

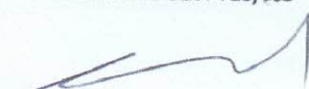
**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 82044/2018

Heard on: 26 January 2021

Date of judgment: 22 February 2021

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/ ~~NO~~	
(2) OF INTEREST TO OTHERS JUDGES: YES/ ~~NO~~	
(3) REVISED	
22/2/21	
DATE	SIGNATURE

In the application between:

WOODLANDS DAIRY PROPRIETARY LIMITED

First Applicant

MILK SOUTH AFRICA NPC

Second Applicant

and

**THE MINISTER OF AGRICULTURE, FORESTRY
AND FISHERIES IN THE GOVERNMENT
OF THE REPUBLIC OF SOUTH AFRICA**

First Respondent

BILLY MALOSE MAKHAFOLA N.O.

Second Respondent

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] First Applicant (“Woodlands”) is the third largest producer of milk and long-life dairy products in South Africa. Second applicant (“Milk SA”) is a non-profit company which was established by the dairy industry to deal with issues of common interest to role players within the industry.

[2] First respondent is the Minister of Agriculture, Forestry and Fisheries (“the Minister”). One of the Department of Agriculture Forestry and Fisheries’ functions is to monitor and exercise control over various agricultural sectors, of which the dairy industry is one. Second respondent (“the Executive Officer”) is the Executive Officer appointed by the Minister in terms of section 2 (1) of the Agricultural Product Standards Act, Act 119 of 1990 (“the APS Act”).

[3] Third respondent (“Nejahmogul”) is a for profit company designated by the Minister on 9 December 2016 as assignee in terms of section 2 (3) (a) of the APS Act. It was so designated for the application of sections 3 (1) and 4 A of the APS Act, and specifically for the inspection of dairy and related products.

[4] Applicants seek the following relief:

[4.1] That section 3 (1A) (b) (ii) of the APS Act be declared to be unconstitutional in terms of section 172 (1) of the Constitution;

[4.2] That the Minister be directed to submit an amendment to the APS Act to Parliament whereby any fees determined by an assignee in terms of section 3 (1A) (b) (ii) of the APS Act be made subject to regulatory control over, and approval by the Minister and/or the Executive Officer, prior to the imposition of such fees upon the owner of any agricultural products;

[4.3] That the decision of the Minister on 13 February 2015, to invite potential service providers to apply for designation as assignees in respect of dairy and related products, under section 2 (3) of the APS Act, be set aside;

[4.4] That the notice published by the Minister in the Government Gazette No 40140 dated 15 July 2016, which invited prospective assignees to express their interest to be designated as an assignee be declared unlawful and of no force and effect;

[4.5] That the decision by the Minister on 13 January 2017 to designate Nejahmogul as assignee for the purposes of sections 3 (1) (a) and (b), 3A (1), 4 A 1 (1) (a), 7 and 8 of the APS Act be set aside;

[4.6] That Nejahmogul's decision to determine its fees, and the publication of the fees in Notice 267 of 2018, Government Gazette No. 41650 dated 25 May 2018 be set aside;

[4.7] That, pending any order in respect of the decision of the Minister to invite assignees, Nejahmogul be prohibited from charging or recovering any fees for performing any functions or duties assigned to it by the Minister;

[4.8] That the decision of the Executive Officer on 15 June 2018 not to stay the commencement by Nejahmogul of the execution of its powers and duties pending the:

[4.8.1] conclusion of the consultative process with the dairy industry;

[4.8.2] conclusion of a service level agreement between Nejahmogul and the Department of Agriculture, Forestry and Fisheries ("the Department"); and

[4.8.3] the approval by the Executive Officer of the standing operating procedure with regard to the execution of Nejahmogul's powers and responsibilities,

be set aside;

[4.9] That the decision of the Executive Officer on 15 June 2018 not to issue directions in terms of section 2 (3) (b) (i) of the APS Act, to the effect that only one routine inspection per annum per producer is required, and thereafter on a risk-based approach after assessing the compliance or non-compliance (as the case may be) by owners of dairy

products with the enforcement/compliance provisions of the APS Act and its regulations, be set aside;

[4.10] Costs.

THE AGRICULTURAL PRODUCTS STANDARDS ACT, ACT 119 OF 1990

[5] The aims of the APS Act are set out in its preamble:

“To provide for control over the sale and export of certain agricultural products, control over the sale of certain imported agricultural products, and control over other related products, and for matters connected therewith.”

[6] The APS Act empowers the Minister to designate any person, undertaking, association or board as an assignee. Section 2 of the APS Act reads as follows:

“2. 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.

(2)

- (a) *The Executive Officer may, unless expressly provided otherwise, in writing delegate or transfer to any officer under his or her control any such power or duty, or in writing authorize or direct any such officer to exercise such power or perform such duty.*
- (b) *A power exercised or duty performed by an officer other than the Executive Officer shall be deemed to have been exercised or performed by the Executive Officer: Provided that the Executive Officer may at any time amend or withdraw any decision made or order given by such other officer.*

(3)

- (a) *The Minister may, for 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 performance of such duties.*
- (c) *The chief executive official, chairman or other person in charge of such assignee who is not a natural person-*
 - (i) *shall act on behalf of that assignee in the exercise of the powers concerned and the performance of the duties concerned; and*
 - (ii) *may in writing delegate or transfer to an employee of that assignee any such power*

or duty which the assignee concerned shall or may exercise or perform by or under this Act, or in writing authorize or direct such employee to exercise such power or perform such duty.

- (d) *A power exercised or duty performed by an employee referred to in paragraph (c) (ii), shall be deemed to have been exercised or performed by the chief executive official, chairman or other person in charge, as the case may be: Provided that the chief executive official, chairman or other person in charge, as the case may be, may at any time amend or withdraw any decision made or given by such employee.”*

[7] The section at the heart of this matter is section 3 (1A) of the APS Act. Applicants contend that section 3 (1A) (b) (ii) is inconsistent with the Constitution. Section 3 (1A) reads as follows:

“(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 fee shall be payable; and*
 - (ii) the assignee, the fee determined by the assignee shall be payable”.*

THE BACKGROUND

[8] The department has, for some years, been unable to properly fulfil its regulatory functions due to a lack of capacity. The Director-General of the Department was aware of this deficiency and consequently, on 12 December 2014 he recommended to the Minister that potential service providers should be invited to apply to be designated as assignees in a number of sectors, the dairy sector being one of them.

[9] The Minister agreed, and after the first invitation was issued and withdrawn, a second invitation was published in the Government Gazette on 15 July 2016. Specifically relevant to this matter, applications were sought for the dairy and related products sector. A summary of the requirements that prospective assignees had to meet was also subsequently published. They were the following:

[9.1] The assignee was required to have an organizational structure that would enable it to maintain the capability of exercising its mandate;

[9.2] It required a sufficient number of competent, designated permanent personnel with the necessary expertise to carry out the assigned functions;

[9.3] The assignee was required to have adequate and suitable facilities and equipment for rendering the service;

[9.4] The assignee had to use prescribed methods and procedures in exercising its functions;

[9.5] The assignee was required to have and maintain sound financial administration and have an annual business plan and budget setting out the powers and duties to be exercised and performed and the expected costs thereof.

[9.6] The assignee had to comply with the requirements of the AgriBEE Sector Code;

[9.7] The assignee had to maintain a record keeping system to suit its particular circumstances and ensure the confidentiality of the clients.

[10] On 18 July 2016 an information session was held to acquaint prospective applicants with the minimum requirements determined by the Minister for appointment as assignee. Nejahmogul was incorporated on 20 July 2016, five days after the second invitation was issued, and two days after the information session was held. During August 2016 Nejahmogul replied to the invitation by delivering a lengthy application to the Department.

[11] One of the other applicants for designation was the Dairy Standard Agency (“DSA”), a non-profit company which had been established by the organized dairy industry to balance the interests of the industry and the consumer. It is funded by the producers of dairy products and it assists the department and its inspectors to identify compliant and non-compliant processors and manufacturers.

[12] On 22 September 2016 all of the applicants were shortlisted for interviews. After interviews had been conducted with the applicants, the Department held a meeting on 8 November 2016 where the applicants were assessed. On 9 December 2016, after consideration of the applications and the assessments, the Minister designated Nejahmogul as assignee for dairy and related products. The designation was published in Government Notice No. 40545 dated 13 January 2017.

[13] What followed was a months-long attempt by Nejahmogul and the dairy industry to find common ground on the manner in which Nejahmogul would fulfil its obligations and exercise its powers, more specifically regarding the cost of inspections and the testing of products. On 27 February 2017 the Executive Officer published a notice to affected stakeholders which provided a guideline to the inspection of regulated agricultural products, and which set out the assignee and the stakeholders’ respective responsibilities and obligations. Of importance is that the Executive Officer made it clear that the fees attached to the inspections would be determined by the assignee, and that it would amount to a criminal offence under section 11 of the APS Act for a stakeholder not to comply with its obligation to pay the fees.

[14] On 13 April 2017 Nejahmogul published a notice in the Government Gazette in which it listed its proposed fees, and it sought comment thereon from the industry. The industry was overwhelmingly of the view that the fees were exorbitant, and would result in serious financial harm to producers. On 3 May 2017 Milk SA proposed the establishment of a workgroup consisting of representatives of the industry, the Department and Nejahmogul, with the purpose of putting together an appropriate standard operating procedure ("SOP") according to which the assignee would fulfil its functions. Milk SA pointed out, in support of its proposal, that inspection and sampling fees should not be determined before the standard operating procedure had been finalized.

[15] The Department welcomed the proposal, and the process of appointing members of the workgroup commenced. On 9 June 2017 the Minister invited comment on draft regulations which would regulate the inspections and fees. The draft regulations included proposals which would require the assignee to submit a business plan and a budget on an annual basis. The plan and the budget would be published and, after having received comment, the assignee would be obliged to determine its fees having had regard to the comments. The draft regulations specifically required the assignee to have regard to the input of the industry in determining its fees. Unfortunately, the draft regulations did not deal with the Executive Officer's obligation, arising from section 2 (3) (b) (i) of the APS Act, to direct the assignee in the manner in which it exercised its powers or performed its duties. The draft regulations never came into operation.

[16] Milk SA, the Consumer Goods Council of SA and Nejahmogul met on 22 June 2017. At this meeting it was decided to establish a dairy task team. Two specific decisions were taken that are of importance to this matter. Firstly, it was resolved to draft a guideline document outlining the frequency of inspections. Secondly, Nejahmogul undertook to reconsider the published inspection fees, and to publish the revised fees for comment. These two issues, the frequency of inspection, and the inspection fee structure would emerge as the main points of dispute between Nejahmogul and the dairy industry. Nejahmogul wanted to conduct 12 inspections per producer per annum. The industry proposed one inspection per annum (under normal circumstances).

[17] On 25 August 2017 the task team presented the Executive Officer with a fourth version of a draft protocol on the assessment and compliance management of dairy and imitation dairy products. At this meeting the Executive Officer undertook that the inspection fees would not be published until they had been approved by the Executive Officer, and an SOP was in place. This undertaking accorded with the department's statement on 28 March 2017 in which it had said:

"Section 3 (1A) of the APS Act allows for an assignee to charge fees in respect of the powers exercised and duties performed. However, assignees must charge their fees on a cost-recovery basis and not a profit basis. Although not currently required by the APS Act, assignees will on a yearly basis publish their proposed inspection fees for public comment in the Government Gazette to ensure transparency and buy in from affected stakeholders. Once the consultation process has

been concluded, the finalized fees will be submitted to the Executive Officer for approval and again published in the Government Gazette by the assignee concerned.”

[18] On 8 September 2017 the Dairy Standard Agency circulated a draft of the protocol to its members. The task team continued to work on an SOP. Its efforts were mainly hamstrung by disagreement on the frequency of inspections, and the dearth of information in respect of the cost structure proposed by Nejahmogul. One of the stumbling blocks was that, whereas the department had assured the industry that the assignee’s cost structure would be based on a cost-recovery model, Nejahmogul was a company for profit, and it had premised its cost estimation on the principle that it was entitled to make a profit. On 19 October 2017 the task team met again. At this meeting the industry reiterated that the costs should be premised on a cost-recovery basis. Nejahmogul undertook to review its cost model, and to provide clarity on specific identified issues.

[19] On 17 November 2017 Milk SA wrote to the Executive Officer. It requested a meeting with him, and it also attached comments from various industry role-players regarding the proposed SOP. Although the draft SOP was generally acceptable to the industry, there was strong disagreement with the proposed frequency of inspections and the proposed inspection fees. More specifically, there was concern around the financial impact of the fees on smaller producers.

[20] On 22 November 2017 the Executive Officer advised Milk SA that he would not convene a meeting, and that the department would not become involved in formulating an SOP. He said that Nejahmogul could determine the frequency of inspections as it saw fit. The Executive Officer also reneged on his undertaking that the proposed fees would not be published until the department had approved an SOP. The Executive Officer's email signified the department's complete withdrawal from the process of establishing an SOP, and from the process of determining inspection fees. The Executive Officer's view was that the consultations had gone on for long enough, and that it was up to Nejahmogul to carry on as it pleased.

[21] The task team made a further effort to come up with an agreed SOP. Nejahmogul was by then clearly frustrated at consultations that had, in its words, gone on "*ad nauseam*". Nevertheless, on 14 December 2017 the task team (including Nejahmogul) met once again, and although common ground could not be reached on the inspection fees, a revised draft SOP was agreed upon. DSA presented the draft SOP to the Executive Officer on 15 December 2017. On 18 December 2017 the Executive Officer replied to the draft SOP by stating that Nejahmogul could not be prevented from implementing the provisions of the APS Act any longer. The inspections would start on 1 February 2018, regardless of whether the SOP was agreed upon or not.

[22] The Executive Officer offered to meet with DSA if necessary, and also undertook to advise DSA in advance of any possible decision to approve the SOP. The Executive Officer's response was accompanied by his comments on the draft SOP. He expressed the view that it was unnecessary to implement an

SOP before the inspections could commence. His view was that Nejahmogul could implement the APS Act without being “encumbered” by an SOP or a service level agreement. He made it clear that the industry was the “regulated”, Nejahmogul was the “regulator”, and he warned against what he regarded as overreach by the industry. The Executive Officer would furthermore not commit to publishing regulations regarding the implementation of Nejahmogul’s mandate.

[23] Following further input from the industry, the Executive Officer clarified his stance in an email of 18 January 2018. He said that section 15 (1) (g) of the APS Act allowed the Minister a discretion whether to make regulations in respect of the Executive Officer’s fees. His view was, however, that Nejahmogul was solely responsible for the determination of its own fees. Neither the Minister, nor the Executive Officer were, in the latter’s view, entitled to interfere in that process.

[24] By January 2018 Nejahmogul had agreed to reduce the inspections to six per annum. The industry, however, persisted in its demand for only one inspection per annum. Nejahmogul had also undertaken to reconsider its business plan, budget, fees and management structure, in order to reduce the cost of inspections to the industry. The revised budget was never forthcoming. However, in an unsigned letter dated 20 February 2018 Nejahmogul recorded that it required four inspections in a 12 month cycle, in order to fulfil its mandate. Applicants contend that it was clear at that stage that Nejahmogul did not have sufficient knowledge of the dairy industry, and that its approach to the determination of inspection frequency was irrational. The discussions and

correspondence between the parties continued. At issue were the same bugbears, the number of inspections to be conducted annually (the industry insisted on one inspection per annum), and the cost thereof.

[25] By May 2018 the Executive Officer had accepted that six inspections per annum were unnecessary. The Executive Officer concedes in these papers that six inspections per annum were not required, but, he says, the number of inspections is a random number, and only has to be statistically valid. I am not told why six inspections per annum were then suddenly considered to be excessive to achieve the purposes of the APS Act, when all along Nejahmogul had been proposing twelve inspections per annum with, it seems, the Executive Officer's concurrence.

[26] The parties could still not reach consensus on the outstanding issues. Nevertheless, despite the industry's objections, Nejahmogul published its fee structure in Notice 267 of 2018, in Government Gazette 41650 dated 25 May 2018. The starting date for inspections was 28 May 2018. There was no SOP in place, no service level agreement, and no agreement on the frequency of inspections.

[27] Milk SA continued to try and reach agreement with Nejahmogul and the department on the outstanding issues, and it continued with its efforts to engage with them. The Executive Officer's attitude was, however, firm. He expressed his willingness to engage with Milk SA on other issues, but in respect of the execution of Nejahmogul's powers, he was intransigent. In an email dated 15 June 2018 he said the following:

- "1. You remain the subject of the Agricultural Products Standards Act 119 of 1990 and its attendant regulations in terms of enforcement and application, and therefore, as the regulated community you are in no position to dictate as to how you should be regulated except to influence the regulatory course.*
- 2. With respect to the letter that you addressed to Nejahmogul, there is no way that DAFF can vary the frequency of inspection except to be led by the inspecting agency, Assignee, lest we are accused of conflict of interest. At any rate, except the Executive Officer: Agricultural products Standards Act and the honourable Minister, there is no official who can articulate a position authoritatively on behalf of DAFF in so far as the regulatory matters that fall within the remit of the Agricultural Product Standards Act are concerned.*
- 3. As far as I am concerned, there is no "SOP" be it in a draft or whatever form. At any rate, an SOP is subordinate to the existing legislation rather than being an authoritative document."*

[28] It is clear from the Executive Officer's various communications that he understood the protocol by which inspections were to be conducted, the frequency of inspections, and the fees charged inspections to fall completely within the remit of the assignee, and that he had no authority to exercise control over those matters. The parties were at an impasse. The industry took the view that the publication of the fees was of no force and effect, and that Nejahmogul was not entitled to commence with inspections. On the other hand, Nejahmogul

took the stance that it was going to continue with inspections, whether the industry liked it or not. The impasse resulted in this application being launched on 13 November 2018.

CONSTITUTIONALITY OF SECTION 3 (1A) (b) (ii) OF THE APS ACT

[29] I have quoted section 3 (1A) (b) (ii) of the APS Act above. It provides that an assignee may charge fees for the powers exercised and the duties performed by it. Section 3 A (4) renders the payment of the fee or amount determined by the assignee mandatory. Section 15 (1) (g) of the APS Act allows the Minister to make regulations regarding the fees that have been determined by the assignee.

[30] Applicants argue that the aforesaid provisions give the assignee the unfettered right to determine its own fees. In contrast, they say, the fees payable to the Executive Officer is subject to the Minister's approval. Therefore, there is no rational reason why the fees determined by the assignee should not be subject to some form of control. Applicants say that the Minister was aware of the shortcomings of the APS Act, and that he attempted to remedy the deficiencies by publishing the Agricultural Product Standards Act Amendment Bill for comment on 18 August 2017. The Bill provided for three key changes to the statutory position:

[30.1] An assignee would be obliged to determine its fees on a cost-recovery basis;

[30.2] The assignee would be required to produce a business plan and a budget, setting out the powers and duties to be exercised and performed, and the expected cost thereof.

[30.3] The Executive Officer would be required to invite written comment from interested parties on the business plan and the budget, whereafter he could grant his approval for a specified period.

[31] Unfortunately the Bill has been withdrawn and has not been passed into law. In the meantime, applicants say, Nejahmogul is at liberty to charge whatever it wants, without control by either the Minister or the Executive Officer. Applicants contend that other legislation, such as the Perishable Products Export Control Act, 1983 provides for a mechanism to control the determination of fees. In terms of the said Act, fees must be expenditure related, must be budgeted, and must be approved by the Board on an annual basis. On that basis, applicants say, there is no rational reason why an assignee should be able to set its own fees without regulatory control.

[32] Applicants argue that the *lacuna* in the APS Act infringes on sections 22 and 33 of the Constitution. In terms of section 22:

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

[33] Section 33 provides that:

“Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.”

[34] Applicants say that as a result of the provisions of section 3 (1A) (b) (ii):

[34.1] An assignee is permitted to determine its own fees, and the producer is obliged to pay the fee;

[34.2] No due process is followed in determining the fee, and there is no statutory control over the determination;

[35] Therefore, applicants argue, the provision is not rational nor reasonable given the purpose of the APS Act. The differentiation between the prescribed fees payable when the Executive Officer performs his duties, (which are subject to Ministerial approval), and the self-determined fees of the assignee is not legitimate, is arbitrary, irrational and serves no legitimate public end, applicants say.

[36] The crux of the applicants’ argument is that the provision does not allow for control by the Minister or by the Executive Officer, when the fees are determined by the assignee. If the applicant’s contention on this point is incorrect, then the entire argument on constitutionality falls away.

[37] I was referred to the judgment in ***Bertie van Zyl (Edms) Bpk and others v The Minister of Agriculture Forestry and Fisheries and others***¹. This is a judgment by Baqwa J in this Division, and it deals with a virtually identical set

¹ Gauteng Division case no. 45144/2017 dated 28 February 2020 (unreported)

of facts. The applicants had also sought a declaration of unconstitutionality of section 3 (1A) (b) (ii) of the APS Act, albeit on a slightly different Constitutional ground. In **Van Zyl** applicants contended that the fees payable to an assignee amounted to unlawful deprivation of property which is prohibited by section 25 of the Constitution.

[38] In **Van Zyl** applicants argued, as the applicants have in this matter, that the assignee has an unfettered discretion with regard to the determination of its fees. Therefore, the applicants contended, the determination of fees by an assignee without regulatory control amounted to deprivation of property contrary to the provisions of section 25. On this point Baqwa J held as follows:

“35. In terms of section 2 (3) (b) (i) of the APS 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 upon the assignee in terms of section 2 of the APS Act.

36. The APS 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.”

[39] Applicants argued that the **Van Zyl** judgment was, in this regard, clearly incorrect. I do not agree. Section 2 (3) (b) (i) of the APS Act specifically provides that the powers and duties of the assignee shall be exercised and performed subject to the direction of the Executive Officer. The assignee's powers include the implementation of inspection procedures, and the determination of fees. The assignee must subject its work to the direction of the Executive Officer, who is entitled (and obliged) to give direction to the assignee. It is therefore not correct to say that the assignee has unfettered discretion to do as it pleases. It may be so that the Amendment Bill would have had the salutary effect of codifying exactly how the Executive Officer has to exercise his duties. That does not mean that the APS Act, as it stands, does not allow for proper monitoring and direction by the Executive Officer. Furthermore, the fact that the Executive Officer may be remiss in fulfilling his obligation to direct the assignee in the execution of its powers and performance of its duties does not result in the provision itself being unconstitutional.

[40] Ironically, applicants undermine their own case when they point out in paragraph 129 of the founding affidavit:

“On the same day the Executive Officer replied, a copy of which is annexed as FA 48. He again exhibited a lack of rationality and a clear bias by saying that the industry was in no position to dictate how is should be regulated and that DAFF could not vary the frequency of inspections for fear it would be accused of a conflict of interest. He was clearly wrong in this regard – section 2 (3) (b) (ii) of the APS Act

expressly provides that an assignee shall exercise its powers and perform its duties subject to the directions of the Executive Officer.”

[41] I am consequently respectfully in agreement with the judgment of Baqwa J. The relief sought, that the provision be declared unconstitutional must therefore fail. The APS Act already provides for regulatory control over, and approval of the decisions of the assignee by the Executive Officer. It would therefore be inappropriate to order the Minister to submit to Parliament the amendment to the APS Act proposed by applicants.

RELIEF UNDER THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 2000 (“PAJA”)

[42] Applicants furthermore seek to review and set aside a number of administrative actions taken by both the Minister and the Executive Officer. The first group of actions relate to the issuing of the invitation by the Minister, the process by which the applications were considered, and Nejahmogul’s eventual designation by the Minister as assignee for the dairy industry. These actions occurred more than 180 days before the application was launched. Applicants have argued that the Minister did not depose to an answering affidavit, and that the allegations relating to the Minister’s conduct, and that he was mislead, have therefore not been answered. In light of the view that I take in respect of the application to extend the period for review below, nothing more needs to be said regarding this argument.

[43] The second group of actions relate to the determination by Nejahmogul of its fees and the publication of the fees on 25 May 2018. Finally, applicants

attack the alleged refusal of the Executive Officer on 15 June 2018 to stay the commencement of the execution of Nejahmogul's powers and duties and to direct that Nejahmogul's inspections would be limited to only one standard inspection per annum.

[44] Administrative action is reviewable under PAJA. Sections 6 (1) and (2) of PAJA read as follows:

“Judicial review of administrative action

6. (1) *Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*

(2) *A court or tribunal has the power to judicially review an administrative action if-*

(a) *the administrator who took it-*

(i) *was not authorized to do so by the empowering provision;*

(ii) *acted under a delegation of power which was not authorized by the empowering provision; or*

(iii) *was biased or reasonably suspected of bias;*

- (b) *a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) *the action was procedurally unfair;*
- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken-*
 - (i) *for a reason not authorized by the empowering provision;*
 - (ii) *for an ulterior purpose or motive;*
 - (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*
 - (iv) *because of unauthorized or unwarranted dictates of another person or body;*
 - (v) *in bad faith; or*
 - (vi) *arbitrarily or capriciously;*
- (f) *the action itself-*
 - (i) *contravenes a law or is not authorized by the empowering provision; or*

- (ii) *is not rationally connected to-*
 - (aa) *the purpose for which it was taken;*
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator;*
- (g) *the action concerned consists of a failure to take a decision;*
- (h) *the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
- (i) *the action is otherwise unconstitutional or unlawful.”*

[45] Section 7 (1) of PAJA requires the review proceedings to be instituted without unreasonable delay:

“7 (1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-

- (a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or*
- (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became*

aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

[46] In terms of section 9, the period of 180 days referred to in section 7 (1) may be extended by agreement, or by a court or tribunal on application by the person concerned, where the interests of justice so require.

[47] This application was launched in November 2018. In respect of the first group of administrative actions to which I referred above, applicants have applied for an extension of the 180 day period, as those actions were taken in 2016 and 2017, far beyond the 180 day period. The second group of actions, which concern the implementation of the fee structure, and the refusal by the Executive Officer to limit the frequency of inspections to one per annum, all occurred less than 180 days before the institution of this application, and do not require an extension of time.

EXTENSION OF TIME PERIOD IN TERMS OF SECTION 9

[48] The ‘delay rule’ at common law, and section 7 of PAJA both have the purpose of ensuring that judicial challenges to the validity of decisions are brought without undue delay, or as it was framed in ***Louw v The Mining Commissioner Johannesburg***², to non-suit a litigant who “wishes to drag a cow which has long been dead out of the ditch”.

² (1896) 3 OR 190

[49] In **Gqwetha v Transkei Development Corporation Ltd and others**³, writing for the majority, Nugent J said as follows:

It is important for the efficient functioning of public bodies (I include the first respondent) that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule – reiterated most recently by Brand JA in Associated Institutions Pension Fund v Van Zyl 2005 (2) SA 302 (SCA) at 321 – is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, and in my view more important, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions. As pointed out by Miller JA in Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 41E–F (my translation):

“It is desirable and important that finality should be arrived at within a reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonably long period of time has elapsed – interest reipublicae ut sit finis litium . . . Considerations of this kind

³ 2006 (2) SA 603 (SCA)

undoubtedly constitute part of the underlying reasons for the existence of this rule.” (footnote omitted)

Underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body, and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay, although the extent to which prejudice has been shown is a relevant consideration that might even be decisive where the delay has been relatively slight (Wolgroeiërs Afslaërs, above, at 42C).”

[50] Plaskett AJA held in ***Beweging vir Christelik-Volkseie Onderwys and others v Minister of Education and others***⁴ that a two-stage approach should be followed. The first question to be answered is whether the delay in launching the application was unreasonable, or whether it was launched more than 180 days after internal remedies had been exhausted or the applicant had been informed of, had knowledge of or ought to have had knowledge of the administrative action under challenge. The second question, if the first is answered in the affirmative, is whether it is in the interests of justice to condone the delay.

[51] In considering whether condonation should be granted, the Court is obliged to disregard the merits of the review, unless the decision complained

⁴ [2012] 2 ALL SA 462 (SCA) at par. 46

about was egregious. In ***Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality (South African Civics Organisation as amicus curiae***⁵) the manner in which the granting of condonation should be considered was dealt with as follows:

“The manner in which the discretion to extend the statutory time period should be exercised, was described in Camps Bay Ratepayers’ and Residents’ Association and another v Harrison and another [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) paragraph 54, in the following terms:

“[11] And the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success.” [My emphasis.]

[12] Although a consideration of the prospects of success of the application for review requires an examination of its merits, this does not encompass their determination. In Beweging vir Christelik-Volkseie Onderwys v Minister of Education [2012]

⁵ [2017] 1 ALL SA 677 (SCA) at paras. 11 to 13

ZASCA 45; [2012] 2 All SA 462 (SCA) paragraphs 42–44, the proposition that a court is required to decide the merits before considering whether the application for review was brought out of time or after undue delay and, if so, whether or not to condone the defect, was rejected. Thereafter, in *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* [2013] ZASCA 148; [2013] 4 All SA 639(SCA) paragraphs 22, 26 and 43, it was decided that a court was compelled to deal with the delay rule before examining the merits of the review application, because in the absence of an extension the court had no authority to entertain the review application. The court there concluded that because an extension of the 180- day period was not justified, it followed that it was not authorised to enter into the merits of the review application. However, in *South African National Roads Agency Limited v Cape Town City* [2016] ZASCA 122; [2016] 4 All SA 332 (SCA); 2017 (1) SA 468 (SCA) paragraph 81, a submission based upon this decision, namely that the question of delay had to be dealt with before the merits of the review could be entertained, was answered as follows:

“It is true that . . . this court considered it important to settle the court’s jurisdiction to entertain the merits of the matter by first having regard to the question of delay. However, it cannot be read to signal a clinical excision of the merits of the impugned decision, which must be a critical factor when a court embarks on a

consideration of all the circumstances of a case in order to determine whether the interests of justice dictates that the delay should be condoned. It would have to include a consideration of whether the non-compliance with statutory prescripts was egregious.”

[13] *A full and proper determination of the merits of the review application was accordingly dependent upon a finding that the respondent’s failure had to be condoned. As stated in Opposition to Urban Tolling Alliance (supra), paragraph 26:*

“Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been ‘validated’ by the delay”

It was thus impermissible for the court a quo to have entered into and decided the merits of the review application without having first decided the merits of the condonation application.”

[52] In ***Opposition to Urban Tolling Alliance and others v South African National Road Agency Ltd and others***⁶ it was explained that after expiry of the 180 day period, a court may only review an action if the interests of justice require an extension of time. Once the 180 day period has expired, in the absence of an extension, a court is not authorized to consider the review.

⁶ [2013] 4 ALL SA 639 (SCA)

Whether the decision was in fact unlawful is then of no consequence. The decision would be “validated” by the delay.⁷

[53] A final point I would make is that the Supreme Court of Appeal in *Tasima* (*supra*), and the Constitutional Court (in *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as amicus curiae)*)⁸ have held that an extension of time in terms of section 7 may have important consequences, and is not merely for the asking:

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of the delay. And, what is more, the explanation given must be reasonable”

[54] Applicants say that when they first became aware of Nejahmogul’s designation as assignee the organized dairy industry, working through Milk SA, engaged with both the Executive Officer and with Nejahmogul. They did so in order to try and reach common ground with Nejahmogul on an SOP, a service level agreement, and on fair inspection fees and laboratory costs. They say that they acted with diligence in attempting this outcome, and when the initiatives failed, they launched this application.

[55] The first decision under attack is that of the Minister, when he decided to invite potential service providers to apply for designation as assignees. This decision was made on 13 February 2015, some 3 ½ years before the application was launched. Applicants knew about the invitation when it became

⁷ *Tasima (Pty) Ltd v Department of Transport and others* [2016] 1 ALL SA 465 (SCA)

⁸ 2008 (4) BCLR 442

public, but there is no evidence that they took issue with the decision at any time before November 2018.

[56] The second action sought to be reviewed is the publication of an invitation to prospective assignees to apply for the appointment. The invitation was published on 15 July 2016, more than two years before the application was launched. Applicants now say that the invitation did not comply with the Treasury Regulations and should be set aside for that reason. Applicants knew that the invitation had been issued. Not only did they not object to the invitation at the time, the DSA responded to the invitation and also applied to be appointed as assignee. Applicants, and other role players in the industry were instrumental in creating the DSA in the first place, and the question is now why applicants did not take issue with the invitation at the time. Instead, they participated in the process that followed the invitation, albeit through DSA.

[57] The third decision that applicants attack is that of the Minister on 13 January 2017 to designate Nejahmogul as the assignee. The same criticism is applicable to applicant's conduct in regard to this decision. Applicants make out a case that Nejahmogul should never have been appointed as assignee in the first place. It had been incorporated five days after the second invitation had been issued. It had no employees, no offices, no business plan of note, no track record, and it was not BEE compliant, having not traded at all. In fact, when its application was filed, Nejahmogul's director was still a municipal employee. Applicants argue that Nejahmogul's application was unresponsive and should never even have been considered.

[58] Applicants would likely have been aware of Nejahmogul's circumstances when the applications were being considered. Even if that were not so, applicants say that in a letter dated 20 February 2018 Nejahmogul made certain proposals that made it clear that it had little or no knowledge of the industry. At that stage at least, the alarm bells should have rung, and applicants should have taken action. However, they continued to engage with Nejahmogul for months thereafter, trying to reach common ground. Even if I find that Nejahmogul's alleged unsuitability for appointment came to light only in February 2018, which is unlikely, applicants still allowed the 180 day period to expire. None of the aforementioned delays are explained save to say that applicants tried to engage and reach common cause with Nejahmogul. This explanation is, in my view, not a proper explanation at all.

[59] The only reasonable conclusion is that applicants made a conscious decision not to attack the assignment at the time. Nevertheless, I must still determine whether it is in the interests of justice that the period be extended. In this regard, the nature of the administrative decision must be taken into account, as well as its purpose and the effect that a setting aside thereof would have on the parties affected by the decision. The prejudice to the applicant should the decision not be set aside must be weighed against the prejudice to the respondent if it were set aside. The longer the decision is allowed to stand, the more profound the effects of it being set aside would likely be.

[60] Following its designation as assignee Nejahmogul has opened four offices countrywide. It has appointed board members, senior staff, 5 inspectors and support staff. Should any of the aforementioned decisions be set aside, it

would follow that Nejahmogul's designation as assignee is of no force and effect. All of the aforesaid persons would be affected thereby. Also of importance is the fact that Nejahmogul has been exercising powers and performing duties in terms of the APS Act. It has levied fees and has been paid. It has conducted inspections and has reported to the Department. All of those actions would be affected should any of these decisions be set aside. Therefore, not only will Nejahmogul be severely prejudiced if its designation as assignee is set aside, but also its regulatory functions over the last three years would be impugned.

[61] I can therefore not find that it would be in the interests of justice to grant an extension of time in terms of section 9 of PAJA. The prayer for an extension of time in terms of section 9 of PAJA cannot succeed.

THE DETERMINATION AND PUBLICATION OF FEES

[62] Applicants attack both the determination of its fees by Nejahmogul, and the publication of the fee structure on 25 May 2011. They argue as follows:

[62.1] The process by which the fees were determined was procedurally unfair, and stands to be set aside under section 6 (2) (b) of PAJA;

[62.2] The determination was arbitrary, and stands to be set aside in terms of section 6 (2) (e) (iv) as being the result of the unauthorized or unwarranted dictates of another person or body;

[62.3] The decision was not rationally connected to the information before Nejahmogul or to the reasons given for the determination by Nejahmogul, and is therefore an action referred to in section 6 (2) (f) (ii) (cc) and (dd) of PAJA;

[62.4] The decision was so unreasonable that no reasonable person could so have exercised the power or performed the function, and consequently it stands to be set aside in terms of section 6 (2) (h) of PAJA.

[63] Applicants also contend that the decision was unconstitutional. However, given my finding on the constitutionality of section 3 (1A) (b) (ii), this argument is moot.

[64] In ***Van Zyl*** (*supra*) the fees payable to the assignee had been determined after a process of notice and comment, and after oral representations had been made to the assignee. The Executive Officer was involved in the process by receiving comments and emails from industry representatives. Baqwa J found that the process of fixing the fees had taken place under the supervision of the Executive Officer. In that case the Executive Officer had exercised his powers to direct the assignee in the determination of its fees.

[65] The question in this matter is, however, whether the determination of the fees was the result of a clear and transparent process, whether it was rationally connected to the purpose for which the decision was taken and to the purpose of the APS Act, and whether the decision had been taken subject to the

Executive Officer's direction. The decision should also have been rationally connected to the information available to Nejahmogul and to the Executive Officer when the decision was made.

[66] In order to determine this question, it is necessary to delve into the events preceding the determination of the fees. On 27 February 2017 the Executive Officer issued a notice to affected parties in which he set out the “*administrative regulatory functions*” that assignees were to perform. The essence of the notice was that the assignee:

“....shall for purposes of the application of the APS Act, inter alia, inspect, grade and sample for quality control in order to establish compliance of the regulated agricultural products with the regulations concerned.”

[67] The notice did not provide any guidance as to how the inspections were to be conducted, and at what frequency. The protocol to be applied was evidently left up to the assignee. The notice furthermore reiterated that fees would be determined by the assignee, and that sellers were to fully comply with the provisions of the APS Act, to cooperate with the assignee, and to pay the accounts presented to them.

[68] It seems to be common cause that the fees cannot be determined *in vacuo*. There first has to be a decision as to the manner in which the assignee is to fulfil its obligations. A number of questions have to be answered before the assignee can sensibly consider what fees are to be levied:

[68.1] How are the inspections to be conducted?

[68.2] What frequency of inspection is necessary for the assignee to be able to fulfil its obligation to “*grade and sample for quality control*”.

[68.3] How are the costs to be recovered, by way of payment for each inspection, or by levies per unit produced?

[68.4] How many samples, and of which products, are to be taken at each inspection?

[68.5] Are large producers to be dealt with on the same basis as smaller producers, or are different tariffs to be imposed?

[68.6] What infrastructure is necessary for Nejahmogul to be able to fulfil its mandate?

[68.7] Is Nejahmogul to charge on a cost-recovery basis, as the Department suggested at one point, or is it entitled to make a profit?

[68.8] What would the impact of the fees be on the producers' financial affairs?

[68.9] How does the fact that the industry is already heavily self-regulated impact on the protocol to be applied to inspections, more especially with regard to the frequency of inspections?

[69] There had clearly been no thought given to these practical questions before the assignees were appointed, and it was left to the assignee to find common ground with the industry concerned. More importantly, until a number of these key questions had been answered, the assignee would not be in a position to determine its fees.

[70] On 28 March 2017 the Department published a list of frequently asked questions together with answers to those questions. It was then the Department's position that the method of inspection would be left up to each individual inspector's discretion. The frequency of inspections would be agreed with each individual industry. Each assignee would be required to have an inspection model in place as agreed with the industry concerned. Assignees would be required to sign a service level agreement to ensure that the assignee keeps to the set performance agreements.

[71] On 13 April 2017 Nejahmogul published its proposed fee structure and requested comment thereon. The proposal contemplated 12 inspections annually per producer. It estimated that the cost to the industry would amount to some R 90 million per annum. Nejahmogul later revised its estimate to R 38.7 million per annum, although it is not clear how any of these figures were arrived at.

[72] On 18 April 2017 Milk SA replied to the request for comment. Its view was that it was difficult to comment on the proposal in the absence of information regarding the protocols and procedures to be followed, the "*how*,

when, how frequent and where” as they termed it. Milk SA requested an urgent meeting with the Department.

[73] As I have said above, a task team was then appointed to attempt to find common ground on the outstanding issues. Various protocols and SOP’s were drafted, but none was ever agreed upon. At the task team meeting on 10 and 16 October 2017 it was pointed out that Nejahmogul had not given any meaningful information on the calculation of its fees. It was therefore impossible to assess the frequency of inspections, as it had to be weighed against the economic impact on the dairy industry. There were no proper budgets available, and given the uncertainty as to how Nejahmogul intended to fulfil its duties, the fee structure could not be properly assessed.

[74] The proposed fees were especially burdensome to smaller producers. The Small Stock Dairy Association commented that the method of inspection proposed was cumbersome, the frequency of inspections was unrealistic, and the costs exorbitant. The largest dairy processor in the country estimated that the costs would reduce its profit after tax by 21%. Woodlands estimated that its annual costs would amount to R 372 360.00.

[75] The industry sought a meeting with the Executive Officer in order to address these concerns. He refused to meet with them. He said that the Department would not participate in the drafting of an SOP, and that the assignee could determine the frequency of inspections and its fees as it pleased.

[76] Nejahmogul, probably because of pressure from the industry, proposed to reduce the inspections to six per annum. Later, Nejahmogul conceded that less inspections per annum may be acceptable. Whilst the cost of the inspections to the industry is a key element in deciding on the frequency of inspections, the main question remains: How often would Nejahmogul have to inspect a producer in order to ensure that it has complied with the provisions of the APS Act and the regulations? Is one inspection per annum enough to fulfil the purpose of the APS Act, especially given the level of self-regulation by the industry itself, or should producers be inspected biannually, every quarter, or every month?

[77] That question is not answered in these papers. On the one hand the industry insists that one inspection per annum is sufficient, whilst Nejahmogul has veered from 12, to six, and then to something less than six inspections per annum. There is simply no explanation, scientific or otherwise, for Nejahmogul's proposal. All I have been told is that Nejahmogul considered the regulations, the comments from the industry, various meetings with the industry, data provided by Nielsen, the proposed SOP, email exchanges, the testing capacity of accredited laboratories and the costs of testing, and the effects of the fees on the consumer. What specific factors were considered, and how the fees were in fact arrived at, is still unclear.

[78] Nejahmogul published its fees in the Government Gazette on 25 May 2018. Fees for the inspection of large processing facilities (more than 1 million units per annum) were set at R 5 052.00. The cost of inspection of importers was R 2 190.00 per inspection, and for small processing facilities (less than 1

million units per annum), a charge of R 0.02 per unit was set. The laboratory costs were also set out, the costs varying according to the nature of the test.

[79] Applicants argue that the notice only refers to “processors” and “importers”. A processor is understood in the industry to mean the processing of a product without changing its essential characteristics. Therefore, they say, the notice excludes manufacturers of cheese and butter products from inspection. Nejahmogul says that a processor and a manufacturer are one and the same thing.

[80] Applicants also say that the term “unit” is not defined in the notice, and therefore the distinction between large and small processors is unclear. The notice does not define whether a “unit” is one individual product, a unit of volume, or a unit of mass. Nejahmogul’s answer, which I frankly do not understand, is that *“A unit is an individual thing regarded as single and complete but which can also form an individual component of a larger or more complex whole.”* This definition has, in my view, no rational meaning within the context of the current case.

[81] Section 33 of the Constitution provides that *“Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.”* In ***Pharmaceutical Manufacturers Association of SA; In re: ex parte application of President of the RSA***⁹ the Constitutional Court held that the exercise of public power should not be arbitrary, but must be rationally related to the purpose for which the power was given. The enquiry is objective, and

⁹ 2000 (2) SA 674 (CC)

rationality is the minimum requirement. In ***Trinity Broadcasting, Ciskei v Independent Communications Authority of South Africa***¹⁰ the difference between 'reasonable' and 'rational' was explored:

"In requiring reasonable administrative action the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable: cf Bel Porto School Governing Body and others v Premier, Western Cape and another. As made clear in Bel Porto, the review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, as has been shown above, one of the criteria now laid down in section 6(2)(f)(ii) of the Promotion of Administrative Justice Act. Reasonableness can, of course, be a relevant factor but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it (see section 6(2)(h))."

¹⁰ 2004 (3) SA 346 (SCA)

[81] In ***Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry***¹¹ Nugent J said that “a decision is rationally connected to the purpose for which it was taken if it is connected by reason as opposed to being arbitrary or capricious.”

[82] In my view the determination of the fees was not rationally connected to the purpose of the APS Act, and that which Nejahmogul was trying to achieve, which is the proper inspection and sampling of dairy products in order to determine whether the APS Act and the Regulations had been complied with. If Nejahmogul had not determined what frequency of inspection was required to achieve that purpose, it would be unable to determine what infrastructure and personnel it required, and it follows that it could also not compile a budget. Furthermore, not only was the determination of the fees not rationally connected to the purpose sought to be achieved, the fee structure was irrational. It does not define what a “unit” is. It leaves one in the dark as to the difference between a large and small processor, and how small processors are to be charged. The fees were arbitrarily determined in my view, and did not take into consideration all of the information that Nejahmogul had available to it.

[83] The decision to determine the fees by Nejahmogul, and their subsequent publication, should be set aside for the above reasons. However, that is not the end of the matter. Section 33 of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 2 (3) (b) (i) of the APS Act provides that an assignee shall exercise its powers and perform its duties subject to the direction of the Executive Officer.

¹¹ 2010 (5) SA 457 (SCA)

Having regard to the purpose of the APS Act¹², and the fact that the Executive Officer is clearly intended to have a role in directing the manner in which the assignee fulfils its tasks, the word “shall” appears to me to be peremptory.

[84] In this case, as opposed to the the **Van Zyl** matter, the Executive Officer expressed the view that he was unable to give any direction to the manner in which the assignee fulfilled its mandate. He cited a nebulous “conflict of interest” for his decision not to give direction to the process of developing an SOP, and to the determination of fees. This approach is patently incorrect, and by refusing to act, the Executive Officer has abdicated his responsibilities. Applicants were entitled to expect of the Executive Officer to fulfil his duties, and to exercise the powers that the APS Act has given him. In my view, the executive Officer’s failure to act was unlawful. For that reason also, the decision to determine the fees is reviewable under section 6 (2) (g) of PAJA.

SHOULD THE APPLICANTS HAVE FIRST EXHAUSTED THEIR INTERNAL REMEDIES?

[85] In its heads of argument Nejahmogul contended that applicants had failed to exhaust all of the internal remedies available to them in terms of the APS Act, and that they should therefore not have approached the Court to review the assignee’s decision to determine its fees. Section 10 (1) and (2) of the APS Act provides as follows:

¹² See: *Messenger of the Magistrate’s Court, Durban v Pillay*[1952] 3 ALL SA 449 (A) at 451: “The cardinal rule is still as stated in *Standard Bank v Estate Van Rhyn*, 1925 A.D. 266 at 274: ‘After all, what we have to get at is the intention of the Legislature’....”

“10. Appeals –

- (1) *Any person whose interests are affected by any decision or direction of the executive officer as an assignee under this Act, may appeal against such decision or direction to the Director-General.*
- (2) *An appeal referred to in subsection (1) shall be lodged in the prescribed manner within the prescribed period, and the prescribed fee shall be payable in respect of such appeal.”*

[86] Section 7 (2) (a) of PAJA prohibits any court from reviewing an administrative action unless any internal remedy has first been exhausted. A court may, in exceptional circumstances and on application by the person concerned, exempt the person from the obligation to first exhaust its internal remedies.¹³ The duty to exhaust internal remedies is not absolute, nor is it automatic.¹⁴ It was held in **DPP Valuers** (*supra*) that a court will condone a failure to pursue an available remedy where the remedy is illusory or inadequate.

[87] On 23 August 1991 regulations were published¹⁵ in respect of section 10 appeals only in appeals dealing with a consignment, production group, production lot, lot or carcass. These regulations were repealed in September

¹³ Section 7 (2) (c) of PAJA

¹⁴ DDP Valuers (Pty) Ltd v Madibeng Local Municipality [2015] ZASCA 146; par. 15; See also: Koyabe v Minister of Home Affairs (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC) para 38

¹⁵ GNR 1979 of 23 August 1991

2019. Consequently, when the fees were determined in May 2018 there was no prescribed manner in which an appeal of this kind had to be brought, nor a prescribed time within which it should be brought, and no fees were prescribed.

[88] Therefore, although the APS Act nominally provided for an appeal, in reality there was no appeal procedure available to the applicants. This, I believe, is exactly what Mhlantla JA was referring to in **DPP Valuers** in referring to an illusory or inadequate remedy. There is in my view no merit to this point.

THE EXECUTIVE OFFICER'S FAILURE TO STAY THE EXECUTION OF NEJAHMOGUL'S POWERS

[89] Applicants contend that the Executive Officer took an administrative action on 15 June 2018 by deciding not to stay the commencement of Nejahmogul's functions pending the outcome of the consultative process. They say that this action was procedurally unfair, arbitrary, not rationally connected to the information before him, so unreasonable that no reasonable person could have so exercised the power or performed the function, and was biased, alternatively gave rise to a perception of bias.

[90] In **President of the RSA v South African Rugby Football Union**¹⁶ the Constitutional Court admitted that what is, and what is not administrative action is sometimes difficult to determine, and would have to be considered on a case-by-case basis.

¹⁶ 2000 (1) SA 1 (CC)

[91] The alleged “administrative action” complained of by applicants was preceded by a letter addressed to the Acting Deputy Director: Food Safety and Quality Assurance by Milk SA. In the letter Milk SA made three points:

[91.1] It said that it regarded the publication of the fees on 25 May 2018 to be *ultra vires*;

[91.2] It amounted a breach of trust that the fees were published whilst the consultative process was still ongoing;

[91.3] The industry wished to continue with the consultative process.

[92] On the same day the Executive Officer replied to the letter. He held the same unmovable views as before, saying that the industry could not dictate the manner in which it was regulated. He also reiterated his view that the Department could not interfere in Nejahmogul’s decision on the frequency of inspections. He said there was no SOP in place, whether in draft or otherwise, and that he viewed an SOP to be superfluous in any event.

[93] Does this amount to administrative action? The term is defined in PAJA as follows:

“(i) ‘administrative action’ means any decision taken, or any failure to take a decision, by-

(a) an organ of state, when-

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) *exercising a power or performing a public function in terms of any legislation; or*

(b) *a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,*

*which adversely affects the rights of any person and which has a direct, external effect.....*¹⁷

[94] The following definition was given to administrative action in ***Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others***¹⁸

“Administrative action means any decision of an administrative nature made...under an empowering provision [and] taken...by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution, or exercising a public power or performing a public function in terms of any legislation, or [taken by] a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect...’.”

¹⁷ See: *City of Tshwane Metropolitan Municipality and others v Nambiti Technologies (Pty) Ltd* [2016] 1 ALL SA 332 (SCA) at par. 22

¹⁸ 2005 (3) SA 313 (SCA) par. 21; See also *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC)

[95] The question is, what decision did the Executive Officer take on 15 June 2018? The letter of Milk SA had not been addressed to the Executive Officer, and it made no request to him (or to the Deputy Director) to do anything. It simply expressed Milk SA's desire to continue to consult, and restated its view that Nejahmogul should not commence with enforcement until that process was complete.

[96] In replying to Milk SA, the Executive Officer did not purport to make any decision. All he did was to restate his (incorrect) view that he was not empowered to interfere with Nejahmogul's determination of fees, and the consultation process had been finalized, and that there was no further impediment to Nejahmogul commencing with the performance of its functions. In my view the Executive Officer did not take administrative action when he restated his belief that the consultative process was final.

[97] Exactly the same criticism applies to the contention that the Executive Officer took administrative action on 15 June 2018 to the effect that he did not direct that normal inspections should be limited to one *per annum*. There is no indication on the papers that the Executive Officer was asked to apply his mind to that issue on that date, nor that he failed to take a decision. Again, the Executive Officer was merely restating what he had previously decided, that the assignee was free to do what it pleased, without direction from the Executive Officer. In my view, therefore, the Executive Officer did not take an administrative action on 15 June 2018 as alleged by the applicants

CONCLUSION

[98] For the reasons set out above, the attack on the constitutionality of section 3 (1A) (b) (ii) of the APS Act must fail, as must the relief sought that the Minister must present an amendment to the APS Act to Parliament. All the relief sought under PAJA must also fail, save for the relief sought in respect of the determination of inspection fees, and the publication thereof on 25 May 2018.

[99] Even though applicants have not succeeded on the majority of the relief sought, they have been successful in respect of the setting aside of the fee structure, which was essentially at the core of this dispute. Consequently, the normal rule must apply that the successful party is awarded costs.

[100] Consequently, I make the following order:

[100.1] The decision by the third respondent to determine its fees, and thereafter to publish those fees in Notice 267 of 2018, Government Gazette No. 41650 of 25 May 2018 is set aside.

[100.2] Respondents shall pay the costs of the application jointly and severally, including the cost of senior and junior counsel where so employed.

JJC Swanepoel

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 February 2021.

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HEARD ON:	26 January 2021
JUDGMENT ON:	22 February 2021