did not amount to an unreasonable delay. It was not inordinate or egregious and contended that the court *a quo* misdirected itself in the exercise of its discretion by failing to condone the delay and consider the merits of the application. The appellants contended that the principle of legality and the interests of justice demanded that the court below should have also taken into account the merits of the application. They argued that an *ultra vires* notice amounted to a trade measure having a continuing unlawful effect and placed Namibia in breach of its international law obligations.

The government respondents and NPI argued that the court *a quo's* decision was correct to finding that there was unreasonable delay and declining to condone it. They submitted the court *a quo* could not be faulted in its application of accepted principles to the facts of the case. They contended that unexplained delay of 6 months from the date of publishing the notice and engaging the South African Department in October 2013 was fatal for the appellants and rendered the delay unreasonable. They further submitted that the appellants did not demonstrate a capricious exercise of the court *a quo's* discretion in declining to condone the delay. They also argued that the appellants' review was without any reasonable prospects of success, and referred to the prejudice to the respondents. It was contended that a review of an international trade measure in a domestic court under international trade treaties were not justiciable in national courts and meant that there were no prospects of success. They submitted that international treaties which contradict national legislation would not, to that extent, form part of Namibian law under the Constitution (as provided for by Art 144). The respondents submitted that the impugned measure was in any event authorised by s 2 of the Act and was not inconsistent with the treaty prohibition contended for by the appellants.

Legal principles governing delay – Two enquiries are to be determined: the first is an objective one and is whether the delay was on the facts unreasonable. The second is whether the delay should be condoned. As stated in *Keya v Chief of the Defence Force and others*, the first enquiry is a factual one and does not involve the exercise of a discretion. It entails a factual finding and a value judgment based upon those facts. The second enquiry involves the exercise of a discretion. There is a narrow ambit of an appeal, against the exercise of a discretion. This court would

only interfere with the exercise of that discretion when it is found not to have been exercised judicially by the court *a quo*.

Was the delay unreasonable – Despite the assertion by SAPA concerning steps taken (that it had made ‘best efforts’ to resolve its grievance against the measure ‘by diplomatic means’), there was no explanation forthcoming concerning the six months period following the publication of the notice until the diplomatic approach in October 2013. After receiving draft application papers from counsel in December 2013, the appellants were tardy in finalising their papers and serving them in April 2014.

Held, the court *a quo* correctly found that SAPA’s contention in reply that it had made ‘best efforts’ to resolve its grievance against the measure ‘by diplomatic means’ during this period was factually unsupported and thus untenable. The unexplained delay rendered the delay unreasonable.

Held, the court *a quo* did not misdirect itself in its value judgment upon the factual finding made, that the delay was in the circumstances unreasonable.

Exercise of the court’s discretion to refuse condonation – it is well established that where non-compliance with rules is found to be egregious or ‘glaring’, ‘flagrant’ and ‘inexplicable’, this court will not consider the prospects of success in determining a condonation application see *Kruger v Transnamib Ltd (Air Namibia) and others*. The court *a quo* did not find that the delay was so egregious that a consideration of the merits was not warranted. The court *a quo* considered a variety of factors particularly the prejudice to the parties, which the court *a quo* found to be material for the

respondents and far less significant for the appellants. It concluded that condonation should not be granted.

Held, in deciding whether or not to grant condonation after finding that a delay is unreasonable, the criterion to be applied under common law is the interests of justice. Factors to be considered include the nature of the impugned decision, the merits of the challenge, prejudice to the respective parties, the extent and cause of the delay and the importance of the issue raised.

Held, public interest is generally served by bringing certainty and finality to administrative action or the exercise of public power of the kind in question.

Held, the merits are however a fundamental factor to be considered by a court in such an enquiry. The failure to do so, as occurred in this appeal, results in the application of a wrong principle in the exercise of the court's discretion which was not exercised judicially as a consequence. It follows that the court *a quo* decision on condonation is to be set aside.

Further held that, public interest would be served by the ventilation and determination of the application of Art 144 of the Constitution and the extent, if any, to which international treaties can be enforced in domestic courts.

Held, condonation for the unreasonable delay should have been granted. The matter remitted to the High Court for further case management concerning setting the matter down for argument.

APPEAL JUDGMENT

SMUTS JA (MOKGORO AJA and FRANK AJA concurring):

[1] The appellants approached the High Court to set aside a trade measure restricting the importation of poultry products by the Minister of Trade and Industry (the Minister) of 5 April 2013 to protect the fledgling poultry industry in Namibia. The appellants also sought further relief arising from that measure. They contend that the measure is unlawful by reason of the failure to comply with or consider international treaty obligations. They also challenge the measure on procedural and substantive grounds and contend that the measure amounts to an illegality.

[2] The application was opposed by the Minister and the Government of Namibia as well as by Namibia Poultry Industries (Pty) Ltd (NPI), the beneficiary of the measure. Extensive papers were exchanged and there were also opposed interlocutory applications before the matter was eventually enrolled for a three-day hearing in the High Court in late June 2016. Both sets of respondents raised preliminary points against the appellants' application. These included attacking the appellants standing and contending that the appellants had unduly delayed in bringing the review application. At the instance of the respondents, the High Court decided to hear argument on the preliminary issue of delay without hearing argument on the merits, although there was a measure of dispute on this.

[3] The High Court upheld the delay point and dismissed the application with costs. The appellants appeal against this judgment and, in their heads of argument, advance submissions on the merits and invite this court to deal with the merits if we were to find in their favour that the High Court had misdirected itself on the delay question. Both sets of respondents likewise filed detailed written argument which also included addressing the merits. They however both contend that the appeal should only address the delay issue as the High Court had not heard argument on or decided upon the merits although during oral argument counsel for 3rd respondent contended that there was some argument on the merits.

[4] At the outset of the appeal hearing, we expressed a prima facie reluctance to determine the merits of the review application, as to do so would be as if this court were one of first instance, thereby usurping the role of the High Court. We nevertheless invited argument on the merits in so far as may be relevant in determining the question of delay. We also invited argument from the appellants as to whether the merits should in fact be determined, despite our preliminary view.

[5] The decision impugned in the review application is in the form of the notice by the Minister under s2 of the Import and Export Control Act, 30 of 1994 (the Act) placing a restriction (by way of a specified monthly limit) upon the importation into Namibia of poultry products. This measure is known as a quantitative restriction upon imports. It was published in the Government Gazette on 5 April 2013. The appellants' review application was served on 17 April 2014. This period of just over a year is said by the respondents, and found by the High Court, to have constituted an unreasonable delay. The High Court declined to condone it and hence dismissed the application.

Factual background

[6] Prior to the publication of the impugned notice, the Permanent Secretary of the Ministry of Trade and Industry (the Ministry) in November 2012 invited interested parties to attend a consultative meeting concerning an application by NPI addressed to the Government for infant industry protection (IIP) under the Southern African Customs Union (SACU) and the imposition of additional tariffs upon imports of poultry into Namibia as a protective measure.

[7] The first appellant is the South African Poultry Association (SAPA). The other appellants are South African concerns engaged in the poultry industry and are members of SAPA.

[8] SAPA's chief executive officer accompanied by its South African attorney from the firm Webber Wentzel attended the consultative meeting which took place on 17 January 2013. After the meeting, SAPA's attorneys on 4 February 2013 requested a copy of NPI's IIP application from the Permanent Secretary. The latter on 7 March 2013 declined to provide it but undertook to forward a copy of NPI's presentation. On 12 March 2013, SAPA's attorneys enquired from the Permanent Secretary as to the status of NPI's IIP application. They also addressed the South African Minister of Trade and Industry on 3 April 2013, informing him that the Namibian government was at an advanced stage in the process of affording IIP status to NPI and complained to him that the process had been procedurally unfair and contended that the granting of the IIP status would violate both the protocol to the SADC Agreement and also the SACU treaty. They requested the South African

minister's intervention either directly or through SACU or SADC in order to assist members of SAPA.

[9] In the days which followed the publication of the notice, SAPA's representatives had discussions with the (Namibian) Association of Meat Importers and Exporters of Namibia (AMIE). AMIE objected to the notice, as recorded in a letter of 17 April 2013 addressed to the Minister by AMIE's legal practitioner, Mr I Petherbridge. The letter complained that the quantitative restriction had been irregularly imposed and demanded its withdrawal. But this objection was, apparently unbeknown to SAPA, soon afterwards on 24 April 2013 retracted by Mr Petherbridge in a letter of that date.

[10] In October 2013, SAPA decided to approach the South African Department of Trade and Industry on the issue. On 14 October 2013 SAPA representatives met with officials of the Department and SAPA's attorneys provided a subsequent submission on 28 October 2013, setting out the background to the imposition of the impugned measure and their concerns relative to it. The Department officials informed SAPA's attorneys that bilateral discussions would take place in early November 2013 between Namibia and South Africa and undertook to raise the issue in those discussions. Following those bilateral discussions, the Department officials reported back to SAPA's lawyers that the submissions had not been expressly considered and decided upon. A task team had however been appointed during the talks to investigate the objections and that this investigation would take at least until the end of March 2014 at the earliest. These facts were contained in the appellants' founding affidavit in setting out the steps taken prior to bringing the review.

[11] The founding affidavit also set out the review grounds upon which the Minister's decision was challenged. Shortly stated, it was contended that the quantitative restriction had been imposed in a procedurally unfair manner, in breach of Art 18 of the Constitution and the common law. It was also argued that the imposition of the restriction was unlawful and beyond the Minister's powers contained in the Act and contravened several of Namibia's international treaty obligations which formed part of Namibian law pursuant to Art 144 of the Constitution. It was also argued that the imposition of the restriction was substantively unfair and unreasonable and in breach of Art 18 of the Constitution. Certain further review grounds were also raised. The point was also taken that the Meat Board of Namibia was not authorised by its empowering legislation to issue the permits contemplated by the Minister's notice. The appellants also took issue with the manner of implementation of the issuing of the permits themselves in that a certain class of poultry products namely individually quick frozen products were effectively excluded from importation into Namibia and sought declaratory relief in the notice of motion to address this.

[12] The review grounds were traversed in detail in both sets of answering affidavits. Relevant for present purposes is that the delay point was also squarely taken in both sets of answering affidavits. The point was also taken that the appellants had not sought condonation for what was termed an unreasonable period in bringing the review application. The respondents pointed out in their respective affidavits that there were specified portions of the period taken to launch the application which had not been explained at all in the founding affidavit. Both the Minister and NPI pointed to their respective prejudice sustained by them as a result

of the appellants' delay in instituting the review application and called for its dismissal on this ground alone.

[13] After being expressly challenged on the question of delay, the appellants in the replying affidavit explained that they had resorted to diplomatic efforts initially. After it became apparent to them in late November 2013 that these would become protracted, it was then that they considered a resort to litigation in the form of the review.

[14] Counsel was then approached for advice. It was received on 12 December 2013. A first draft of the review application was thereafter received from counsel and provided to the applicants for their comments on 23 December 2013. It is then stated that the intervention of the festive season meant that the appellants could only arrange a meeting on 21 January 2014 to discuss the draft review application and to consider comments made in relation to it. Changes to the affidavits were then incorporated, confirmatory affidavits prepared and annexures collated during February and March and a final draft was sent to the appellants to sign off on 23 March 2014.

[15] A further delay occurred when the original affidavits were sent by courier to local Namibian practitioners on 28 March 2014. The documents were held up because of a delay at customs as a result of a system upgrade. The original documents were finally delivered to Namibian practitioners on 11 April 2014 and the application was launched straight afterwards.

[16] The replying affidavit did not provide any further detail on steps taken between April and October 2013.

Approach of the High Court

[17] In the course of a thorough survey of the legal principles governing the issue of delay in review proceedings, the court *a quo* referred to both decisions of this court and of the High Court which have dealt with this question. In particular, the High Court cited the approach consistently followed in this court in *Kruger v TransNamib Ltd (Air Namibia) and others*,¹ *Namibia Grape Growers and Exporters Association and others v Ministry of Mines and Energy and others*² and the succinct summary of the two-stage enquiry which is to be applied as set out in *Keya v Chief of the Defence Force and others*:³

[21] This court has held that the question of whether a litigant has delayed unreasonably in instituting proceedings involves two enquiries: the first is whether the time that it took the litigant to institute proceedings was unreasonable. If the court concludes that the delay was unreasonable, then the question arises whether the court should, in an exercise of its discretion, grant condonation for the unreasonable delay. In considering whether there has been unreasonable delay, the high court has held that each case must be judged on its own facts and circumstances so what may be reasonable in one case may not be so in another. Moreover, that enquiry as to whether a delay is unreasonable or not does not involve the exercise of the court's discretion.

[22] The reason for requiring applicants not to delay unreasonably in instituting judicial review can be succinctly stated. It is in the public interest that both citizens and government may act on the basis that administrative decisions are lawful and final in effect. It undermines that public interest if a litigant is

¹ 1996 NR 168 (SC).

² 2004 NR 194 (SC).

³ 2013 (3) NR 770 (SC) at paras 21 and 22.

permitted to delay unreasonably in challenging an administrative decision upon which both government and other citizens may have acted. If a litigant delays unreasonably in challenging administrative action, that delay will often cause prejudice to the administrative official or agency concerned, and also to other members of the public. But it is not necessary to establish prejudice for a court to find the delay to be unreasonable, although of course the existence of prejudice will be material if established. There may, of course, be circumstances when the public interest in finality and certainty should give weight to other countervailing considerations. That is why once a court has determined that there has been an unreasonable delay, it will decide whether the delay should nevertheless be condoned. In deciding to condone an unreasonable delay, the court will consider whether the public interest in the finality of administrative decisions is outweighed in a particular case by other considerations.'

[18] The court *a quo* also referred to the steps which would precede a review challenge as set out by the Judge President in the High Court decision in *Keya*⁴ which are salutary and bear repetition:

'It is now judicially accepted that an applicant for review need not rush to Court upon his cause of action arising as he is entitled to first ascertain the terms and effect of the offending decision; to ascertain the reasons for the decision if they are not self-evident; to seek legal counsel and expert advice where necessary; to endeavour to find an amicable solution if that is possible; to obtain relevant documents if he has good reason to think they exist and they are necessary to support the relief desired; consult with persons who may depose to affidavits in support of the review; and then to consult with counsel, prepare and lodge the launching papers. The list of possible preparatory steps and measures is not exhaustive; but in each case where they are undertaken they should be shown to have been necessary and reasonable. In some cases it may be required of the applicant, as part of the preparatory steps, to identify and warn potential respondents that a review

⁴ Case No A 29/2007 (20/02/2009) at para 17.

application is contemplated. Failure to so warn a potential respondent may lead to an inference of unreasonably delay.’

[19] In setting about the application of the dual enquiry, the High Court referred to the appellants’ statement in reply with reference to the period April to October 2013 to the effect that they had pursued diplomatic means to address the Minister’s decision and that, despite their ‘best efforts’, they were ‘unable to engage the Ministry’ on the imposition of the quantitative restriction. The court referred to the involvement of SAPA’s attorneys, Webber Wentzel, already at the stage of the consultative meeting and in correspondence with the Permanent Secretary prior to the issuing of the notice by the Minister. Having thus been in contact with the Ministry prior to the publication of the notice in the Government Gazette, the court referred to the failure to explain what ‘best efforts’ were attempted and when. Even though a letter was addressed to the South African Minister on 3 April 2013, there was no explanation as to why there had not been any further follow-up of that approach until October of that year. The court accordingly found that there was no explanation for the inaction on the part of the appellants between the period April and October 2013.

[20] The court also referred to the failure on the part of the appellants to give notice to the Minister of an intention to review the decision in advance of the service of the application. Given the early involvement of their lawyers in the process, there would be no need for massive research to be undertaken and detailed consultations with potential deponents prior to the preparation of the review application. The High Court also referred to the almost immediate response by AMIE’s legal practitioner objecting to the notice and the statement in the appellants’ papers that the concerns voiced in that correspondence as to alleged irregularities in imposing the

quantitative restriction represented their concerns. This meant that the appellants at that stage already held the view that the Minister's decision was unlawful and unfair. By launching their application some 12 months later meant, in the court's view, that the appellants had unreasonably delayed in doing so.

[21] Turning to the question as to whether to condone the unreasonable delay, the court first referred to the submissions advanced on behalf of the appellants. Firstly it was contended that the ordinary delay rule would not apply or be significantly ameliorated because of the challenge to a trade measure which had continuing unlawful effect. There was also reference to argument on behalf of the appellants of first exhausting the diplomatic route, the complexity of the issues involved in the review, time to be taken by each of the appellants which are separate juristic personalities to resolve to join the application and a reference to their disparate locations and constituencies, and the time taken to finalise the drafting of the application itself, taking into account the views of the different applicants.

[22] The court then referred to the submissions made on behalf of the respondents as to the inadequacy of the explanations provided as well as the prejudice to the respective respondents caused by the delay.

[23] In determining whether to grant condonation or not, the court *a quo* stressed that it is incumbent upon an applicant seeking condonation for delay to place a 'sufficient, cogent and convincing facts before the court to explain, to the satisfaction of the court, the whole period of the delay'.

[24] The court proceeded to refer to the initial lapse of six months between April and October 2013 for which the appellants had failed to furnish an explanation. This, the court stated, demonstrated a 'state of mind of inaction' on the part of the appellants. The court further referred to the public interest being served to have finality in respect of an industrial policy to support or protect a local industry for the purpose in addressing issues of high unemployment and investment in a given industry. The court stressed the importance of prejudice in the exercise of its discretion, with reference to the *Namibia Grape Growers*⁵ and *Keya*.⁶

[25] The court found that the respondents had established prejudice as a consequence of the delay in the bringing of the review application and that the prejudice was in the court's view material and carried considerable weight in determining whether to dismiss the application by reason of the delay. In this context, the court referred to the failure on the part of the appellants to give notice to the respondents of the intention to bring their review prior to doing so as to a further factor in the exercise of its discretion. The court concluded that the extent of the delay and the failure on the part of the appellants to provide a satisfactory and acceptable explanation were of such a nature that condonation should be refused. The court proceeded to dismiss the application with costs.

Submissions on appeal

[26] Mr Unterhalter SC, who together with Messrs Corbett SC, du Plessis and Obbes appeared for the appellants, argued that the court *a quo* erred in its finding that the delay was unreasonable and that it had also misdirected itself in failing to

⁵ At 217F.

⁶ Para 22.

take into account the merits of the application when considering the question of condonation.

[27] In respect of the first enquiry as to whether the delay was unreasonable, Mr Unterhalter submitted that the appellants could not be faulted for first trying to avoid litigation by diplomatic intervention. It was only when that approach had not yielded the desired outcome that the appellants turned to pursue the application. The period of time from that realisation (in late November 2013) to the service of the application was some four and a half months. This, he contended, was not unreasonable in the context of the complex questions raised in the review, the need to secure mandates from SAPA's members, their disparate structures and locations and the logistics involved in launching the application. Although not entirely perfect, he argued that the preparatory steps taken in instituting the review did not amount to an unreasonable delay.

[28] Mr Unterhalter argued that even if it were to be found that the court *a quo* had not erred in finding the delay to be unreasonable, it was neither inordinate or egregious and that the court *a quo* misdirected itself in the exercise of its discretion by failing to condone it. The misdirection, so he contended, was by failing to consider the merits of the application in the weighing up exercise entailed in an enquiry for condonation. This, he argued, amounted to the application of a wrong principle in the exercise of the court's discretion. The principle of legality and the interests of justice demanded that the court below should have also taken into account the merits of the application. He argued that an *ultra vires* notice amounted to a trade measure having a continuing unlawful effect.

[29] Mr Unterhalter also advanced argument on the merits of the review. He submitted that the application involved a legality challenge to a quantitative restriction which he said was impermissible under international law. He contended that s 2 of the Act does not, on a proper interpretation consistent with Namibia's obligations under treaties, permit a trade measure of the species outlined in the notice and that the Minister had thus acted *ultra vires* in imposing it.

[30] It was argued that the Minister in imposing the restriction, had also failed to act in accordance with Namibia's obligations under international law. Mr Unterhalter also contended that, even if the Minister had the power to impose a quantitative restriction, that power had not been exercised in a procedurally fair manner.

[31] The principle of legality and the interests of justice meant, so Mr Unterhalter submitted, that the High Court should have condoned the delay in bringing the application.

[32] Both sets of counsel engaged by the respondents strenuously submitted that the reasoning of the High Court was impeccable in finding that there had been an unreasonable delay and declining to condone it.

[33] Mr Gauntlett, QC, who along with Mr Pelsler and Mr Maasdorp appeared for NPI, submitted that the court *a quo* correctly set out the test to be followed and could not be faulted in its application of those principles to the facts of this matter.

[34] On the objective question as to the delay being unreasonable, Mr Gauntlett argued that the entirely unexplained delay of 6 months after the notice and before a

follow up with the South African Department in October 2013 was fatal to the appellants and that the High Court was correct in this finding. He also contended that the tardiness in launching the application, by taking more than three months to do so after counsels' draft had been provided, was also unacceptable. He submitted that a delay of over twelve months was *prima facie* unreasonable and called for a full explanation in the founding affidavit which was singularly lacking. He pointed out that even after the delay point was taken in both answering affidavits the initial delay of six months remained unexplained.

[35] Mr Gauntlett also pointed out that SAPA had been legally represented throughout and was aware of factual and legal matter to be contained in a founding affidavit shortly after the notice had been published. He argued that the considerations referred by the Judge-President in *Keya*⁷ and *Kleynhans*⁸ as well as in *Radebe*⁹ which had often been cited and applied by this court¹⁰ and the High Court¹¹, did not avail the appellants.

[36] Mr Gauntlett referred to the narrow ambit of an appeal against the exercise of the High Court's discretion in declining to grant condonation for an unreasonable delay. He argued that the appellants had not demonstrated any capricious exercise of the discretion or that it had been upon wrong principles or that the court had not 'brought its unbiased judgment to bear on the question or not acted for substantial

⁷ Set out in para 18 above.

⁸ 2013(4) NR 1029 (SC).

⁹ *Radebe v Government of the Republic of South Africa* 1995 (3) SA 787 (N) at 799 B-G.

¹⁰ *Kruger and Keya*, supra.

¹¹ *Disposable Medical Products (Pty) Ltd v Tender Board of Namibia* 1997 NR 129 (HC) at 132. *Samcor Diamond Mining (Pty) Ltd v Minister of Mines and Energy* 2014 (1) NR 1 (HC) at par 27.

reasons' as articulated by this court in *Rally for Democracy v Electoral Commission for Namibia ('RDP' II)*.¹²

[37] Mr Gaunlett referred to the factors taken into account by the court *a quo* such as the failure to give notice of the intended review, the unexplained delays and the respondents' respective prejudice and submitted that no basis to interfere with the exercise of the court's discretion had been shown. He argued that, to the extent that the merits may arise in the exercise of the discretion, the appellants' review was without any reasonable prospects of success and that this would militate strongly against the exercise of discretion in favour of the appellants. The review, he submitted, was an attempt to review an international trade measure in a domestic court. He argued that trade treaties under international law were not justiciable in national courts and that treaties which contradict national legislation would not to that extent form part of Namibian law under the Constitution. He further submitted that the impugned measure was authorised by s 2 of the Act and was also not inconsistent with the treaty prohibition contended for by the appellants.

[38] Mr Gauntlett also argued that the imposition of trade measures was acknowledged as falling within the heartland of executive discretion¹³ and that the decision to do so in pursuit of an industrial policy aimed at employment creation and reducing balance of payment deficits was a 'policy laden' one, involving 'polycentric decision-making'. He also submitted that the ground attacking the fairness of the process was first mounted in reply and that it was in any event unsupported by the facts.

¹² 2013 (3) NR 664 (SC).

¹³ With reference to the South African Constitutional Court in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* 2012(4) SA 618 (CC) at para 102.

[39] Mr Namandje, together with Ms lhalwa, appeared for the Minister and the Government. He associated himself with much of the argument on delay advanced on behalf of NPI. He also stressed that the appeal should be confined to that issue alone and that the merits should not be determined by this court as if a court of first instance. He referred to Art 79(4) of the Constitution, ss 14 and 15 of the Supreme Court Act, 15 of 1990 and also the earlier *RDP* matter,¹⁴ in submitting that this court should not determine the application as of first instance.

[40] Mr Namandje also argued that the High Court had not misdirected itself in reaching its finding that there was unreasonable delay. He also referred to the limited basis upon which a court of appeal interferes on appeal with the exercise of a discretion as articulated by this court in *RDP (II)*.¹⁵ He likewise contended that the appellants had not demonstrated any basis to interfere with the exercise of the High Court's discretion not to condone the unreasonable delay.

[41] As for the merits, Mr Namandje submitted that where international treaties contradict national legislation, the latter would prevail in terms of Art 144 of the Constitution. He also argued that before there could be any question of international law becoming domesticated, the principle of legality would require publication of the provisions. There were in his contention no prospects of success of the review.

¹⁴ *Rally for Democracy and Progress and others v Electoral Commission and others* 2010(2) NR487 (SC) at paras 75-76. (*RDP I*).

¹⁵ At para 106.

Legal principles governing delay in review proceedings

[42] The parties were in agreement that the High Court correctly set out the dual enquiry in determining the question of undue delay in review proceedings. That test has been consistently applied by this court and was neatly summarised by O'Regan AJA in *Keya* as quoted by the court *a quo* referred to in para [17] above.

[43] In essence, a court is to engage in two enquiries. The first is an objective one and is whether the delay was on the facts unreasonable. The second is whether the delay should be condoned. As stated in *Keya*, the first enquiry is a factual one and does not involve the exercise of a discretion.¹⁶ It entails a factual finding and a value judgment based upon those facts.

[44] The second enquiry involves the exercise of a discretion. As was correctly accepted by all the parties, the ambit of an appeal is narrower when directed against the exercise of this form a discretion. This court would only interfere if the discretion was not exercised judicially.¹⁷ This principle was amply summarised by the full court in *RDP (II)*:

[106] The relief sought related to a matter falling within the inherent powers of the high court to regulate its own procedures. As such, the discretion which the court *a quo* exercised on consideration of the facts of this case, was judicial in nature and involved a value judgment on whether the appellants had given a proper and satisfactory explanation for their failure to include the amplified papers as part of

¹⁶ *Keya* at paras 21-22.

¹⁷ *Namibia Grape Growers* at p 218, *Kruger* at p 173.

the election application. Although a discretion of that nature is not unfettered, it is well settled that a court of appeal would be slow to interfere with it “unless a clear case for interference is made out and (it) should not interfere where the only ground for interference is that the Court of appeal might have an opinion different to that of the Court a quo or have made a different value judgment”. The power to interfere on appeal in such instances is strictly circumscribed. It is considered a discretion in the “strict or narrow sense, ie a discretion with which this court as a court of appeal can interfere only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself’.¹⁸

[45] I turn to each of these enquiries.

Was the delay unreasonable?

[46] The starting point in this enquiry is a period in excess of twelve months taken from the date of publication of the notice to launching the review application. Much shorter periods have been found by the courts to be unreasonable for the institution of review proceedings. It certainly called for a full explanation, and one which covered the entire period.¹⁹ Very little was however devoted to the issue in the founding affidavit, as is already set out. Apart from the Petherbridge correspondence in April 2013, there was in essence a brief reference to the diplomatic avenue pursued in October to November 2013 with the Department of Trade and Industry

¹⁸ At para 106.

¹⁹ *Van Wyk v Unitas Hospital and another* 2008(2) SA 472 (CC) at para 22.

in South Africa and when this approach did not promise to produce a positive outcome before the end of March 2014, the decision was taken to approach counsel in November 2013 for advice and later to prepare papers. In a nutshell, that was all which was offered as an explanation for the period more than a year taken to bring the review.

[47] After the Minister and NPI emphatically raised the point of unreasonable delay in their respective answering affidavits, SAPA provided some additional detail as to steps taken by it and on its behalf during that twelve month period. Most of the amplification addresses the period between November 2013 (after a report back is received that a diplomatic solution would not at best be achieved some months later) and the service of the application on 17 April 2014.

[48] No explanation remained forthcoming in reply concerning the six month period following the publication of the notice until the diplomatic approach in October 2013. There is however reference to an approach made to the South African Minister two days before the publication of the notice. But inexplicably, there was no follow-up upon that approach which in any event concerned the prospects of granting IIP status and not a quantitative restriction. As was correctly found by the High Court, there remained simply no explanation for the entire initial six month period and the inference of inaction is inescapable.

[49] The inaction over this period is also to be viewed in context. SAPA had been legally represented during the consultative process which preceded the notice. Its attorneys had engaged in correspondence with the Ministry on the issue of granting IIP status. A letter was also addressed to the South African Minister on that issue

as well, outlining concerns relating to potential conflicts with SACU and the SADC agreement. Shortly after the impugned notice was issued, there were 'informal discussions' with AMIE and the latter's letter of 17 April 2013 objecting that the measure had been irregularly imposed and should be withdrawn was said to reflect SAPA's concerns.

[50] SAPA was thus alive to the legal and factual issues which would form part of a review challenge at that stage already. No extensive research or investigation would be required in order to proceed with a review application. Yet no action is taken for some 6 months until the diplomatic route was initiated concerning the notice by approaching the South African Department in October 2013. It is plainly incumbent upon applicants not to adopt an attitude of indifference but rather to take all reasonable steps available to them to investigate and take steps concerning administrative decisions adversely affecting them as soon as they are aware of the import of decision.²⁰ Even though the appellants had resolved to follow the diplomatic route, they took far too long to initiate those steps. Furthermore, it was incumbent upon them to take steps to prepare for a review in case those approaches did not bear fruit. This they did not do until late November 2013. It was unreasonable not to do so.

[51] The High Court correctly found that SAPA's contention in reply that it had made 'best efforts' to resolve its grievance against the measure 'by diplomatic means' during this period was factually unsupported and thus untenable. The High Court's finding that the failure to take any steps during that period was fatal cannot

²⁰ *Associated Institutions Pension Fund v Van Zyl* 2005(2) SA 302 (SCA) at para 51.

be faulted. It rendered the delay unreasonable. Even in the absence of NPI and the Minister taking the point of delay, it was open to the High Court to do so of its own accord given this unexplained delay of 6 months.

[52] That lengthy period of delay – entirely unexplained – is compounded by the tardiness in launching the application after receiving draft papers from counsel on 23 December 2013 and only serving the application some three and a half months later. The disparate geographic locations and constituencies of SAPA’s members cannot absolve the appellants from the further delay in finalising and serving the application. In the age of electronic communications, particularly as between corporate entities, the dilatory finalising of the application compounds the earlier unexplained delay. The court *a quo* was also justified in taking into account the failure to give notice of the review.

[53] It follows that the court *a quo* did not misdirect itself in its value judgment upon the factual findings made it, that the delay was in the circumstances unreasonable. On the contrary its finding on first enquiry is beyond reproach.

Exercise of the court’s discretion to refuse condonation

[54] Mr Unterhalter argued that the failure to take into account the merits of the application resulted in the exercise of the court’s discretion upon a wrong principle, justifying an interference with its refusal to grant condonation.

[55] Whilst Mr Gauntlett said that the court *a quo* heard some argument on the merits, both Mr Namandje and Mr Unterhalter were adamant that the merits were not broached. What is certainly clear is that the merits do not feature as a factor in

the weighing up of factors in the exercise of the court's discretion. The question arises as to whether the failure to do so results in the discretion not being exercised judicially and thus upon a wrong principle.

[56] This court has made it clear that in condonation applications, where non-compliance with rules is found to be 'glaring', 'flagrant' and 'inexplicable', this court will not consider the prospects of success in determining the condonation application.²¹ This court in *Kruger* applied that principle to condonation applications in review applications. In *Kruger*, this court in effect upheld the approach of the High Court, in a case involving an extremely lengthy unexplained delay, that it would be entitled not to consider the merits in dismissing an application.²²

[57] Unlike *Kruger*, the court below did not make a finding that the delay was so egregious that a consideration of the merits was not warranted. Nor did I understand the respondents to contend for this position. They instead argued that the court *a quo* had considered a variety of factors, particularly the prejudice to the parties and concluded that condonation should not be granted.

[58] In deciding whether or not to grant condonation after finding that a delay is unreasonable, the criterion to be applied under the common law is the interests of justice, as was recently reiterated by the South African Supreme Court of Appeal (SCA) in *South African National Roads Agency v Cape Town City*.²³ In determining

²¹ *Arangies t/a AutoTech v QuickBuild* 2014(1) NR 187 (SC) at para 5; *Katjaimo v Katjaimo* 2015(2) NR 340 (SC) at para 34; *Tweya and others v Herbert and others*, case no SA 76/2014 on 6 July 2016.

²² At p 174F-I.

²³ 2017(1) SA 468 (SCA) at para 80.

this question, the SCA reaffirmed that regard should be had to all the facts and circumstances.

[59] The SCA also referred to the decision of the Constitutional Court in *Khumalo and another v MEC of Education, Kwa-Zulu-Natal* where the latter court stated:

‘An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision within the legal challenge made against it and considering the merits of that challenge.’

[60] The SCA in *SANRAL* further found that, although the delay issue in reviews should first be dealt with before the merits of the review are entertained, this

‘cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interest of justice dictate that the delay should be condoned. It would have to include a consideration as to whether the non-compliance with statutory prescripts was egregious.’²⁴

[61] Further factors would include the prejudice suffered by the administrative functionary – in this case the Minister – and the need for certainty, particularly in respect of a trade measure of the kind in question, the extent and cause of the delay, the reasonableness of the explanation for it, the effect on the administration of justice, the importance of the issue raised and the prospects of success.²⁵ A further factor could be whether the failure to launch the application within a reasonable time was in good faith.²⁶

²⁴ At para 81.

²⁵ *Aurecon v Cape Town City Council* 2017(2) SA 199 (SCA) at para 17.

²⁶ *Tasima* at para 168.

[62] The public interest is plainly served by bringing certainty and finality to administrative action or the exercise of public power of the kind in question – where the Minister invokes a power within a statute to regulate trade by way of a restriction upon imports which at the very least can be challenged on legality grounds of not having been taken within the confines of the Act and would thus not be lawful. A decision of this nature in implementing economic policy through legislative powers has wide implications – including budgetary, in the form of balance of payment consequences, and the pursuit of employment creation. The prejudice to NPI would also need to be considered. But as Mr Unterhalter pointed, much of the investment in setting it up was effected before the notice was published. Nonetheless, there would be some prejudice in a delay to a challenge to the notice, as was investigated in some detail by the High Court.

[63] As was stated by this court in *Keya*, prejudice is an important factor and can be material.

[64] But the other factors listed above to be considered would also require consideration in the weighing up process of determining the interests of justice.

[65] After weighing up the parties' prejudice, the High Court, in essence, found that the respondents' prejudice was material and the appellants' of far less significance. The court also considered the failure on the part of the appellants to give notice of their review, the extent of the delay and the failure to provide an acceptance explanation for the initial period of some six months.

[66] Although the public interest was referred to in respect of the prejudice to the government respondents – in the context of the lack of finality concerning the implementation of industrial policy and its implications for employment creation and investment – entirely absent from the factors weighed by the court *a quo* was the question of the merits and prospects of success.

[67] As already indicated, it is incumbent upon a court in determining the criterion of the interests of justice to take into account the merits of a review, in the absence of a finding that the delay is so egregious so as to justify determining the question of condonation without consideration of the merits. The merits are thus a fundamental factor to be considered by a court in such an enquiry. The failure to do so, as occurred in this appeal, results in the application of a wrong principle in the exercise of the court's discretion which was not exercised judicially as a consequence. It follows that the court's decision on condonation is to be set aside.

[68] This court heard argument on the merits as well as on the other factors to be taken into account in determining the question of what the interests of justice require in this case. This court is in a position to exercise its discretion as to whether the delay should be condoned in this instance.

[69] Clearly the issue raised in the review is of considerable public importance. It concerns the validity of a trade measure restricting poultry imports in the implementation of an economic policy to protect a fledgling industry. It also concerns the interpretation to be given to Art 144 of the Constitution and the extent, if any, to which international trade treaties form part of the domestic law of Namibia and can be enforced in the national courts of Namibia. The review also concerns the principle

of legality and whether international treaties in conflict with national legislation would prevail and whether and the extent to which the content of those treaties must inform the exercise of statutory powers conferred to the Minister under the Act. The rule of law, a foundational principle embodied in Art 1 of our Constitution, requires that the exercise of public power under the statute is only legitimate if lawfully exercised and within the confines of the powers conferred upon the repository of that power by law.²⁷

[70] In this instance, the appellants contend that the Minister acted beyond his statutory powers in the Act by issuing the notice on the grounds already referred to.

[71] This question as well as the other review grounds raised by the appellants are substantial legal questions heavily contested in both written argument and cannot be said to be so devoid of merit as not to be entertained. On the contrary, the public interest would be served by the ventilation and determination of the application of Art 144 of the Constitution and the extent, if any, to which international treaties can be enforced in domestic courts.

[72] In expressing this view, we deliberately refrain from expressing ourselves on the merits at all. That would need to be determined by the High Court, as we explain in the next portion of this judgment.

[73] It follows that condonation for the unreasonable delay should have been granted and we hereby do so.

²⁷ *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and others* 1999(1) SA 374 (CC) at paras 56 – 58.

Should the matter be remitted?

[74] Mr Unterhalter maintained that the appellants sought that this court should determine the merits of the application in the event of the appeal being allowed although he did not press the point in oral argument. Counsel for the respondents powerfully argued that the matter should be remitted to the High Court in that event.

[75] As was made clear in *RDP (I)* with reference to the position and function of this court:

‘In our view, the matter should be remitted to the High Court for further adjudication. This court, constitutionally positioned at the apex of the judiciary, is primarily a court of appeal. Being a court of ultimate resort, it will be slow to entertain litigation as if a court of first instance. Constitutionally, the High Court is differently positioned. In all important matters, it is a court of first instance. Albeit in another context, some of the resulting differences have been highlighted in *Schroeder and Another v Solomon and 48 others*:

‘The Constitution conferred original jurisdiction on the High Court to hear and adjudicate upon all civil disputes and criminal prosecutions; its rules and structures are designed to entertain such matters as a court of first instance; . . . Moreover, proceedings in the High Court accord the parties ample opportunity to ventilate the disputes between them; allows for those disputes to be referred to oral evidence in appropriate instances and for the court to make credibility findings where necessary; serve to distil the most pertinent issues to be debated in legal argument and to be pronounced upon. The intellectual and judicial contribution of the judges of that court in the adjudication of . . . matters have also been of great value to this court in the hearing of appeals following thereon.’²⁸

²⁸ At para [75].

It is, without doubt, for these reasons that the legislature ordained the High Court in terms of the Act as the forum where an election application should be lodged and adjudicated upon in the first instance.

[76] As was the case in *RDP (I)*, there remains the balance of the issues in the application to be determined. In addition to the merits, they include challenges to the appellants' standing, the question of mootness and jurisdiction and residual procedural issues relating to applications to strike out. Even in the absence of any referral to oral evidence, these are issues more appropriately dealt with by a court of first instance for the reasons articulated in *RDP (I)* and emphasised by Mr Namandje with reference to the pertinent provisions in the Constitution and the Supreme Court Act, 1990.

[77] It follows that the further issues in the application should be determined by the High Court. The matter is accordingly remitted to the High Court for further case management concerning setting the matter down for argument.

Costs

[78] The appellants sought the costs of four instructed counsel in addition to one instructing counsel. NPI applied for the costs of three instructed counsel and Mr Namandje, for the government respondents, argued that the costs of two instructed counsel would suffice.

[79] The issues raised in this appeal are complex and certainly warranted the engagement of more than one instructed counsel. Two of the parties engaged three or more. In the exercise of our discretion, it would seem to us that the engagement of three instructed counsel was justified. We confine our cost order to that effect.

[80] Given that the appellants sought an indulgence in the High Court by reason of their unreasonable delay and given that the opposition was, to the condonation application, by no means unreasonable, the respondents should be entitled to costs in that court. As the respondents proposed to argue the delay point only, those costs should be confined to the costs of one instructing and two instructed counsel for the hearing on 28 and 29 June 2016.

Order

[81] The appeal accordingly succeeds and the following order is made:

1. The appeal succeeds with costs and the decision of the High Court is set aside and replaced with the following:
 - ‘(a) Condonation is granted for the delay in launching the applicants’ application.
 - (b) The costs of the hearing on 28 and 29 June 2016 are to be borne by the applicants, jointly and severally, and include the costs of one instructing and two instructed counsel.’
2. The costs of this appeal are to include the costs occasioned by the employment of one instructing and three instructed counsel.

3. The matter is remitted to the High Court for further case management and determination.

SMUTS JA

MOKGORO AJA

FRANK AJA

APPEARANCES

APPELLANTS:

D Unterhalter SC

Assisted by A Corbett SC, M Du
Plessis and D Obbes

Instructed by Ellis Shilengudwa Inc

FIRST and SECOND

RESPONDENTS:

S Namandje

Assisted by L N K Ihalwa

Instructed by Government Attorney

THIRD RESPONDENT:

J J Gauntlett SC, QC

Assisted by F B Pelsler and R L
MaasdorpInstructed by Theunissen, Louw &
Partners