REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 82759/2018

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

3/06/2019
DATE

SIGNATURE

In the matter between -

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| **SOUTH AFRICAN FRUIT AND VEGETABLE CANNERS ASSOCIATION** | First Applicant |
| **SOUTH AFRICA FRUIT JUICE ASSOCIATION** | Second Applicant |

and

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| **IMPUMELELO AGRIBUSINESS SOLUTIONS (PTY) LTD** | First Respondent |
| **EXECUTIVE OFFICER OF THE AGRICULTURAL PRODUCT STANDARD ACT** | Second Respondent |
| **MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES** | Third Respondent |

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**JUDGMENT**

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| **IMPUMELELO AGRIBUSINESS SOLUTIONS (PTY) LTD** | First Respondent |
| **EXECUTIVE OFFICER OF THE AGRICULTURAL PRODUCT STANDARD ACT** | Second Respondent |
| **MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES** | Third Respondent |

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**JUDGMENT**

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STRYDOM AJ

**Introduction**

[1] This is an application in which the applicants seek interim relief to restrain and prevent the respondents from conducting inspections at the members of the applicants and/or levying any inspection fees, pending the final determination of the relief sought in terms of Part B of the notice of motion.

[2] At issue is the inspection fees determined and published by the first respondent in non-Governmental Notice 509 of 31 August 2018 (Notice 509) in terms of the Agricultural Product Standards Act[1] (the Act). Pursuant to the published inspection fees it is the intention of the first respondent to continue with inspections and to levy fees from the members of the applicants.

[3] The relief sought in Part B of the application (the review) is premised on the following:

[3.1] On a proper interpretation of section 3(1A)(b)(ii), read with sections 2(3), 3(1A) and 3A(4) of the Act, and sections 25, 55 and 217(1) of the Constitution[2], it is unconstitutional for the first respondent to unilaterally determine, publish and impose inspection fees (the legality challenge).

[3.2] The process to determine the fees was procedurally unfair and was done contrary to the provisions of the Promotion of Administrative Justice Act[3] (PAJA) (the PAJA challenge).

**Points *in limine***

[4] On behalf of the respondents, two points *in limine* were raised in their heads of argument. These points were not pursued with any vigour. A non-joinder point was taken and also a point that the applicants did not exhaust the internal remedies available. It was further argued that the applicants, on their own version, still had an interim order in place, interdicting and restraining the respondents from imposing inspection fees. It was argued on behalf of the respondents that if this was the

[1] Act 119 of 1990.
[2] The Constitution of South Africa, 1996.
[3] Act 3 of 2000.

stance taken by the applicants then they would have had an alternative remedy to pursue, i.e. contempt of court proceedings, and should not have re-applied for similar relief by way of this interim application.

[5] It became a contentious issue between the parties whether the existing previous interim interdict, is still operative. I do not intend to make a finding in this regard in light of the conclusion I reached in this matter. It should be noted, however, that the existing previous order contained suspensive terms which rendered the fulfilment thereof a discretionary issue. The parties are in dispute on whether the conditions were fulfilled. Consequently, it remained contentious whether the interim order was discharged.

[6] Paragraph 4.2 of the order reads as follows:

> *"4. That the aforesaid interim interdict shall endure until the earlier of either:*
>
> *4.1 ...*
>
> *4.2 the date on which the first respondent's final inspection fees become known to the applicant, whether the first respondent's final inspection fees demonstrate that it has adhered to the principle of just administrative action and that it has sufficiently consulted with the relevant stakeholders, being the first and second applicants;"*

[7] Clearly, this clause creates uncertainty as it leaves a discretion to be exercised by the applicants and/or the respondents when and to what extent, adherence to the principle of just administrative action, took place. As stated previously, the respondents were of the view that the interim interdict was discharged because they determined the final inspection fees following proper procedure whilst the view of the applicants is to the contrary.

[8] Considering this uncertainty, I am of the view that this court should consider the application for interim relief on the papers currently before this court.

[9] The further issue that was raised relates to the internal remedies *inter alia*, a right to appeal, against the decision of the Executive Officer or an assignee. Section 10(1)

of the Act provides that any person, whose interests are affected by any decision or direction of the Executive Officer or an assignee under this Act, may appeal against such decision or direction to the Director-General. The question arose during argument whether this right to appeal also pertained to the determination of inspection fees by an assignee. On behalf of the applicants it was argued that it does not, as section 10(2) of the Act refers to the lodging of an appeal in the prescribed manner and if the prescribed form is considered, it does not cater for an appeal against the determination of inspection fees. In my view this is an issue which the parties can pursue during the review application stage, if this issue remains contentious.

**The interdictory relief**

[10] An applicant in interdict proceedings *pendente lite* has to satisfy the court that he has a reasonable prospect of success in the main action although there is no definite preponderance of possibilities in his favour. Put differently, an applicant must show that it has a *prima facie* case although this case may be open to some doubt. The applicants had to show that they have a prospect of success in the review proceedings.

[11] Should the applicants be able to show such a *prima facie* right, it will then have to meet the other requirements for interim relief. This include that the applicants have to show that they have a well-founded apprehension of irreparable harm if the interim interdict is not granted. The court, in considering whether an interim interdict should be granted, will look at the balance of convenience and whether there are other suitable remedies available to the applicants.

**Legislative framework**

[12] The applicants' members produce canned fruits and vegetables, fruit juice and drinks, jams, jellies and marmalades, canned pasta, canned mushrooms, mayonnaise and salad dressing. These products are regulated by the Act. The preamble to the Act sets out that the purpose of the Act is to provide for control over the sale and export of certain agricultural products and control over the sale of certain imported and related products. According to the regulations promulgated in

terms of the Act these inspections would further be conducted to determine microbiological spoilage, quality, quantity and grading and also to ascertain what exact ingredients are contained in these products. This will be established by conducting laboratory tests.

[13] For purposes of the application of the Act, the Minister may, with regard to a particular product, designate any person, undertaking, etc. *which has particular knowledge*, in respect of the product concerned as an assignee in respect of that product. The Act provides that an assignee must determine the fees payable to it by the parties to be inspected.

[14] Ultimately, the purpose of the Act is to protect consumers and to provide consumers with products of consistent quality.

[15] The first respondent was appointed to conduct these inspections and to determine their own fees. At some stage when it became known to the applicants that the first respondent is about to publish the inspection fees, the applicants, being unhappy about the process which was followed, approached the court for interim relief preventing the first respondent, together with the second and third respondents, to continue with such publication of the fees. An interim interdict was obtained on an unopposed basis. A draft order was made an Order of Court by Jordaan, J on 16 January 2018.

[16] Thereafter, correspondence followed between the applicants and the first respondent which culminated in the first respondent publishing a final inspection fees on 30 August 2018. I do not intend to refer to all correspondence and communications between the parties but for purposes of this judgment, I refer to the following engagements or events:

[16.1] On 26 January 2018, the applicants were informed that the first respondent is in the process of finalising a contract with an independent expert consultant to re-look at its business plan and determine inspection fees based on sound research. The applicants were informed that a model of constructive workshops with the applicants' members will be followed in the process of developing a new business

plan and determining inspection fees. Thereafter a workshop would be held to present a final business plan and fees which would have been considered after the stakeholders' input.

[16.2] It was further stated as follows:

*"After the stakeholder engagement, we will then be publishing our final fees and commence services thereafter."*

[16.3] On 2 February 2018, the industry was informed that the first respondent appointed OABS Development Agricultural Consultants (OABS) to assist the first respondent to determine its business plan and its inspection fees.

[16.4] On 6 February 2018, OABS held an introductory meeting with the applicants.

[16.5] On 15 February 2018, OABS informed representatives of the applicants that the idea was never to conduct a public participation / consultation process with stakeholders but rather that the process was aimed to engage with stakeholders to obtain their views, identify challenges and gather information in order to formulate a proposal / model.

[16.6] In a letter dated 16 February 2018, it was again made clear to stakeholders that OABS will not engage in a broad stakeholder engagement. This will be done by the first respondent itself.

[16.7] On 15 June 2018, non-Governmental Notice 339 of 2018 was published in the Government Gazette. In this notice proposed inspection fees were published and comments were invited. Such comments should have reached the first respondent by not later than 30 (thirty) days from the date of publication of the notice.

[16.8] On 6 July 2018, a draft report containing a business plan to determine inspection fees for production standards was made available to the applicants and other stakeholders. That was approximately nine days before the deadline for comments pursuant to the notice 339, communicating the proposed inspection fees.

[16.9] On 10 July 2018, the applicants wrote to the first respondent enquiring what the relevance of the draft report was and whether it should be considered by the applicants. It was specifically asked whether the applicants need to consider and comment on this report. Further, it

was pointed out that if the draft report needs consideration and comments it should be noted that it was only received on 6 July 2018, and that it would be impossible to comment thereon before the 15 July 2018 deadline. It was stated that it would take at least 30 days to submit comments thereon from the date that the applicant became aware of it.

[16.10] On 11 July 2018, the first respondent responded to the enquiry from the applicants by stating that the draft report is not to be commented upon since it merely provides a background and context to the published proposed inspection fees. It was reiterated that the deadline for comments on the proposed inspection fees still remains the date which was contained in the notice being 15 July 2018.

[16.11] On 12 July 2018, the applicants wrote to the first respondent. In this letter it was stated that the first respondent needs to provide additional information such as, but not limited to, the business and implementation plan which informs the inspection fees (as it must be charged on a cost recovery basis), the scope of the mandate of the first respondent, technical capabilities, method and standard operating procedures to be followed in the inspections. It was stated that the applicants could only meaningfully comment on the proposed inspection fees if they know the extent of the inspections, the cost involved and standard procedures to be followed. It was stated that the first respondent has not consulted the applicants on the newly proposed inspection fees. It was noted that only a draft report was received from OABS and that the first respondent refused to provide an extension for the applicants to consider same. Various issues were raised on how the first respondent was able to determine the proposed inspection fees. The applicants reiterated that they did not receive sufficient information to provide meaningful comments on the proposed fees. A further request was then made to obtain the requested information.

[16.12] On 25 July 2018, a date after the expiry of the deadline for comments, the first respondent replied to the applicants' letter dated 12 July 2018, wherein it was stated that the applicants should have commented on

the proposed fees. It was stated that the first respondent had consulted the applicants before entering into the contract with OABS and that comments should not be made on the draft business report but on the notice itself. In paragraph 10 of this letter it was *inter alia* stated as follows:

*"In that context, it is worth noting that, SAFJA and SAFVCA did not request additional information to be provided to them nor did they deem it necessary to request an extension of the published notice. However, Impumelelo undertakes to have additional consultative meeting (sic) the industry prior to the publication of the final fees."*

[16.13] On 27 July 2018, a stakeholders meeting was held between the first respondent, industry and the Department of Agriculture, Forestry and Fisheries. In the minutes of this meeting the purpose thereof was described as follows:

*"The main purpose of the meeting was intended for an Impumelelo Agribusiness Solutions to present its business plan and the model used to determine the proposed inspection fees for local processed products."*

[16.14] On 6 August 2018, the applicants responded to the first respondent's letter dated 24 July 2018. It was pointed out that the first defendant incorrectly alleged that the applicants did not request additional information and an extension of the deadline. It was further pointed out that during the stakeholders meeting the applicants were informed that further stakeholder engagement would take place before the final fees would be published. The applicants requested for more detail in this regard.

[16.15] On 13 August 2018, a stakeholders meeting was in fact held but the applicants were not invited. At the beginning of the meeting this was realised and the applicants were informed about the meeting after which their representatives did arrive.

[16.16] On 22 August 2018, OABS filed an addendum to the first respondent's business plan. In this report reference is made to the various workshops held with certain sections of industry.

[16.17] On 30 August 2018, the first respondent wrote to the applicants,

indicating that Mr Billy Makhafola of the Department of Agriculture, Forestry and Fisheries (DAFF) was willing to meet the applicants to discuss the principles and concerns around the regulations. He indicated he will make himself available to meet industry stakeholders on any chosen date, time and venue.

[16.18] On 31 August 2018, the inspection fees were published by way of Notice 519 of 2018.

[17] Considering what transpired as set out above, it was the applicants' case that there was never proper consultation with them. The applicants were never placed in a position to meaningfully comment on the proposed fees. With only approximately nine days left to comment, the applicants received a draft business model and they were informed not to comment on this model but rather on the published fees. When an extension was sought to consider the draft report and refer it back to the members of the applicants, such extension was not granted.

[18] The question may arise to what extent the principle of just administrative action would require consultation with stakeholders before comments are made. Each case must be considered on its own facts. In *casu*, I am of the view that a mere request for comment on the proposed fees would not suffice. The fees to be charged must be determined by the first respondent to cover its costs. Unless the applicants knew what the cost structure of the first respondent would be and how it is arrived at it would be very difficult, if not impossible, for the applicants to comment on the proposed fees. To this extend it differs from a situation where a fee is proposed by a government agency that merely should be reasonable.

[19] In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as amici curiae)*[4] Sachs J wrote:

> *"[630]... The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an*

[4] 2006 (2) SA 311 (CC) at para [630].

*adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case. Prudence allied to principle indicates that this is an area where the law should develop in a fact-sensitive and incremental way."*

[20] In *South African Veterinary Association v Speaker of the National Assembly and Others*[5] Goliath, AJ stated:

*"[32]...From the above it is obvious that the standard by which public participation must be measured is reasonableness. The content of this standard will vary from case to case. However, a complete failure to take any steps to involve the public in a material amendment to a Bill cannot be reasonable by any measure."*

[21] Accordingly, I am of the view that the applicants have established a *prima facie* right on the basis that the publication of the final inspection fees was preceded by an unfair administrative process. After the publication of the concept business plan drafted by OABS, the applicants would have required more time to engage with the first respondent enabling them to meaningfully comment on the proposed inspection fees.

[22] This *prima facie* right in my view is open to some doubt considering that at least a reasonable time was afforded to comment on the inspection fees. This is also not a matter where the applicants did not know about the imminent determination of the inspection fees. A long process of engagement was followed since 2017, and the applicants were not left totally in the dark and could, to some extent, have done their own investigations. Some comments were received from the applicants after a previous non-governmental notice 251 of 1917. This interaction came to naught as every time the first respondent requested comments the applicants replied by asking for a business plan and for standard operating procedures and documents which the first respondent did not have in place, as it was a start-up situation as far as the determination of inspection fees were concerned on the conducting of such inspections.

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[5] 2019 (3) SA 62 (CC) at para [32].

**The legality challenge**

[23] In light of this court finding that the applicants have established a *prima facie* right for purposes of an interim interdict I do not intend to make a finding relating to the constitutional challenge. I will, however, touch on these issues as it may have some bearing on the strength of the applicants' *prima facie* right which in turn may have a bearing on the balance of convenience.

[24] The applicants submitted that an assignee appointed in terms of the Act should not have the power to unilaterally determine its own fees and that as far as such conduct is permitted those sections authorizing the first respondent to do so, stand to be declared invalid and unconstitutional for the following reasons:

[24.1] it will permit the deprivation of property in accordance with a system that is procedurally unfair thereby contravening section 25 of the Constitution;

[24.2] the fact that an assignee, being a private person, is authorised to determine fees that the applicants are by law required to pay, offends against the prescripts contained in section 55 of the Constitution; and

[24.3] should an assignee be able to determine its own fees it would sidestep the provisions of section 217 of the Constitution as the third respondent would effectively be contracting for services not in a fair, cost-effective and transparent manner.

[25] As far as the section 25(1) of the Constitution[6] is concerned I am not convinced that the applicants have established a strong case. Without deciding any specific issue, I am of the view that it cannot be said that the levying of inspection fees amounts to an arbitrary deprivation of property. Moreover, even if it is to be found that the levying of inspection fees would amount to a deprivation of property this is the kind of situation which would be covered by the limitation of rights clause in the Constitution on the basis that the limitation is reasonable and justifiable in an open and democratic society.

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[6] *"No-one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."*

[26] The section 55 of the Constitution challenge which is based on a separation of powers argument is also not convincing. The applicants' case is that the power to determine inspection fees should not have been delegated to the first respondent. Delegated subordinate regulatory authority was not only constitutionally permissible, but was necessary for effective governance. Although this authority was delegated to a private person it was on the basis that the first respondent may only recover costs. This would mean that it may not profit from the exercising of its delegated functions. In terms of section 15(1)(g) of the Act the Minister may make regulations regarding inspection fees that have been determined by an assignee. Moreover, the third respondent can appoint an assignee and can then by implication also revoke such an appointment. Accordingly, some form of oversite remains in place.

[27] The question remains to what extent the oversight remains in place. The act provides for an appeal procedure but the availability of such procedure has been questioned by the applicants. There will always be oversight in a situation where a delegated power can be revoked which is the case in *casu*. Accordingly, I am of the view that as far as this challenge is concerned, the applicants did not make out a strong case.

[28] As far as the section 217 challenge is concerned, the applicants argued that the third respondent, is in terms of the Act, able to contract for services contrary to section 217 as the fees of the first respondent is not determined prior to its appointment but only determined once the first respondent is appointed, the second and third respondent exercise no oversight over the determination of the fees. According to the applicants' argument, the provisions that allow for the first respondent to determine its' fees essentially enables the second and third respondents to abdicate their duties set out in section 217.

[29] Section 217 of the Constitution deals with a procurement which should take place in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. The reference to "cost-effective" would mean that it should be cost-effective for the organ of state appointing the service provider. In this instance the inspection fees are not to be paid by government. These fees are to be paid by the

producers and the issue of cost-effectiveness cannot be applicable to the designation of an assignee. I am of the view that it cannot be found that the appointment of the first respondent was not fair, equitable, transparent and competitive. First respondent can only recover its own expenses through the levying of fees.

[30] As already stated, it is not the court's intention to finally decide these issues but I had to consider the veracity of these challenges as it may have an effect on a consideration where the balance of convenience lies when I decide whether an interim interdict should be granted. In conclusion, I am of the view that a strong case has not been established pertaining to this legality challenge.

**Irreparable harm and balance of convenience**

[31] On behalf of the applicants, it was argued that the applicants will suffer irreparable harm should the interim interdict not be granted. It was stated that the first respondent can inspect any quantity of products. This would destroy the products and this would occasion losses. Further, the applicants will have to pay the inspection fees. It was stated that the applicants' members stand to suffer "severe economic losses" as a result of the payment of the inspection fees as well as in respect of the destroyed products due to inspections. According to the applicants, this will have a knock-on effect to the members' employees, the farmers producing the products and ultimately the consumer, who for some of these products are the most vulnerable in our society.

[32] From the papers, it is evident that the quantities of products produced by the members of the applicants are enormous. If samples are to be taken for inspection purposes this can never lead to "severe economic losses". The same would apply to the inspection fees to be paid. The applicants have not set out in their papers the turnover and profit of its members and what the exact impact the inspection fees will have on their profit margins. Moreover, on the basis of confidentiality, the members of the applicants have elected not to place any evidence before the court pertaining to their turnover and profit margins of the different members and/or the individual products.

[33] I am of the view that the applicants failed to prove that their members will suffer irreparable harm should the interim interdict not be granted. I am not finding that there will not be financial losses, but in my view the extent of such losses is minuscule in relation to the total turnover and unknown profit margins of the members of the applicants.

[34] The third requisite for an interim interdict is the balance of convenience in favour of granting the interim relief or not. The court must weigh the prejudice to the applicants if the interim interdict is refused against the prejudice to the respondents if it is granted. The stronger the prospects of success, the less the need for the balance of convenience to favour the applicants; the weaker the prospects of success, the greater the need for balance of convenience to favour the applicants.

[35] This court has found that the applicants have established a *prima facie* case although it may be open to some doubt. The Act is aimed at serving a public interest for the control over the sale and export of certain agricultural products. If the regulations promulgated in terms of the Act is considered, the inspectors will look for quality standards which should be maintained, micro biological spoilage, quantity and many other aspects to ensure that the consumer gets what he or she pays for. To, at this stage, prohibit further inspections (which I was informed from the bar has now to a limited degree been implemented) will undermine the legitimate legislative purpose. This public interest purpose should be weighed against the applicants paying inspection fees as was determined, at least until the review application is finalised. This will be for a limited duration. Considering that it was always the stance on behalf of the applicants that they were not against the conducting of inspections and the levying of fees but rather only against the determination thereof, it is my view that the balance of convenience does not favour the granting of interim relief. The true dispute between the parties relates to the amount of the inspection fees which may very well have been correctly calculated by the first respondent.

[36] Accordingly, I am of the view that the application for interim relief should be dismissed.

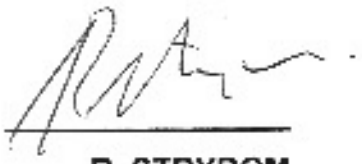
**Declaratory relief**

[37] On behalf of the applicants, Mr van der Merwe asked the court to, under the rubric of alternative relief declare that the respondents are in contempt of the previous court interdict prohibiting them from publishing and imposing inspection fees. Such a declaration can only be ordered if a court is satisfied that the factual basis upon which it is premised has been fully canvassed in the papers before court. The focus of the respondent was not to place facts before the court to oppose such an order. It has always been the case of the respondents that they have complied with the order in that they adhered to the principles of just administrative action and that the first respondent has sufficiently consulted with the relevant stakeholders. This is denied by the applicants. Although the court found that the applicants made out a *prima facie* case that the requirements of a fair administrative process was not met, this does not mean that such a finding can be made on a balance of probabilities. Accordingly, the court is of the view that the applicants would not be entitled to a declaratory order as requested.

**Costs**

[38] There were appearances on behalf of the three respondents. Mr Puckrin acted as senior counsel for the respondents. On behalf of the first respondent, he appeared with a junior counsel and on behalf of the second and third respondents, he appeared with another counsel. I am of the view that the costs order should follow the result. Accordingly I make the following order:

[38.1] The application for interim relief is dismissed with costs, including the costs of one senior counsel and two juniors.



**R. STRYDOM**

ACTING JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

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| Counsel for applicants: | Adv M. P. Van der Merwe SC |
| Counsel for the 1st respondent: | Adv C. Puckrin SC<br>Adv H. C. Janse van Rensburg |
| Counsel for the 2nd & 3rd respondents: | Adv C. Puckrin SC<br>Adv E. Langa |

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| Date heard: | 16 MAY 2019 |
| Date delivered: | 3 JUNE 2019 |