



**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 15066/2018**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ /  
NO.

(3) REVISED. ✓

DATE 03/03/2020

SIGNATURE

In the matter between:

**TOP LAY EGG CO-OP LIMITED**

First Applicant

**GEORGE SCHWARTZEL BOERDERY (PTY) LTD**

Second Applicant

**EGGBERT EGGS (PTY) LTD**

Third Applicant

**W W BARTLET POULTRY FARM (PTY) LTD**

Fourth Applicant

and

**MINISTER OF AGRICULTURE,  
FORESTRY & FISHERIES**

First Respondent

**EXECUTIVE OFFICER: AGRICULTURAL  
PRODUCT STANDARDS, DEPARTMENT  
OF AGRICULTURE: FOOD SAFETY AND  
QUALITY ASSURANCE**

Second Respondent

**FOOD SAFETY AGENCY (PTY) LTD**

Third Respondent

**AGENCY FOR FOOD SAFETY AND  
QUALITY (PTY) LTD**

Fourth Respondent

**AGENCY FOR FOOD SAFETY**

Fifth Respondent

## JUDGMENT

### DAVIS, J

#### [1] Introduction

The Agricultural Products Standards Act No 119 of 1990 (“the Act”) provides for the control over the sale and export of certain agricultural products and similarly, for control over the sale of imported agricultural products. Eggs and poultry meat are such products. The dispute in this matter centers around the delegation by the Minister of Agriculture, Forestry and Fisheries (“the Minister”) of certain inspection, grading, sampling and control functions to a third party.

#### [2] The statutory framework<sup>1</sup>

<sup>1</sup> The various sections of the Act provide as follows: 2(3)(a) - The Minister may, for the purposes of the application of this Act or certain provisions thereof, with regards to a particular product, designate any person, undertaking, body, institution, association or board having particular knowledge in respect of that product.

**3 Control over sale of products.** - (1) The Minister may -

- (a) Prohibit the sale of prescribed product -
  - (i) Unless that product is sold according to the prescribed class or grade;
  - (ii) Unless that product complies with the prescribed standards regarding the quality thereof, or a class or grade thereof;
  - (iii) Unless the prescribed requirements in connection with the management control system, packing, marking and labelling of that product are complied with;
  - (iv) if that product contains a prescribed prohibited substance or does not contain a prescribed substance; and
  - (v) unless that product is packed, marked and labelled in the prescribed manner or with the prescribed particulars;
- (b) determine that a prohibition referred to in paragraph (a) shall apply only to a prescribed category of persons or in a prescribed area ...

2.1 The relevant portion of Section 2(3) (a) of the Act authorizes the Minister to “*designate any person, undertaking, body, institution, association or*

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(1A)(a) Fees may be charged in respect of the powers exercised and duties performed by the executive officer or the assignee as the case may be, to ensure compliance with this section.

(b) In the case of powers exercised and duties performed by -

- (i) the executive officer, the prescribed fees shall be payable and
- (ii) the assignee, the fee determined by such assignee shall be payable

**3A. Inspection, grading and sampling for quality control. –**

(1) The executive officer or the assignee may, during business hours of the industry in question in the case of control in terms of section 3(1), or at any time in the case of control in terms of section 4 (1) and 4A (1), enter any place, premises or conveyance in or upon which any product, material, substances or other article in respect of which this Act applies, is or upon reasonable grounds suspected to be produced, processed, treated, prepared, classified, graded, packed, marked, labelled, kept, removed, transported, exhibited or sold, and –

- (a) open any container found at or on the place, premises or conveyance which the relevant person referred to in subsection (1) believes on reasonable grounds contains any product, material, substance or other article to which this Act applies;
- (b) classify, grade, pack or mark any quantity of a product of a product in accordance with the prescribed requirements, or direct the owner or person in charge of that place, premises or conveyance to thus classify, grade, pack or mark such quantity;
- (c) inspect or test or cause to be tested any quantity of a product;
- (d) inspect or test or cause to be tested any quantity of a product, material, substance or other article which is used or suspected to be used at or in connection with the production, processing, treatment, preparation, classification, grading, packing, marking, labelling, keeping, removal, transporting, exhibition or sale of such product;
- (e) subject to subsection (2) (d), take such samples of a product, material, substance or other article in question as he or she may deem necessary; and
- (f) require the owner or custodian to produce for inspection, or for obtaining a copy or extract, any book, label or other document or paper with regard to the administration of this Act ...

(4) In the case of action under subsection (1) (b), (c), (d) or (e) by the relevant person referred to in subsection (1), the owner of the product in question shall [pay the prescribed fees or the amount determined by the assignee, as the case may be, for such action.

**4. Control over export of products. – (1) The Minister may**

- (a) prohibit the export from the Republic of a prescribed product unless each quantity of that product, intended for export, has been approved by the executive officer for that purpose ...

**4A Control over sale of imported products. – (1) The Minister may –**

- (a) prohibit the sale of a prescribed product imported into the Republic unless each quantity of such product intended for sale in the Republic complies with the provisions of sections 3 (1)...

**7. Power of entry, investigation and sampling. – (1) The executive officer or the assignee may, on the authority of a warrant issued in terms of subsection (2), and for purposes other than for the purpose of the application of section 3A, at any time –**

- (a) enter upon any place, premises or conveyance in or upon which any product, material, substances or other article in respect of which this Act applies, is or is upon reasonable grounds suspected to be produced, processed, treated, prepared, classified, graded, packed, marked, labelled, kept, removed, transported, exhibited or sold;
- (b) perform any of the acts referred to in section 3A for such other purposes ...

**8. Seizures. – (1) A person referred to in section 7 (1) may in terms of section 7 (1) (c) or (5), seize the whole, or any part or quantity, of a product, material, substance or other article, or any book or document, ...**

*board ...*” as assignee for purposes of the application of the Act or certain provisions thereof.

- 2.2 Section 3(1) of the Act prohibits the sale of a prescribed product unless it is sold according to the prescribed standards regarding the quality thereof. Products may also not be sold unless properly packed, marked and labelled in a prescribed manner.
- 2.3 Section 3(1A) determines that fees may be charged “*in respect of the powers exercised and duties performed by the Executive Officer or the assignee, as the case may be, to ensure compliance with this section*”. In terms of section 3A(4) the person responsible for payment of these fees is the owner of the products in question.
- 2.4 In the case of control over the sale of both exported and imported products, the Minister may, in terms of sections 4(1) and 4A respectively prohibit the sale of such products unless “*each quantity of such product intended for sale in the Republic complies with the provisions of Section 3(1)*”.
- 2.5 For purposes of exercising the control envisioned in sections 3(1), 4(1) and 4A, section 3A authorizes the entry into premises and opening of containers for purposes of inspection, testing, classification, grading or marking of any quantity of a product, by the executive officer or the assignee.
- 2.6 Sections 7 and 8 provide for certain search and seizure powers to be exercised by the Executive Officer or the assignee.

[3] Purpose of the legislation

- 3.1 The purpose of the legislation is clearly aimed at maintaining standards of agricultural products in the interests of the public as consumers.
- 3.2 Examples furnished in the affidavits of instances of abuse or aspects particularly needing inspection and control are the limitations imposed on the amount of brine (salt water) injected into a chicken carcass (15%). Previously excessive brine injection (up to 45%) resulted in the public paying for salt water rather than chicken meat.
- 3.3 Similarly, the public should be protected from paying higher prices for eggs incorrectly or falsely labelled and sold. Claims made on packaging are difficult to verify, particularly for the lay person or ignorant shopkeeper. Free range eggs command a higher price than barn eggs due to the additional labour costs. The prices also differ, sometimes markedly so, between, medium, large, extra large and jumbo eggs. The weight of eggs determine their size classification, whilst they are also graded in classes according to their cleanliness or deformities. Furthermore, the freshness of eggs is determined by a “Haugh meter” reading.
- 3.4 Where it is alleged that poultry and eggs make up 59% of South African protein consumption, the need for control in terms of the Act speaks for itself.

[4] The designation

- 4.1 On 9 December 2016 the Minister, acting in terms of section 2(3)(a) of the Act, designated “Agency for Food Safety” in respect of the application of sections 3(1) and 4A “*with respect to the inspection of regulated animal*

*products (poultry meat and eggs, as well as any other meat and meat products for which regulations may be promulgated)”.*

- 4.2 On 19 January 2017, the Executive Officer: Agricultural Product Standards made known for general information by way of a publication in the Government Gazette that the Minister has appointed three entities as assignees. One of these was described as being “Agency for Food Safety (Pty) Ltd”. Furthermore, the Executive Officer’s publication read that the appointment was for purposes of the “*application of sections 3(1)(a) and (b), 3A (1), 4A(1)(a), 7 and 8*” of the Act (the other assignees listed in the publication were in respect of dairy and related products and fruit and vegetable processed products).
- 4.3 From 21 February 2017 the Agency for Food Safety began consulting industry role players. After consultation with the industry at two workshops, one being on 20 April 2017 and the other on 4 May 2017 (which were, incidentally attended by representatives of the applicants), the industry’s suggestion that, because of the risk profile of eggs, quarterly instead of monthly inspections should be conducted, was accepted together with a proposed reduction in the fees for inspections initially proposed and published.
- 4.4 Accordingly, inspections were indeed no longer performed monthly but quarterly and the fees were reduced from R0, 015 to R0, 0006 per egg. The suggested fees charged per egg (and not per carton or otherwise) was an acceptable method of calculating and budgeting for inspection costs.
- 4.5 In the inspection of eggs were included the inspection of packaging and labelling to ensure that both the product and the manner in which it is described and sold comply with the quality and public safety provisions

of the Act as referred to in paragraph [3] above. The inspection fees included these functions without extra charges.

- 4.6 The fees referred to in paragraph 4.4 above were subsequently published in Government Gazette No 40847 dated 19 May 2017 per Notice 35 of 2017.

[5] Relief claimed

It is against the aforesaid background that the Applicants claim relief, which, after some amendments, entail the following:

- 5.1 Condonation in terms of section 9 of PAJA for the late institution of review proceedings.
- 5.2 A declaratory order that the Minister had not assigned or designated the powers provided for in sections 3(1A)(a) and (b)(ii) and 3A, 7 and 8 of the Act to any of the respondents.
- 5.3 That the decision contained in the Executive Officer's publication of 16 January 2017 be set aside alternatively that it be declared that the Minister has not designated the Third or Fourth Respondents as assignees in terms of Section 2(3)(a) of the Act.
- 5.4 That the determination of the inspection fees as published in the relevant Government Notice "*be declared to constitute an illegality and consequently a nullity*".
- 5.5 That all notices issued by the Fourth Respondent be "reviewed" and set aside and /or that it be declared that such invoices "constitute illegalities".

- 5.6 That it be declared that the Minister has not designated the power to determine fees to the Third or Fifth Respondents.
- 5.7 Costs orders were also sought.
- 5.8 Certain constitutional relief have since been abandoned and need no further consideration.

[6] The parties

- 6.1 The First Applicant alleged that it was a co-operative society, registered as such in terms of the co-operatives Act No 14 of 2005. It further alleged that it was a “primary agricultural co-operative” acquiring eggs from its members and thereafter marketing and selling the eggs under the trademark “Top Lay”, charging its members a fee for this function. Initially its *locus standi* was hotly contested, which dispute added to the already voluminous papers and various sets of heads of argument. The objection to the First Applicant’s *locus standi* was jettisoned at the hearing of oral argument simultaneously with the Applicants’ corresponding abandonment of their objection to the Second Respondent’s *locus standi*.
- 6.2 The Second, Third and Fourth Applicants are corporate egg and poultry producing entities.
- 6.3 The Minister is the First Respondent and the Executive Officer the Second Respondent.
- 6.4 The Third Respondent is Food Safety Agency (Pty) Ltd.



- 6.5 Another company, Agency for Food Safety and Quality (Pty) Ltd (referred to as “AFSQ” during argument and, for sake of clarity, also hereinlater as such) was cited as the Fourth Respondent.
- 6.6 An entity, described as “Agency for Food Safety” was cited as the Fifth Respondent.
- 6.7 A substantial portion of the Applicants’ attack on the designation by the Minister and a substantial part of their motivation for the late institution of their application, centers around their “confusion” as to the identity of the actual assignee. Much is made of the difference between the designation mentioned in paragraph 4.1 above and the Executive Officer’s publication mentioned in paragraph 4.2 above. In the designation, the Fifth Respondent is mentioned and in the publication, the suffix “(Pty) Ltd” is added to the name of the Fifth Respondent.
- 6.8 It became clear from the papers that there is no registered entity as Agency for Food Safety (Pty) Ltd. The Applicants’ assertion in this regard was therefore correct. The Executive Officer, however, has no decision-making power in respect of designating assignees and his publication was only a notification of the Minister’s decision. The publication cannot and did not detract from the decision itself. Insofar as the publication refers to a non-existing company by having added the suffice “(Pty) Ltd” to the name of the First Respondent, the publication is both erroneous and legally of no consequence.
- 6.9 That takes care of the alleged confusion regarding “Agency for Food Safety (Pty) Ltd” as opposed to the Fifth Respondent as the entity designated by the Minister.

- 6.10 What about the alleged confusion between the Third Respondent, Food Safety Agency (Pty) Ltd and the Fifth Respondent? As set out in correspondence exchanged prior to the launch of the application, the Fifth Respondent is the trading name of the Third Respondent. Not only has this been set out and confirmed extensively by the said Respondents, but the Minister's deponent stated that this fact had been made known even during presentations made to the Minister prior to the designation in question having been made.
- 6.11 On a conspectus of all the facts, it is clear that the Minister has designated the Third Respondent by its trading name as the relevant assignee.
- 6.12 I shall deal with the involvement of the Fourth Respondent hereinlater.
- 6.13 Apart from these confusions of identities (which are more apparent than real) the actual designation itself is not sought to be reviewed. The relief claimed is aimed at the substance or content of the actual designation.

[7] What powers have been assigned?

- 7.1 From the statutory framework set out earlier it is clear that there are three broad categories of products: those locally produced, those imported and those exported. The sale of both the locally produced and the imported products are dealt with in sections 3 and 4A. These were the two sections expressly referred to in the designation by the Minister quoted in paragraph 4.1 above.
- 7.2 The powers in respect of products to be exported, catered for in section 4, were not assigned.

- 7.3 As already referred to in respect of the relief claimed by the Applicants, they (in their amended notice of motion) seek that it be declared that sections 3(1A) (a); 3(1A) (b)(ii), 3A and 7 and 8 were not assigned by the Minister. A large foundation of their attack in this regard is the fact that these sections and sub-sections were not expressly listed in the Minister's designation but only contained in the Executive Officer's publication of the notice referred to in paragraph 4.2 above.
- 7.4 There was little attack on the manner in which the assignee had performed its duties (albeit with the help of the Fourth Respondent as more fully dealt with in paragraph [8] hereunder). It had apparently performed inspection of eggs and poultry meat, including the packaging and labelling thereof and, to all intents and purposes, sought to ensure that the said products complied with the prescribed standards. The Applicants' principal complaints are directed at the fact that they were, after various inspections, required to pay fees which they claim were determined arbitrarily and capriciously by a person or persons not entitled to do so and moreover "illegally" on the basis of invoices issued by the Fourth Respondent.
- 7.5 As already alluded to earlier, it therefore became clear that the Applicants do not seek to have the Third Respondent's actual designation as assignee set aside, what the "review" is actually about is the power to determine and levy fees. This, the Third, Fourth and Fifth Respondents claim, was prompted by the fact that some of the members of the First Applicant had labelled their barn eggs as free range eggs and, when they were "caught out" by inspectors of the assignee, they failed to obtain a dispensation (exemption) from the officials of the Minister. The First Applicant then closed down a training facility which it had previously provided for use

of the assignee's inspectors. Similarly, so the allegations continued, the Third Applicant started refusing inspectors access to its products when they were found to be of lesser standard than required. I need not decide the exact motive of each of the Applicants in having launched their application, but need only decide whether they have legitimate claims to the relief claimed.

7.6 The Applicants argue that any delegation of power must be restrictively interpreted and quoted some authority in support of this proposition (such as Kosiyamhura v Minister of Home Affairs 1991 (1) SA 643 WLD, Lucky Horseshoe v Minister of Mineral Affairs 1992 (3) SA 838(A) and Hershel Zetler N.O & Others v Minister of Transport and Public Works [2011] ZAWCH 200).

7.7 In interpreting both the document containing the designation by the Minister and the statutory provisions referred to therein themselves, one is reminded of the principles of such interpretation as outlined in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) as follows

*"[18]... 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. Whatever the nature of the documents, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and*

*the material known to those responsible for its production. Where more than one meaning is possible each possible must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.”*

7.8 To this can be added the following principles set out in Cool Ideas 1186 CC v Hubbard & another 2014 (4) SA 474 (CC) (at para [28]):

*“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:*

- 1. that statutory provisions should always be interpreted purposively;*
- 2. the relevant statutory provision must be properly contextualized; and*
- 3. all statutes must be construed consistently with the Constitution, that is, where reasonable possibly, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach ...”. (emphasis added)*

- 7.9 So what is the purpose of Section 3(1) of the Act in the context of this case? Clearly, upon a reading thereof, to prohibit the sale of poultry meat and eggs unless it is sold according to the prescribed class or grade, the prescribed quality standards and accordingly packaged and labelled, as determined by the Minister.
- 7.10 How does one determine whether a product in question complies with the Minister's determinations? The answer is in Section 3A. This section provides for numerous ways in which products can be accessed and assessed in order to determine compliance with the determined standards of quality, labelling and packaging. It expressly states that "*in the case of control*" for purposes of all three categories of products mentioned earlier (that is locally produced, exported or imported) the executive officer or the assignee may enter into any premise where products are kept, produced or sold, open any container in which such products are kept, inspect or test the products in question, including taking samples thereof and classify, grade, pack or mark "*any quantity of a product in accordance with prescribed requirements*".
- 7.11 Sections 3(1) and 4A cannot logically be severed from section 3A, or to put it differently, control over the compliance of products with the requirements determined in sections 3(1) and 4A can only take place by way of the powers created by section 3A.
- 7.12 It has nowhere been suggested by any party that, what the Minister sought to delegate in the present instance, was the power to determine standards and requirements of poultry meat and eggs, and not the inspection and compliance with those standards and requirements. It was clearly the

latter. The word “control” in Section 3A should therefore be interpreted to mean quality control<sup>2</sup>.

- 7.13 So, the Minister has designated the assignee to perform the functions of quality control provided for in section 3(1) and by necessary implication and in order to perform those functions, the rights and powers of inspection provided for in section 3A. The same applies to the designation in terms of section 4A relating to imported products. Had there not been such a designation, the executive officer would have had to perform these functions. This is the only “sensible meaning” to be attributed to the wording of the designation.
- 7.14 Is there a fee payable for performance of these functions and, if so, how is it determined? The answer to the first part of the question lies in section 3(1A)(a) which provides that fees may be charged in respect of the powers exercised and duties performed by the executive officer or the assignee, as the case may be to ensure compliance with section 3(1).
- 7.15 Who shall be liable for these fees? Section 3A(4) provides that “*in the case of action under subsection 1(b), (c), (d) or (e)*” (i.e. classification, grading, packing, marking, inspection or sampling), “*the owner of the product in question shall pay these fees*”. In the present matter, that would be the Applicants.
- 7.16 How are these fees to be determined? The answer is in section 3(1A)(b): if the functions are performed by the executive officer, the fees shall be

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<sup>2</sup> Quality control is defined in the Shorter Oxford English Dictionary to mean “the maintenance of the desired quality in a manufactured product, especially by comparison of a sample of the output with the specification”

the “*prescribed*” fees and if the functions are performed by an assignee, “*the fee determined by such assignee*”.

7.17 In terms of section 15(1)(g) the “*Minister may make regulations regarding the inspection fees that have been determined by (an) assignee*”. In the present instance, no such regulations have been made although the fees determined by the assignee, after a consultative process with the inducting has been followed, had been published. The Applicants attack the fees themselves on two grounds: firstly they argue that the assignee did not have the power to determine or levy fees and secondly they attack the determination thereof as having been done arbitrarily and capriciously.

7.18 As already illustrated above, the incorporation of section 3(1A) and 3A into the designation of the powers of quality control is the only sensible interpretation of the designation itself: the assignee has been designated to exercise quality control over eggs and poultry meat produced in or imported into the Republic, for which purpose it may perform all the functions ancillary to the inspection and assessment of such products and for which it may levy fees as determined by it. The determination of the fees were calculated on budgeted costs and thereafter arrived at after a consultative process with the industry. The determination was clearly not arbitrary nor capricious. Pursuant to this, the Minister did not see any need for further regulation, which I find, on a wording of the Act, not to be a prerequisite. There is no limitation imposed in Section 3(1A)(b)(ii) on the determination by the assignee. The sub-section’s wording also, clearly intentionally, differs from that of section 3(1A)(b)(i) where the fees to be levied by the executive officer has to be prescribed. This is couched in the imperative form whilst the wording in section 15(1)(g)



relating to regulation of fees in respect of an assignee by the Minister is in a purely permissible form without any indication of such regulation being a prerequisite.

[8] This brings me to the invoices issued by AFSQ:

8.1 As explained earlier, AFSQ is a separate legal entity and is not the assignee. In terms of the statutory provisions set out above, AFSQ has no powers of determining the relevant fees nor of raising or collecting them.

8.2 At best, AFSQ can act as collecting or administrative agent of the assignee. But this is not what has factually taken place. AFSQ has collected the fees (determined by the Third Respondent trading as the Fifth Respondent as assignee) by issuing VAT invoices in its own name.

8.3 The explanation given by the assignee for this practice has been stated by its deponent as follows:

*“During the planning of the systems and administration of the Third Respondent’s obligations and duties in terms of the designation, it became apparent that there was a requirement that comprehensive accounting of all the activities would have to take place. The Third Respondent was also involved in the inspection duties of the red meat industry in terms of a different designation. The concerns raised were conveyed to the First and Second Respondents’ representatives. The solution proposed was that a subsidiary company be utilized to separate the activities for the poultry industry and those of the red meat industry. This was approved by the representatives of the First and Second Respondents. This formed the basis of the presentation to the role players in the poultry and egg industry. In each of the meetings with the role players and*

*representatives of the First and Second Respondents, this was explained. This is clear from the slide presentations attached to the First and Second Respondent's answering affidavit. AFSQ was the subsidiary company".*

- 8.4 The annexures to the First and Second Respondents' answering affidavits indeed confirm the holding of various workshops and meetings with various role players in the industry, representing producers, co-operative societies, marketers and wholesale and retail shops. The issue of the discussion of fees also corroborate the assignee's version.
- 8.5 As far as the slide presentations go, however, the Fifth Respondent only features insofar as it is indicated that AFSQ is its subsidiary (in fact it is a subsidiary of the Third Respondent). For the rest, the whole slide show, all aspects of training of inspectors, independence from Government, inspection and control only feature AFSQ. In fact, the presentations are all headed as "AFSQ Industry Information Workshop" and similar designations. The workshops were attended (and apparently run) by AFSQ personnel. It appears from the answering affidavits that all inspections and aspects of control were, in fact, conducted by AFSQ. All the correspondence with the Department, all inspection reports and all invoices were done on letterheads and documentation referring only to AFSQ. To all intents and purposes, AFSQ was acting as the assignee.
- 8.6 No valid objection has been advanced against the Third Respondent contracting contractors (or sub-contractors) to perform its functions of inspection and assessment, but that can only be while such contractors act as agents of the Third Respondent. There is no provision in the Act permitting the designated assignee to sub-delegate (or sub-designate, to

use the wording of the Act) its obligations and duties to another legal entity. Such sub-delegation would run contrary to the common law principle of *delegatus delegare non protest* (he who has been delegated cannot again delegate). This is an established principle in our law. See eg. Attorney General OFS v Cyril Anderson Investments (Pty) Ltd 1965 (4) SA 628 (A) at 639 C –D.

- 8.7 AFSQ cannot therefore act as assignee despite the prior disclosure of its involvement to the Minister. Insofar as it performs the Third Respondent's functions, it can only do so in the name of the Third Respondent and not in its own name. AFSQ is a separate corporate and legal entity. Although it is a subsidiary of the Third Respondent, it cannot ignore the separate corporate identity of the designated assignee and issue VAT invoices for the recovery of the Third Respondent's fees in the name of AFSQ. Counsel for the relevant Respondents could also not furnish satisfactory answers as to, for example, the VAT conundrum which would ensue when AFSQ issues a VAT invoice, collects VAT on fees due to the Third Respondent but would be entitled to offset its own VAT on expenses against it and so on. It must follow that the VAT invoices issued by AFSQ in its own name for the recovery of the Third Respondent's fees as assignee are, in the words of the Applicants, "unlawful". This does not, however, preclude the Third Respondent from the issuing of fresh invoices for its fees, even if the inspections had been done by its subsidiary as its contractor or agent. Nor does it notionally prevent the Minister from expressly providing for such "sub-designation" or from issuing a fresh designation to AFSQ.

[9] Conclusions in respect of the relief claimed, dealt with in the sequence set out in the Applicants' amended notice of motion:

### 9.1 Condonation for the late PAJA review:

Save for all the declaratory relief the Applicants seek, the only true review of an administrative act pertains to the determination of the fees by the assignee. These were already published on 19 May 2017 in Government Gazette No 40847 and the Applicants' products had been inspected, assessed and the inspections invoiced from that date in accordance with that fee structure. The Applicants' application was launched only on 19 March 2018, that is way beyond the 180 day period mentioned in PAJA. The Applicants allege that they only became aware of the "unlawful actions and illegalities and the impact thereof on 27 February 2018". Factually, insofar as the issues of fees and fee determination are concerned, this contention is simply unfounded. Furthermore, the basis on which the Applicants sought condonation was based on the alleged "confusion" as to the identity of the designated assignee and has nothing to do with the determination of fees. As already indicated above, the "confusion" was not of real substance. There are no "*interests of justice (which) dictate an extension (of time) in terms of section 9 of PAJA*" as described in Opposition to Urban Tolling Alliance v SANRAL [2013] 4 All SA 639 (SCA) and Van Wyk v Unitas Hospital and Others 2008 (2) SA 472 (CC). The application for condonation must therefore fail. The Applicants' alternative argument, namely that condonation is not needed as they are entitled to proceed with a "legality challenge" which embodies no time period is also flawed: once it has been established that the action sought to be reviewed constitute administrative action, as in this case, then the matter is to be dealt with under PAJA. It is only when PAJA is not been applicable, that litigants and a court are entitled to look at legality challenges and other permissible grounds of review lying outside PAJA. See: Minister of Defence and Another v Xulu 2018 (6) SA 460 (SCA).

- 9.2 The claim for a declaratory order that the Minister had not assigned the powers “set forth” in sections 3(1A)(a) and (b) (ii), 3A, 4A, and 7 and 8 of the Act has already been dealt with above and must similarly fail.
- 9.3 The claim for the review and setting aside of the “decision” by the Executive Officer to publish a different designation than that of the Minister must fail on three grounds: 1) the “decision” to publish a decision taken by the Minister for notification purpose can hardly constitute a reviewable administrative act 2) no further “decision” had been taken by the Executive Officer in the publication and 3) insofar as the publication refers to other sections of the Act than those contained in the Minister’s designation, I have already found that the powers and obligations mentioned in those sections had in any event been included in the Minister’s designation.
- 9.4 The review and setting aside of the determination of fees: even if a PAJA review were to be contemplated in this respect (irrespective of the unsuccessful condonation application) the Respondents all object to the fact that no internal remedies have been exhausted in this regard. Section 7(2) of PAJA provides that no Court shall review an administrative action unless an internal remedy provided for in law has been exhausted (save in the case of exemption from this requirement in exceptional circumstances). Section 10 of the Act provides that “*any person whose interests are affected by any decision or direction of ... an assignee under this Act, may appeal such decision to the Director-General*”. There was no such appeal against the assignees’ determination of its fees and no exceptional circumstances have been shown to exist. Furthermore as already indicated, the public participation process with the industry role players prior to the determination of the fee by the assignee, indicate that the fee determination was not arbitrarily or capriciously made. The last argument, namely that

the fees only become recoverable upon regulation thereof by the Minister and, prior to that, is "illegal", is not supported by the wording of the Act. The relief claimed can therefore, on multiple grounds, not be granted.

9.5 The only claim which appears to have merit, is that the invoices issued by the Fourth Respondent should be set aside. As already stated, this does not have the consequence that the fees mentioned therein fall away and cannot be raised and recovered by way of fresh invoices issued by the Third Respondent.

[10] Costs

- 10.1 It is clear that the Applicants have not been substantially successful in their application. At best, they have succeeded with the correction of the identity of the fee invoicing assignee. The Fourth Respondent should therefore not be entitled to any costs order in its favour.
- 10.2 The Third and Fifth Respondents contend that the Applicants have approached the court on a dishonest basis in not having disclosed their participation in the workshops which preceded the commencement of the assignee's duties. They also doubt the Applicants' bona fides and claim cost on a punitive scale.
- 10.3 The Minister and the Executive Officer similarly claims that the application should be discussed with costs on a punitive scale.
- 10.4 As already stated, I have not made a determination on the real motive behind the application on the basis as suggested by the Third and Fifth Respondents. The fact that a party may have attended public participation workshops would not preclude such a party from raising legality issues at a later stage. The issue of an alleged untruthful confusion of identity is, to

my mind, having regard to the facts of the case and in the exercise of my discretion, not sufficient to justify a costs order on the scale as between attorney and client.

10.5 Save for the above aspects, costs should otherwise follow the event.

[11] Order:

1. Save for the fact that the invoices issued by the Fourth Respondent to the First Applicant and its members listed in annexure NoM1 and to the Second to Fourth Applicants are hereby set aside, the application is dismissed.
2. The Applicants are, jointly and severally, the one to pay the others to be absolved, ordered to pay the costs of the First, Second, Third and Fifth Respondents, such costs to include the costs of two counsel where employed, as well as previously reserved costs.
3. The Fourth Respondent is to pay its own costs.



N DAVIS  
Judge of the High Court  
Gauteng Division, Pretoria

Date of Hearing: 18 November 2019

Judgment delivered: 6 March 2020

APPEARANCES:

For the Applicants:

Attorney for Applicants:

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For the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:

Attorney for Respondents:

Adv. K D Mogano  
The State Attorney, Pretoria

For the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents:

Attorney for Respondents:

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