IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 45144/2017

DELETE WHICHEVER IS NOT APPLICABLE

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

28/02/2020
DATE

SIGNATURE

In the matter between:

Bertie Van Zyl (EDMS) BEPERK (T/A ZZ2)	First Applicant
Tomato Producers' Organisation	Second Applicant
Noordelike Uie Komitee	Third Applicant
Fresh Produce Importers' Association NPC	Fourth Applicant

and

The Minister of Agriculture Forestry and Fisheries	First Respondent
Production Control for Agriculture	Second Respondent
Leaf Services (Pty) Ltd Nejamogul Technologies	Third Respondent

And Agric Services	Fourth Respondent
Agency for Food Safety (Pty) Ltd	Fifth Respondent
Impumelelo Agribusiness Solutions (Pty) Ltd	Sixth Respondent
Perishable Products Export Control Board	Seventh Respondent
South African Meat Industry Company	Eighth Respondent

JUDGMENT

Baqwa J

Introduction

1 In this matter the applicants seek an order declaring Section 3(1A)(b)(ii) read with Section 3A(4) of the *Agricultural Product Standards Act* 119 of 1990 ("The Act") to be not in accordance with the rule of law and/or Section 195(3) of the Constitution and/or that it permits the arbitrary deprivation of property contrary to the provisions of Section 25(1) of the Constitution and to be unconstitutional and invalid.

2 The applicants seek a declaration of invalidity to be suspended for a period of 18 months to enable the first respondent and Parliament to enact the required changes to legislative provisions which have been challenged, in order to render them constitutionally valid.

3 The applicants complied with the provisions of Rule 16A as this application constitutes a constitutional challenge and they filed a section 16A notice.

4 The applicants also seek the review and setting aside of the second respondent's determination of its inspection fees in terms of Section 3(1A)(b)(ii) of the Act in notice 1 of 2017 published in Government Gazette 40537 dated 6 January 2017.

5 In their notice of motion, the applicants further seek the review and setting aside of the first respondent's appointment of the second respondent as assignee but the applicants no longer persist with seeking of such relief. Similarly, a challenge which sought to rely on Section 217(1) of the Constitution has also been abandoned and replaced by a reliance on Section 195 of the Constitution.

The Facts

6 The second respondent was appointed as assignee by first respondent in terms of Section 2(3)(a) of the Act and the third to the sixth respondents were similarly appointed. The third to the eighth respondents were cited only as far as they might have an interest in the case and without any relief being sought against them.

The Law

7 The purpose of the Act is to control the sale and export of certain agricultural products, the sale of certain imported agricultural products and other related products.

8 In terms of Section 2(3) the Minister may appoint assignees as follows:

> *"(a) The Minister may for the purposes of the application of this Act or certain provisions thereof, with regard to a particular product, designate any person undertaking, body, institution, association or board having particular*

knowledge in respect of the product concerned, as an assignee in respect of that product.

(b) An assignee thus designated shall-

(i) unless expressly provided otherwise and subject to the directions of the executive officer, exercise the powers and perform the duties that are conferred upon or assigned to the executive officer by or under this Act, with regard to the product referred to in paragraph (a);

(ii) in the case of a juristic person, notwithstanding anything to the contrary contained in any other law or in the absence of any express provision to that effect, be competent to exercise the powers and perform the duties referred to in subparagraph (i); and

(iii) unless the Minister in a particular case otherwise directs, have no recourse against the State in respect of any expenses incurred in connection with the exercising of such powers or the performance of such duties."

9 In terms of Section 3(1A) assignees are empowered to determine and charge fees in respect of the powers exercised and duties performed in terms of Section 2 (supra). Section 3(1A) provides:

"(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 fee shall be payable; and

(ii) the assignee, the fee determined by such assignee shall be payable."

10 In terms of Section 3A(1)(b)(c)(d) and (e) an assignee may:

"classify grade, pack or market any quantity of a product in accordance with the prescribed requirements..."; "inspect or cause to be tested any quantity of a product"; or "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."

11 Section 3A(4) states:

"In the case of action under subsection (l) (b), (c), (d) or (e) by the relevant person referred to in subsection (l), the o\vner 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."

Background

12 The first respondent and second respondent published regulations in relation to the quality, packing and marketing of various fruits and vegetable between 2011 and 2016 which were intended for sale in the Republic.

13 The first respondent appointed the second and third respondents as assignees on 17 June 2016 in terms of the Act. The second respondent was appointed with regard to *inter alia,* tomatoes, deciduous fruits, potatoes, avocados and onions. This was published in *Government Gazette* 40075 of 17 June 2016.

14 Subsequently, on 14 October 2016 the first respondent's Executive Officer and the second respondent's Chief Executive Officer invited comments on proposed inspection fees, the relevant notice was published in *Government Gazette* 40346 dated 14 October 2016.

15 The first and second applicants commented on the proposed inspection fees and these comments were responded to by the first respondent's Executive Officer. After an exchange of correspondence, a meeting was held at the Imbizo Hall on 1 November 2016 at the first respondent's offices. The participants were the first respondent's employees including the Executive Officer, Mr B Makhafola and representatives from the deciduous fruit producers led by Mr Anton Rabe of Hortgro (Pty) Ltd.

16 In the meeting there was an exchange of views on various matters, such as the consultation process, the proposed fees, the nature of the service rendered and the legislation in terms of which the fees were charged.

17 On 24 November 2016 the second respondent published revised inspection fees in a Government Gazette dated 24 November 2016.

18 The industry representatives were not happy with the revised fee structure and they expressed their unhappiness in a letter from Hortgro's Attorneys in which they expressed their points of dissatisfaction. They were *inter alia* of the view that the first respondent had appointed the second respondent without proper consultation and that the proposed inspection fees did not contain a proper explanation regarding where and when inspections would be conducted. They also averred

that there was no open and transparent explanation regarding the calculation of the proposed inspection fee.

19 A further complainant regarding the proposed fee was that there was no explanation why the first respondent or a public entity with appropriate experience and expertise had not been assigned to perform what was essentially a public function.

20 In his response the Executive Officer stated that the designation of the second respondent was the result of a transparent, open and competitive selection process in terms of Section 2 of the Act and that the first respondent was under no obligation to consult all relevant stakeholders.

21 On 13 February 2017 the second respondent gave notice of its intention to commence inspections on specified categories of products with effect from 20 February 2017 and despite an objection thereto from Hortgro's Attorneys and on 27 February 2017 the first respondent issued an Interpretative Guideline regarding the inspection of regulated agricultural products by designated assignees in the Republic.

Determination of fees in terms of Section 3(1A)(b)(iii)

22 The applicants attack on Section 3(1A)(b)(iii) is premised on the conferral of power of the assignee to determine its own fees, allegedly without parliamentary oversight or control.

23 To contextualise the matter it therefore becomes necessary to give a brief history of process as it existed previously. There were no proper inspections regarding

the import or export of agricultural products from approximately 1997 until the system of appointment of assignees was introduced in June 2016. Potatoes and red meat were the only products that were being inspected in the local market.

24 The Department did not possess the capacity to do the inspections in terms of the Act and inspections were consequently sporadic in nature. When the system of appointing assignees was introduced it was aimed at ensuring that products sold to the public were in accordance with the prescribed class or grade and that they were packed, marked and labelled properly and that they did not contain prohibited substances.

25 The process followed by the second respondent was a notice and comment procedure during which oral representation were also made. It was only after these comments and exchanges that a further notice was published which contained the revised inspection fees.

26 It is common cause that the Executive Officer was involved in the process and that he participated not only by receiving comments and e-mails from industry representatives but also by attending and participating in meetings. For all intents and purposes therefore, it would appear that the process of price fixing took place under the supervision of the Executive Officer.

27 The procedure followed is prescribed in Section 4(1) of the *Promotion of Administrative Justice Act* 3 of 2000 (PAJA) which provides as follows:

"(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –

(a) to hold a public inquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or

(e) to follow another appropriate procedure which gives effect to section 3."

28 In the matter of ***Minister of Health v New Clicks South Africa (Pty) Ltd*** **2006 (2) SA 311 (CC)** it was held that the Minister and pricing Committee acting in terms of the *Medicines and Related Substance Act* 101 of 1965, did not have to follow a particular procedure in making the regulations other than that prescribed in Section 4(1) of PAJA.

29 The essence of the applicant's attack on the procedure followed by the first and second respondent in fixing the inspection fees is that it was arbitrary and that it was not transparent or fair. The applicants also allege that the process took place without any ministerial control. The contentions by the applicants are not supported by the process referred to above.

Determination of fees prior to Appointment

30 It is not possible to predict before an assignee is appointed in terms of the Act whether the assignee will be appointed for a region or for the country and what its service delivery will be in terms of products to be inspected, inspection points, number of inspectors required, volumes of product and tools of trade required.

31 Determination of fees prior to appointment would also render the price fixing unilateral, arbitrary and unfair in that the public participation by representatives of the industry would be circumvented.

32 Contrary to the provisions of Section 3(1A)(b)(ii) which provides that the fees payable would be determined by the assignee after it's appointment, the applicants contend that an assignee must determine its fees prior to its appointment. Evidently, if applicant's contention in this regard is accepted, the most likely outcome would be the very mischief that complainants are complaining about, namely, unfairness, arbitrariness and exclusion of industry participants in the process of fixing an appropriate inspection fee. This leads to the unavoidable conclusion that the contention by the applicants is unsustainable.

Ministerial oversight

33 The fess determined by the second respondent were not contained in the regulations which are formulated by the Minister in terms Section 15(1)(g). The second respondent's fee structure was published in a General Notice published in a Government Gazette dated 6 January 2017.

34 Section 2(1) of the Act provides:

> *"Designation of executive officer and assignees. –*
>
> *(1) The Minister shall designate an officer in the service of the department as executive officer, who shall, subject to the control and directions of the Minister, exercise the powers and perform the duties conferred upon or assigned to the executive officer by or under this Act."*

35 In terms of Section 2(3)(b)(i) of the Act an assignee exercises its powers and duties subject to the directions of the Executive Officer unless expressly provided otherwise. This section also expressly provides that an assignee exercises powers and performs duties conferred upon or assigned to the Executive Officer who acts under the control of the Minister. The Minister also has power to revoke the mandate conferred upon the assignee in terms of Section 2 of the Act.

36 The Act is thus quite explicit regarding the ambit of an assignee's powers. It can therefore not be correct as suggested by the applicants that the power exercised by assignees is unfettered or unqualified. The fact is, an assignee exercises delegated powers in terms of the Act. *Cora Hoexter* in *Administrative Law in South Africa* page 262 correctly summarises the position when she says:

> *"Delegation of Power by a Legislature –*
>
> *When original legislators – parliament, provincial legislatures and local authorities confer authority on administrators, they are said to delegate power. While the assignment of power is usually both complete and irrevocable, delegation connotes a transfer of power that is revocable and less complete."*

As *Kriegler J* put it in Executive Council, ***Western Cape Legislature v President of the Republic of South Africa*** **1995 (4) SA 877 CC** para 173 *"delegation postulates revocable transmissions of subsidiary authority."* See also ***Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*** ***2011 (4) SA 113 (CC)***.

37 Besides Ministerial oversight over the assignees there is also a broader inter-ministerial accountability in that whilst the Minister of Agriculture has authority to make regulations regarding the inspection fees determined by an assignee, this has to be done with the concurrence of the Minister of Finance.

38 It would therefore seem that adequate controls were built into the Act to ensure that the determination of fees is subject to the control of the Minister of Agriculture and that any contention to the contrary is without substance.

Constitutional Challenge

39 The applicants claim that fees payable to an assignee amount to deprivation of property. The claim is based on Section 25 of the Constitution which provides as follows:

> *"25(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."*

They rely, as authority, on the ***First National Bank of SA t/a Westbank v Commissioner, South African Revenue Services*** **2002 (4) SA 768 (CC)** para 100 in which it was held:

> *"The conclusion reached on the meaning of arbitary in s 25*
>
> *[100] Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:*
>
> *(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.*
>
> *(b) A complexity of relationships has to be considered.*
>
> *(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.*
>
> *(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*
>
> *(e) ...*
>
> *(f) ...*

(g) *Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.*

(h) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25."*

40 As alluded to above fees may only be charged after inspections have been conducted. The essence of the applicants' contention seems to be that the function of inspection is a function that ought to be conducted by the first respondent and that the producer or importer of agricultural products ought not to be burdened with an assignee's costs. They contend further that assignees are not subject to the control of parliament or the courts by way of oversight regarding the manner they determine fees.

41 The applicants seem to be of the view that the inspection service should be rendered by the first respondent at no charge. The fact that there was virtually no inspection service between 1997 and 2016 has already been discussed earlier. With the need for such a service having become imperative for not only health, but also for domestic and international trade purposes, the Act sought to introduce the

necessary regulations, hence, the provisions of Section 3(1A)(a) and Section 3A(4). The Department is obliged to render the inspection service and upon realisation that the capacity to do so was limited, legislation was enacted to enable the Department to increase its capacity by means of delegated authority.

42 Through the Act and the regulations promulgated thereunder, the Minister is empowered to regulate and control the sale of agricultural products. The fact that the assignee determines its fees in collaboration with the Executive Officer, has already been discussed above and it is therefore incorrect to contend as the respondents do, that assignees have an unfettered discretion to determine their fees. Such determination is effected through a transparent and fair administrative procedure as provided for in PAJA. The fees are payable whether the inspection is conducted by the Executive Officer or by an assignee, there are costs to be met. The applicants' claim therefore is illogical and not supported by the factual situation especially when considering that while they seek to strike down section 3(1A)(b)(ii) of the Act, they do not seek the same relief in respect of Section 3(1A)(b)(i) which contains provisions identical to the fees charged by the Executive Officer.

43 The contention that the courts are limited regarding oversight over an assignee's fees is also lacking in substance in that the applicants are fully entitled to bring a review application in that regard in terms of PAJA.

44 The only conclusion that one can come to therefore is that the contention by the applicants that there is inadequate control by both parliament and by the courts over the issue of assignee fees or alternatively that the charging of such fees amounts to arbitrary deprivation is not sustainable.

Section 195(1) of the Constitution

45 The applicants' constitutional challenge is summarised in their notice of motion in the following manner

> *"Section 3(1)(A)(b)(ii) read with Section 3A(4) of the Act is not in accordance with the rule of law and/or permits the arbitrary deprivation of property contrary to the provisions of Section 25(1) of the Constitution."*

In addition, the applicants contend that Section 3(1A)(b)(ii) is not consistent with the provisions of section 195(1) of the Constitution which provides that public administration must be accountable.

46 The prism within which a constitutional challenge to legislation ought to be viewed was aptly as set out in ***Hyundai Motor Distributors (Pty) Ltd v Smit*** **2001 (1) SA 545 CC** para 21 when Langa DP, held that:

> *"The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution."*

47 Whilst the applicants argue that Section 3(1A)(b)(ii) offends against the provisions of Section 195(1) and 25 of the Constitution, they fail to identify which subsection of Section 195 it is incompatible with.

48 Section 195(1) directs organs of state to operate in a manner which is transparent, accountable and fair. As indicated above, the processes followed by the second respondent, for all intents and proposes appeared to comply with the requisites of fairness, transparency and accountability.

49 Challenging legislation through reliance on Section 195(1) has not been encouraged by the apex court. In ***Chirwa v Transnet*** **2008 (3) BCLR 251 CC** Skweyiya J held as follows:

> *"Even if the applicant was permitted to bypass the specialised framework of the LRA in the attempt to challenge her dismissal, the reliance on section 195 is misplaced. This is illustrated by the reasoning in Institute for Democracy in South Africa and Others v African National Congress and Others (IDASA). The Court in that case relied on the decision in* ***Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others****, where it was held:*
>
> *'The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of ch 2 which contains the Bill of Rights.'"*

Consequently, the court held that—

> *"...the same considerations apply to the other sections of the Constitution . . . [including] 195(1). These sections all have reference to government and the*

duties of government, inter alia, to be accountable and transparent. . .. In any event, these sections do not confer upon the applicants any justiciable rights that they can exercise or protect by means of access to the respondents' donations records. The language and syntax of these provisions are not couched in the form of rights, especially when compared with the clear provisions of ch 2. Reliance upon the sections in question for purposes of demonstrating a right is therefore inapposite. Therefore, although section 195 of the Constitution provides valuable interpretive assistance it does not found a right to bring an action."

50 What needs to be understood is that the respondent can only be challenged in regard to the manner in which they implemented the provisions of Section 3(1A)(b)(ii), where such implementation did not comply with values set out in Section195. Even if the respondents did not uphold those values that would not imply that Section 3(1A) is unconstitutional.

THE RULE OF LAW

51 The essence of the rule of law is that all administrative authorities must exercise their powers within the confines of the law.

52 As discussed earlier, the Minister was acting properly within his powers in terms of the Act to delegate such authority to the assignees. Thereafter, the assignees must act within the parameters of the authority as delegated in terms of the Act but subject to ministerial control.

53 The purpose of the Act is to regulate the export, import and sale of agricultural products. Such regulation necessitates the inspection of such products before they are released into the market. The inspection cannot be done by the first

respondent only as it does not possess the necessary capacity. Upon delegation of its authority to the assignees, the latter have to conduct inspection services, subject to payment of fees.

54 There is nothing unlawful in the actions of the assignees when they charge fees in exchange for their services. Such unlawfulness cannot be created by bringing the assignee's actions within the ambit of arbitrariness in terms of Section 25 of the Constitution as the payment is due for services rendered. In the event of any arbitrariness or unfairness in fixing the fees by the assignees, the applicants are at liberty to challenge such fees by way of review proceedings.

55 In the present case I do not find that applicants have alleged sufficient facts to justify an illegality on the part of the assignees.

INTERNAL REMEDY

56 The respondents contend that the imposition of inspection fees by assignees is a decision which is appealable in terms of Section 10 of the Act and that the applicants ought to be precluded in terms of Section 7(2)(a) of PAJA from pursuing a review until an internal appeal has been exhausted.

57 On the other hand, the applicants submit that Section 10 does not offer an internal remedy as contemplated in PAJA.

58 Section 7(2)(a) of PAJA provides:

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

59 Section 10 of the Act provides for appeals to the Director – General, as follows:

> *"(1) 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."*

60 The English text of Section 10 provides:

> *"(1) Any person whose interests are affected by any decision or direction…and assignee…may appeal such decision or direction."*

The Afrikaans signed text refers to *"besslissing of lasgewing"*".

61 The applicants submit that the word decision is ambiguous in that it could refer to a decision or dispute or adjudication of some issue. On the other hand, it could refer to a decision to do something or making up one's mind. They go on to submit that on either approach the word "decision" ought to be interpreted as having a more restrictive or narrow meaning of "besslissing" in the Afrikaans text of adjudicating a dispute.

62 *The Verklarende Handwoordeboek Van Die Afrikaans Taal* defines "beslissing" as

> *"(a) uitspraak, eindoordeel;*
>
> *(b) handeling van te beslis; besluit…"*

63 This implies that the Afrikaans word "beslissing" is equally capable of two meanings one of which would be to "make up one's mind".

64 I have considered the conflicting views regarding the interpretation of the word "decision" and I am not persuaded that the decision of the second respondent to determine and implement the inspection fees ought to be regarded as an adjudication of a dispute.

65 In deciding what appears to be an interpretational impasse I consider it preferable to adopt the approach which was suggested in ***Janse Van Rensburg v Minister of Defence 2000 (3) SA 54 (SCA)*** **at 17** *"a court should, where possible, adopt an interpretation of which both versions are capable"*. I accept the submission by the respondents that the second respondent's decision is the same as a "beslissing" contemplated in the Afrikaans text, which brings it within the purview of Section 10.

66 This approach is endorsed in the matter of ***Natal Joint Municipal Pension Fund v Endumeni Pension Fund*** **2012 (4) SA 593 (SCA)** at 603 in para [18} and [19] where it was held:

> *"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."*

The interpretation suggested by the applicants would not be sensible or bussinesslike.

67 I do not accept the submission that an internal appeal in terms of Section 10 would lead to any absurdity as suggested by the applicants. It is common cause that the applicants had participated in the process which was adopted by the second respondent to determine its fees in terms of PAJA. Evidently, the applicants were not satisfied with the outcome thereof. They are an affected party and I do not agree as suggested by them that the mere determination of its fees by the second respondent does not and did not per se affect anybody's interests. If the applicants' interests were not affected, the applicant would not have *locus standi* to bring a review application. In my view, the appropriate action for the applicants is to follow the Section 10 route, if they are not happy with the fees set by the second respondent.

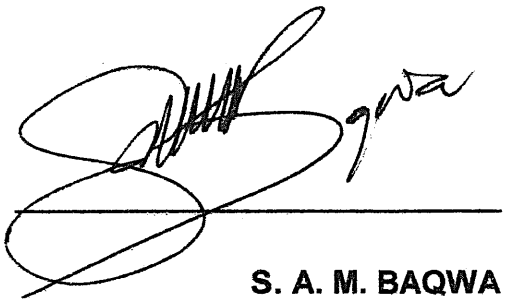
CONCLUSION.

68 In the circumstances, having read the documents filed and having heard and considered the submissions by Counsel, I make the following order:

THE ORDER

68.1 The application is dismissed.

68.2 Costs (inclusive of the costs of 2 (two) Counsel in respect of the second, seventh and eighth respondents to be paid by the applicants jointly and severally, the one to pay the other to be absolved.



S. A. M. BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on:	07 to 11 October 2019
Judgment delivered:	28 February 2020
Appearances:	
For the Applicant	Adv. M Osborne
Instructed by:	Bernhard Van Der Hoven Attorneys
For the First Respondent:	Adv. C.E Puckrin SC
	Adv. H.C Janse van Rensburg
Instructed by:	The State Attorneys
For the Second Respondent:	Adv. H Epstein SC
	Adv. M Mostert
Instructed by:	Fairbridges Wertheim Becker Attorneys