



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

Case No: 82759/2018

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

[Handwritten Signature]
SIGNATURE

14/05/2021
DATE

In the matter between:

**SOUTH AFRICAN FRUIT AND VEGETABLE
CANNERS ASSOCIATION**

FIRST APPLICANT

SOUTH AFRICAN FRUIT JUICE ASSOCIATION

SECOND APPLICANT

and

IMPUMELELO AGRI BUSINESS SOLUTIONS (PTY) LTD FIRST RESPONDENT

**EXECUTIVE OFFICER OF THE AGRICULTURAL
PRODUCT STANDARD ACT**

SECOND RESPONDENT

MINISTER OF AGRICULTURE, FORESTRY
AND FISHERIES

THIRD RESPONDENT

PERISHABLE PRODUCTS EXPORT CONTROL BOARD

AMICUS CURIAE

JUDGMENT

MOLEFE J

INTRODUCTION

[1] This is Part B of the application wherein the applicants seek the following relief:

- 1.1 reviewing and setting aside the first respondent's determination, publication and imposition of the inspection fees;
- 1.2 directing the first respondent to consider the determination afresh; and
- 1.3 declaring that the first respondent cannot unilaterally determine, publish and impose inspection fees.

[2] At issue in this matter is the inspection fees determined by the first respondent in terms of the Agricultural Product Standards Act¹ (the APS Act), in particular, the ultimate publication thereof in the Non-Governmental Notice 509 on 31 August 2019 (Notice 509). The applicants contend that the determination of the inspection fees was done in a manner that offends the prescript of the Promotion of Administrative Justice Act² (PAJA), and stands to be reviewed and set aside. The applicants further argue that it should not be permissible for the first respondent to be able to unilaterally determine, publish and impose the inspection fees payable to it in terms of the APS Act.

¹ 119 of 1990.

² 3 of 2000.

BACKGROUND

[3] On 9 January 2018, the applicants launched an urgent application in terms of which they sought to interdict and restrain the first respondent from publishing its final inspection fees in the Government Gazette, and/or imposing its final inspection fees. The application was not opposed and on 16 January 2018, the applicants obtained an interdict restraining the respondents from imposing the final inspection fees until the earlier of either:

- 3.1 The final determination of the review proceedings to be instituted by the applicants within 60 (sixty) days from the date on which the first respondent's final inspection fees became known to the applicants; or
- 3.2 The date on which the first respondent's final inspection fees became known to the applicants, where the first respondent's final inspection fees demonstrate that it had adhered to the principle of just administrative action, and that it had sufficiently consulted with the relevant stakeholders.

[4] Subsequent to the first interdict being granted, the first respondent published the inspection fees. The applicants contend that this publication was in violation of the court order of 16 January 2018 and contrary to the provisions of just administrative action. The applicants then launched the present proceedings. In Part A of this application, the applicants sought an interim interdict to restrain and prevent the first respondent from, *inter alia*, levying any inspection fees pending the determination of Part B of the review application. On 3 June 2019, Part A of the application was dismissed by Strydom AJ.

APPLICATION FOR INTERVENTION

[5] The Perishable Product Export Control Board (PPECB) is a public statutory body regulated by the Perishable Products Export Control Act³ (PPECB Act). It has been designated by the Minister as an assignee under section 2(3)(a) of the APS Act, to monitor and manage the quality standards of perishable products exported from South Africa. The designation operates indefinitely. In practice this means that as an

³ 9 of 1983.

assignee the PPECB delivers what are described as 'end-point' inspection services to producers and exporters of perishable products destined for export. This entails inspecting and certifying the perishable products intended for exports before they leave South Africa.

[6] The PPECB is funded from fees paid to it by parties who export perishable products. They pay for inspections and certification services rendered by the PPECB. The PPECB performs its functions as an assignee on a costs recovery basis. The power conferred on the PPECB under section 3(1A)(b)(ii) of the APS Act to determine its actual fees is distinct from its duty to submit an annual budget of estimated revenue and expenditure for approval by the Department and the Minister pursuant to section 53 of the Public Finance Management Act⁴ (PFMA). It is contended that the power conferred on the PPECB to determine its fee structure is conferred on the PPECB by the APS Act, in its capacity as a designated assignee under the APS Act.

[7] The PPECB made an application seeking leave to intervene as *amicus curiae*. On 5 March 2019, in response to a letter from the PPECB's attorneys requesting the applicants' consent to intervene, the applicants' attorneys advised that they had no objections to the PPECB joining as *amicus curiae* in respect of prayer 5 of Part B of the applicants' notice of motion. However, when the PPECB filed its application for admission as *amicus curiae*, the applicants changed their stance and opposed the PPECB's admission. The applicants filed an answering affidavit to which the PPECB filed a comprehensive reply. Thereafter, on 2 October 2019, the applicants withdrew the notice of opposition to the PPECB's application with no tender for costs.

[8] Counsel for the PPECB argued that any finding or order which interprets the APS Act as restricting an assignee's powers to determine and vary their fees as contended for by the applicants, will adversely affect the way in which the PPECB discharges its statutory mandate. The PPECB is South Africa's official certification agency for perishable products bound for export and recognised by the European Commission as an approved 'third country', meaning that the inspection services

⁴ 1 of 1999.

rendered by the PPECB as an assignee under the APS Act are treated as equivalent to those of the relevant European authorities.

[9] The PPECB's application for admission as *amicus curiae* is therefore unopposed. I am satisfied that the PPECB has a legitimate interest in the matter and stands to be affected by the relief sought by the applicants and is therefore admitted as *amicus curiae* to these proceedings.

POINTS IN LIMINE

[10] The following points in *limine* were raised by the respondents:

- 10.1 That the applicants have failed to exhaust internal remedies prior to proceeding with the review application; and
- 10.2 There is a material non-joinder of the interested parties. At the hearing of this application, the respondents' Counsel abandoned this point in *limine*.

Exhaustion of the internal remedies

[11] The respondents' counsel submitted that in terms of section 7(2)(a) of PAJA, no court shall review an administrative action unless internal remedies provided for in any other law had first been exhausted. Counsel argued that the applicants did not exhaust the internal remedies available, and in this regard relied on section 10(1) of the APS Act, which provides that any person whose interests are affected by any decision or direction of the Executive Officer or an assignee under this Act, may appeal against such decision or direction to the Director-General. An appeal contemplated in section 10(1) must, according to section 10(2), be lodged in the prescribed manner, which the applicants failed to do.

[12] On the other hand, Counsel for the applicants argued that at the time when the present litigation was instituted, the only procedure prescribed was the APS Act: *Regulations: Inspections and Appeals: LocaF* (the Inspection and Appeal Regulations). Counsel submitted that the Inspection and Appeal Regulations make it

⁵ Published in GN R1979 of Government Gazette 13473 of 23 August 1991 as amended.

apparent that the appeal contemplated in section 10(1) of the APS Act is concerned with actual inspections, and not an appeal against the determination of fees by an assignee, such as the first respondent. It is argued that it was only during September 2019, when the present proceedings had already been instituted, that the Minister⁶ promulgated Regulations⁷ that could possibly cater for an appeal relating to the determination of inspection fees.

[13] The procedure for submission of an appeal in terms of section 10 of the APS Act deals with actual inspections.⁸ Since no procedure was prescribed at the time of the institution of the present proceedings, the applicants argue that the remedy was not available to them.

[14] In my view, in order for the respondents to rely on section 7(2)(a) of PAJA, the appeal in section 10(1) must in fact, be available, effective and adequate in order to count as an existing internal remedy.⁹ The appeal procedure prescribed at the time of launching the present proceedings was tailored for appeals dealing with actual inspections, and therefore did not present an effective remedy to afford redress to the applicants, and accordingly did not constitute an internal remedy that the applicants had to exhaust in terms of section 7(2)(a) of PAJA. This point in *limine* is therefore dismissed.

LEGISLATIVE FRAMEWORK

[15] The APS Act provides for control over the sale, export and import of certain agricultural and other related products, and for matters connected therewith. It principally deals with the grading (for example choice or standard grade), the packaging that the product must comply with, how the product is packed, and the labels (or markings) that need to be placed on these products.

⁶ Minister of Agriculture, Forestry and Fisheries.

⁷ Regulations regarding Appeal Procedures – published in GN 1260 of 2019 – GG 4272 of 27 September 2019.

⁸ Regulation 3(1) of the Inspection and Appeal Regulations provides that '(1) An appeal in terms of section 10 of the APS Act with regard to a consignment, production lot or carcass as the case may be of a production of a kind specified in column 1 of Table 2 shall ...'

⁹ See *Koyabe v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC) at paras 41 to 45.

[16] The applicants' members produced canned fruits and vegetables, fruit juice and drinks, jams, jellies and marmalades, canned pasta, canned mushrooms, mayonnaise and salad dressing.¹⁰

[17] Section 3 of the APS Act deals with the control over the sale of products and section 4 deals with the control over the export of these products. These sections, amongst others, authorises the Minister (the third respondent) to prohibit the sale of products which do not conform with the prescripts of the APS Act and regulations published in terms thereof, i.e. grading, packaging, labelling, etc.

[18] The Minister can designate an officer in the service of the Department of Agriculture, Fisheries and Forestry (the DAFF) as an executive officer.¹¹ The executive officer shall, subject to the control and directions of the Minister, exercise the powers and perform the duties conferred upon such executive officer under the APS Act.

[19] The Minister can also designate any person, undertaking, body, institution, association or board having particular knowledge of the product concerned as an assignee in terms of that product.¹² The assignee, unless expressly provided otherwise, and subject to the directions of the executive officer, performs the duties and has the powers of the executive officer with regard to the appointed products in terms of the APS Act.¹³ The Minister has the power to revoke the mandate assigned to the assignee in terms of section 2 of the APS Act.

[20] The first respondent was appointed as an assignee with effect from 9 December 2016 for the purposes of sections 3(1)(a) and (b), 3A(1), 4A(1) (a), 7 and 8 with regard to regulated agricultural products destined for sale in the local market.¹⁴ These sections deal with the following:

20.1 Section 3(1)(a) and (b): Prohibit the sale of locally

¹⁰ Founding affidavit, para 7.12.

¹¹ Section 1 of the APS Act.

¹² Section 3(a) of the APS Act.

¹³ Section 2(3)(b)(i) of the APS Act.

¹⁴ Annexure "JA1"; Vol 1: page 71.

- produced/manufactured products not complying with the regulations.
- 20.2 Section 3A(1): Provides for the inspection, grading and sampling of products for quality control. The executive and/or assignee have wide powers and can enter any place, premises or conveyance, and open any container, inspect or test or cause to be tested any quantity of a product.
- 20.3 Section 4A(1)(a): Prohibits the sale of imported products not complying with the regulations.
- 20.4 Section 7 and 8: Extends powers to the executive and the assignee to enter upon any place, premises or conveyance, and investigate and sample, and seize when necessary, any regulated product.

[21] Inspections are not mandatory in terms of the APS Act. Section 3 prohibits the sale of products not complying with specified criteria, but does not require that inspections must be conducted. The APS Act simply requires adherence. Furthermore, according to the Inspection and Appeal Regulations referred to above, inspections are requested. The provision reads as follows:

"2 Inspection fees

- (1) If a person requires inspection of a product, such an inspection shall be requested in writing from the Executive Officer.
- (2) The amounts specified in column 2 of Table 1 shall, subject to subregulation (3), be payable in respect of an inspection referred to in subregulation (1).
- (3) Where an Assignee designated under section 2(3)(a) of the APS Act has determined fees, such fees shall be payable".

FEES PAYABLE TO THE ASSIGNEE

[22] The assignee has no recourse against the State for any of the services it renders or expenses it incurs in terms of the APS Act.¹⁵ This is the responsibility of the owner of the regulated product.¹⁶ The fees that may be charged in respect of the

¹⁵ Section 2(3)(b)(iii) of the APS Act.

¹⁶ Section 3A(4) of the APS Act.

powers exercised and duties performed by the assignee, such as conducting inspections, are the fees determined by the assignee.¹⁷

[23] The APS Act does not prescribe how these fees are to be determined save to state that the fees which will be payable are those determined by the assignee. Even the provisions authorising the Minister to make regulations provides that regulations can be made regarding the inspection fees that have been determined by the assignee.¹⁸ According to section 15(4), a regulation prescribing fees shall be made with the concurrence of the Minister of Finance. However, if one has regard to section 15(1)(g), the Minister makes regulations regarding fees that have already been determined by the assignee.

[24] If the owner refuses or fails to pay the fees determined by the assignee, such failure shall, according to section 11(1)(b), constitute an offence. In the event of a first conviction, such owner can be held liable to a fine or to imprisonment for a period not exceeding six (6) months, and in the case of a subsequent conviction, a period not exceeding one (1) year.¹⁹

PAJA REVIEW

[25] The applicants' submission is that the determination of the first respondent's fees is to be reviewed and set aside as it was:

- 25.1 done in a manner that is procedurally unfair (section 6(2)(c) of PAJA);
- 25.2 taken because irrelevant considerations were taken into account or relevant considerations were not considered (section 6(2)(e) (iii) of PAJA);
- 25.3 taken in bad faith (section 6(2)(e)(v) of PAJA); and
- 25.4 not rationally connected to the information before the first respondent (section 6(2)(f)(ii)(cc) of PAJA).

¹⁷ Section 3A(4) of the APS Act.

¹⁸ Section 15(1)(g) of the APS Act.

¹⁹ Section 11(2)(c) and (d) of the APS Act.

[26] It is not disputed that the determination of fees constitutes administrative action in terms of PAJA; that the first respondent was obliged to give effect to procedurally fair administrative actions as prescribed in terms of section 3 and 4 of PAJA, and that the first respondent elected to follow the notice and comment procedure prescribed in section 4(3) of PAJA when determining the fees.²⁰

[27] The first respondent however disputes that the determination was made in a manner contrary to the provisions of PAJA. The respondents submit that a fair procedure was followed in terms of section 3 of PAJA, and submit that should it be found that there was a departure, they rely on section 4(b)(i) to (v) which deals with the provisions when an administrator may depart from the requirements. Counsel for the respondents argued that:

- 27.1 The procedure followed by the first respondent complied with the minimum requirements for fair administrative action in that due notice was given, comments were received, meetings were held and engagements with relevant stakeholders took place;
- 27.2 The information which was given to the applicants was never enough for them, and it was at their own peril that they merely criticised and posed questions instead of providing comments on the proposed inspection fees; and
- 27.3 The applicants were attempting to prescribe to the first respondent as to how it should run its business.

NOTICES CALLING FOR COMMENTS

[28] Prior to the publication of notice 509, the first respondent published two (2) notices calling for comments on the proposed inspection fees. The first notice was notice 251 of 2017 (notice 251) published in the Government Gazette no 40733 on 31 March 2017, which notice culminated in the applicants obtaining an interdict on 16 January 2018. The second notice was notice 339 of 2018 published in the Government Gazette no 41704 on 15 June 2018 (notice 339).

²⁰ Answering affidavit, page 529, para 327.

[29] The applicants contend that both notices 251 and 339 failed to comply with the following PAJA regulations:

- 29.1 Regulation 18(2)(a), as the notice was only published in the Government Gazette and not in a newspaper;
- 29.2 Regulation 18(2)(b), as the notice failed to contain a caution that comments received after the closing date may be disregarded;
- 29.3 Regulation 18(3)(a), as the notice failed to contain sufficient information about the proposed administrative action in order that the applicants could make meaningful comments. The notice contained a list of products together with the proposed inspection fees with no indication given as to how these fees were calculated or how same will be implemented;
- 29.4 Regulation 18(3)(b), as the notice did not specify a place where and the hours within which further information concerning the proposed administrative action will be available for public scrutiny; and
- 29.5 Regulation 19(1), as the notice was only published in English, when the regulation in fact contains a peremptory provision that the notice must be published in at least two official languages.

[30] Counsel for the respondents argued that the applicants, in contrast to their allegations, fully participated in the decision-making process and were fully aware of the steps being undertaken. Counsel submitted that a meeting was held on 22 February 2017, at the premises of the applicants.²¹ After notice 251 was published on 31 March 2017, headed "invitation of comments on the proposed inspection fees", the second applicant commented on the invitation on 25 April 2017 and the first applicant commented on 5 May 2017. Meetings were held with stakeholders between 10-17 July 2017 and on 21 and 29 August 2017. On 20 November 2017, a further consultative meeting was held between the first respondent and the industry, and the applicants were in attendance. The stakeholders were invited to comment on the sampling size relating to inspection. The applicants responded to this invitation on 20

²¹ Answering affidavit, 'JCM 03-32', page 452, para 75.

November 2017.²² On 28 November 2017, the first respondent provided a draft operating procedure.²³

[31] Counsel for the respondents contends that the allegations by the applicants in the replying affidavit that they have no knowledge of these engagements is misleading and it is the very antithesis of what transpired.

[32] The first respondent obtained data from a well-known company, Nielsen, regarding volumes, number of manufacturers, brands and products per product group, and further appointed a company known as OABS Development (Pty) Ltd (OABS) to assist the first respondent to compile a business plan.

[33] On 15 June 2018, the first respondent again in the non-governmental organisation Government Gazette, published notice 339, an invitation for comments on proposed inspection fees. The applicants once again commented on the proposed inspection fees to which the first respondent replied.²⁴ A further meeting was held on 27 July 2018 with the relevant stakeholders and the DAFF, during which a revised business plan was presented. During August 2018, several meetings were held with the relevant stakeholders, and as a consequence of the meetings held, OABS brought out an addendum.²⁵ On 31 August 2018, the first respondent published its final inspection fees.

[34] The first respondent contends that it is clear that it followed a protracted, comprehensive, reasonable and fair process as envisaged in terms of the provisions of PAJA, and did not unilaterally determine its fees. It was further argued that the first respondent followed a hybrid system of notice and comment, together with public participation in accordance with the principles as enunciated in *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others*,²⁶ wherein it was held that the legislation in question – the APS Act in this instance – did not prescribe a particular

²² Annexure 'JA21' pages 135-136.

²³ Answering affidavit, page 465.

²⁴ Annexure 'MN19', pages 962-965.

²⁵ Annexure 'MN29', pages 1114-1157.

²⁶ 2006 (2) SA 311 (CC) at para 150.

procedure for the determination of the inspection fees, and that the relevant requirements were therefore those prescribed in section 4(1) of PAJA.²⁷

[35] The first respondent further argued that it is immaterial that caution was not contained in the notice that comments received after the closing date may be disregarded as it still considered comments received even after the expiry of the 30-day period. In my view, this is inconsequential although the notice ought to have contained the warning as prescribed in regulation 18(2)(b) of PAJA.

FAILURE TO SUPPLY INFORMATION AND CONSIDER COMMENTS

[36] The following are central to the determination as to whether the first respondent's determination was lawful:

- 36.1 whether the applicants received sufficient information in order to enable them to submit meaningful comments; and
- 36.2 whether the first respondent in fact considered the comments received.

[37] The applicants raised the following issues to the first notice 251:

- 37.1 they indicated that they were unable to meaningful comment on the proposed inspection fees without sufficient information as to how the fees were calculated;
- 37.2 they required a business plan to understand the scope, methodology and costs involved; and
- 37.3 in addition they raised a number of questions which they required clarification on in order to enable them to meaningfully comment.

[38] It is a substantive requirement of proper notification that the notice of proposed decisions must contain sufficient information in terms of depth and detail to enable the public to make meaningful representations.²⁸ If a person is supplied with insufficient

²⁷ The requirements of section 4(1) of PAJA call in the first instance, for a decision to be taken as to whether to hold a public enquiry, to follow a notice and comment procedure, to do both or to follow another appropriate procedure which gives effect to section 3 of PAJA.

²⁸ D J Brynard "Procedural fairness to the public as an instrument to enhance public participation in Public Administration" *Administratio Publica* Vol 19 No 4 (2011) at 102.

information and is prevented from dealing with material issues, there will be a failure of procedural fairness to the public.²⁹

[39] The first respondent developed a business plan with the assistance of an independent consultant after the applicants had obtained the interdict. In this regard the following dates are material:

- 39.1 On 16 January 2018, the first interdict was granted;
- 39.2 On 26 January 2018, the first respondent advised that it had appointed an independent consultant to "re-look at their business plan and determine inspection fees based on sound research".³⁰
- 39.3 On 15 June 2018, notice 339 was published, calling for comments on the revised fees to be imposed.
- 39.4 On 6 July 2018, the independent consultant transmitted a draft report on the proposed business plan to the stakeholders. At this stage the closing comments in terms of notice 339 was before 15 July 2018.
- 39.5 On 10 July 2018, the applicants addressed an email to the first respondent requiring clarity as to the status of the draft report and the proposed business plan, and requiring an extension of the period prescribed in notice 339 for comments.
- 39.6 On 11 July 2018, the first respondent replied to the applicants' email that the draft report is not to be commented upon as it merely provides a background and context to the proposed inspection fees and further that the deadline for the comments on the proposed inspection fees is set out in the gazetted notice itself.
- 39.7 On 12 July 2018, the applicants submitted their comments to notice 339 and stated in their submissions that the first respondent needs to provide additional information (but not limited to the business and implementation plan) which informs the inspection fees and standard operating procedures to be

²⁹ *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A).

³⁰ Annexure "JA 34", Vol 2, page 221.

followed in the inspections. The applicants reiterated that they did not receive sufficient information to provide meaningful comments on the proposed fees and a further request was made to obtain the requested information.

39.8 On 27 July 2018, a stakeholders meeting was convened at which an independent consultant presented its draft report on the proposed business plan. The presentation covered the independent consultant's methodology and assumptions as well as the proposed business plan and cost model on which the proposed inspection fees were based³¹. At the meeting, attendees were informed that further consultations would be held to gather information in order to finalize their business plan and proposed final inspection fees³².

39.9 On 13 August 2018, the applicants were telephonically contacted by the consultant to attend the stakeholders meeting where it was agreed that a further meeting would be convened during September 2018 and where, *inter alia*, the draft report would be discussed. This was confirmed in the report of the meeting sent to the applicants by the first respondent on 30 August 2018.

39.10 Notwithstanding the confirmation, the very next day on 31 August 2018, notice was published containing the final inspection fees. The applicants contend that this is evidence that the determination was made in bad faith and illustrates a clear and utter disregard for the process of fair administrative action. The applicants were prevented from giving their inputs as they were instructed not to comment on the draft business plan.

[40] Counsel for the applicants argued that as far back as April 2017, the applicants have been requesting to be provided with a business plan and clarification on the basis on which the first respondent's fees are calculated. Then at the eleventh hour, they were provided with a draft report on a business plan and instructed not to comment

³¹ Answering affidavit, pp 518-519, paras 279-283.

³² Answering affidavit, p 59, para 284.

thereon. They are then hoodwinked to believe that a further consultation will be held, but the very next day the fees are published. The applicants further submit that where private entities such as the first respondent are permitted to determine fees which the public by law is required to pay, such determination must be subject to the highest standard of compliance with the prescripts of administrative justice.

[41] In my view, it is only rational that the proposed fees must be considered having regard to the frequency of inspections, the quantity of products to be inspected, the amounts of samples to be taken, what equipment is required, and the costs involved in conducting each inspection. All this information would typically be contained in the Standard Operating Procedure (SOP) and/or business plan.

[42] The first respondent however, does not share this view. According to the first respondent, the requirement of a "business plan" had been wholly imported by the applicants and has never been a requirement for the determination of inspection fees.³³ It is also argued that the business plan was presented to the applicants as a matter of courtesy and not for the applicants to provide input. This is, however, wholly in conflict with what had been stated by the second respondent in a letter addressed to, *inter alia*, the applicants.³⁴ The letter stated amongst other things:

"The assignee is expected to determine their fees guided strictly by their business plan".

[43] The judgment of Cameron J in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration and Others*³⁵ is insightful in this respect:

"In a review the question is not whether the decision is capable of being justified (or, as the LAC thought, whether it is not so incorrect as to make intervention doubtful), but whether the decision-maker properly exercised the powers entrusted to him or her. The focus is on the process and on the way in which the decision-maker came to the challenged conclusion".

³³ Answering affidavit p 483, para 143.

³⁴ Annexure "JA 10", p 109-110.

³⁵ 2007 (1) SA 576 (SCA) at para 31.

[44] If there is no proper consideration of the issues, then the entire exercise is a smokescreen which is devoid of any benefit and is simply a waste of funds.³⁶ No matter how broadly represented or how well-facilitated the process of public participation is, it will not constitute a fair process if the relevant authority does not intend to incorporate input into policy decisions or development plans.³⁷

[45] The first respondent's attitude is that if the incorrect fees are recovered, it will simply *"revise its fees when it appears that there is an under or over recovery of fees."*³⁸ In the meantime the owners of the products must pay fees based on a flawed calculation. This is clearly an irrational response. Accordingly, the first respondent did not comply with the minimum requirements for fair administrative action.

[46] In my opinion, the applicants have made out a case to review and set aside the first respondent's determination of its final inspection fees.

DECLARATORY RELIEF

[47] The applicants submit that an assignee appointed in terms of the APS Act should not have the power to unilaterally determine its own fees and that should such conduct be permitted, those sections stand to be declared invalid and unconstitutional for the following reasons:

- 47.1 It will permit the deprivation of property in accordance with a system that is procedurally unfair and thereby contravening section 25 of the Constitution;
- 47.2 The fact that an assignee, being a private person, is authorised to determine fees that the applicants are by law required to pay offends against the prescripts contained in section 55 of the Constitution; and
- 47.3 An assignee determining its own fees is in contravention of

³⁶ Govender, K 2003 "An assessment of section 4 of the Promotion of Administrative Justice Act 2000 as a means of advancing participatory democracy in South Africa" SA Public Law Vol 18 No 2: pages 409-435 at para 423.

³⁷ E. Raubenheimer Section 4 of PAJA – "The Constitutional standard on participation provisions in land use management" SA Public Law 22, pages 491-506/2007.

³⁸ Answering affidavit, page 483, para 142.

section 217 of the Constitution as the Minister would effectively be contracting for services which are not fair, cost-effective and transparent.

[48] The applicants are in effect challenging the constitutionality of the provisions of section 3(1A)(b)(ii) of the APS Act. In essence, they contend that section 3(1A)(b)(ii) should be interpreted as meaning that assignees such as the first respondent and the PPECB may not unilaterally determine their inspection fee in advance of their appointment as assignees. The applicants have complied with Rule 16A³⁹ and have delivered the notice of their intention to raise the constitutional issues.

SECTION 25 OF THE CONSTITUTION

[49] Section 25(1) of the Constitution provides as follows:

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

[50] The applicants' contention is that the property which is subject to arbitrary deprivation is:

- 50.1 the products which are "destroyed" during sampling and inspections; and
- 50.2 the money the applicants are liable to pay for the inspection or face conviction.

[51] The mere fact that the provisions give rise to a deprivation of property does not render them unconstitutional. Deprivation of property is arbitrary if the law does not provide sufficient reason for the particular deprivation or is procedurally unfair.⁴⁰

[52] Counsel for the applicants argued that the APS Act on several occasions refers to the "*fees determined by the assignee*",⁴¹ but no mechanism is created in the APS Act to vet these fees. The assignee, in this case the first respondent, is left to his own

³⁹ Uniform Rules of Court.

⁴⁰ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance Services* 2002 (4) SA 768 (CC) at para 100.

⁴¹ Section 3(1A) (b)(ii); 3A(4); 4(2)(a).

devices to determine the fees, without any oversight from the second and third respondents, and the first respondent stands to personally benefit by the determination of fees payable by law. It is therefore submitted by the applicants that insofar as the APS Act provides for the first respondent to determine its own fees, it is procedurally unfair and constitutes an arbitrary deprivation of property in conflict with section 25 of the Constitution.

[53] Where 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.

[54] Whether there has been a 'deprivation' depends on the extent of the interference with or limitation of use, enjoyment or exploitation.⁴² The extent of the purported deprivation of the taking of a sample prescribed by the regulations, is in my view so inconsequential that it cannot be seen as a deprivation of property. Only a representative sample is taken and the entire remaining consignment remains untouched. The applicants have not made out a case that the consignment (the applicants' property) is the subject of deprivation or destroyed when sampling is done, and the use and enjoyment of the applicants' 'property' is not in any manner affected.

[55] In *First National Bank of South Africa*,⁴³ the Constitutional Court held that a deprivation of property is 'arbitrary' as contemplated in section 25 of the Constitution where the law in question '*does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.*'

[56] The objective of the APS Act is to provide consumers with quality standards and concomitantly with products of consistent quality not containing prohibited substances for food safety and to ensure that producers are not offering for sale products falling within the prohibitions. The purported deprivation is so miniscule that

⁴² *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC Local Government and Housing, Gauteng and Others (Kwa-Zulu Natal Law Society & Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC) at para 32.

⁴³ *Supra* n 40 at para 100.

it cannot, formalistically or substantively, be regarded as deprivation. In my view, the taking of samples for inspection does not constitute a deprivation of property.

[57] As afore-mentioned, a deprivation of property arbitrarily within the meaning of section 25 of the Constitution arises if the law either fails to provide '*sufficient reason*' for the deprivation or is procedurally unfair. Although I found that the taking of samples does not constitute a deprivation of property, I still consider whether the deprivation is arbitrary.

[58] The question as to arbitrariness requires a three interrelated step inquiry, which must determine in turn:

- 58.1 the nature of the property concerned and the extent of the deprivation;
- 58.2 the nature of the means-ends relationship that is required in light of the nature and extent of the deprivation; and
- 58.3 whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation.⁴⁴

[59] The only way in which a consignment can be tested to ensure that it complies with the APS Act and the regulations thereto, is by taking of a sample and there are no other means of testing whether a product or consignment falls within the prohibitions listed in the relevant regulations. The taking of samples therefore constitutes sufficient reason for the section 25(1) 'deprivation' for the above-mentioned reasons.

[60] Counsel for the PPECB submitted that in the present case there is no basis for concluding that the scheme established under the APS Act or the fixing and charging of fees by assignees within that scheme is arbitrary. On the contrary, the purpose of the scheme is to provide for necessary functions to be performed by assignees such as the PPECB. This is done in exchange for the payment of fees which cover the

⁴⁴ *Mkhontwana supra* n 42 at para 44.

costs of rendering these services. These functions would otherwise have to be performed by the State at a cost.

[61] Therefore, in the present case, insofar as the APS Act provides for the first respondent to determine its own fees, it does not in my view constitute an arbitrary deprivation of property in conflict with section 25 of the Constitution.

SECTION 55 OF THE CONSTITUTION

[62] Section 55 of the Constitution provides for the powers of the National Assembly when exercising its legislative power, that it must provide for mechanisms to ensure that all executive organs of the state are accountable, and the National Assembly is to maintain oversight of the exercise of National Executive Authority including implementation of legislation and any organ of state.

[63] The applicants without actually challenging the constitutional validity of the APS Act contend in their heads of argument that "it is unconstitutional for the Legislature to have delegated to the first respondent, a private entity, an authority to determine its own fees without providing any oversight...". The applicants in this regard rely on *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others*,⁴⁵ whereby a pre-constitutional Act conferred the power on the President to amend the Act by himself by proclamation and the Act constituted the delegation of legislative power that went beyond Constitutional acceptable limits. In my view, this case is distinguishable in that the APS Act is not amended and does not constitute an unfettered discretion merely to determine inspection fees without any oversight.

[64] The legislature in the APS Act has conferred powers on the assignee, *inter alia*, the power to determine its own inspection fees.⁴⁶ In *New Clicks*,⁴⁷ the Medicines and Related Substances Act did not require the Minister and the pricing committee to follow any particular procedure in making the regulations and the court held that the relevant requirements were therefore those prescribed by section 4(1) of PAJA.

⁴⁵ 1995 (4) SA 877 (CC).

⁴⁶ Section 3 (1A)(b)(ii) of the APS Act.

⁴⁷ *Supra* n 26 at para 150.

[65] The courts do not review provisions of Acts of Parliament on the ground that they are unreasonable. They will only do so if they are satisfied that the legislation is not rationally connected to a legitimate government purpose.⁴⁸ The purpose of the APS Act is to manifestly achieve a legitimate government purpose, i.e. food safety and quality assurance. The powers and duties performed by an assignee, i.e. inspections, are part and parcel of the legitimate government purpose. The applicants' challenge that an assignee cannot unilaterally determine its inspection fees is not founded on a solid legal principle. What is required from an assignee is that a proper procedure prescribed by section 4(1) of PAJA is followed.

[66] On the PPECB's interpretation of section 3(1A)(b)(ii) of the APS Act, it is submitted that it does not infringe section 55 of the Constitution and does not constitute an unlawful delegation of legislative power.

[67] In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*,⁴⁹ the Constitutional Court held that the Minister of Trade and Industry had acted lawfully when he delegated legislative powers to a regulatory body to regulate micro-lending through the imposition of extensive rules applicable to micro-lenders. O'Regan J held that the delegation of power is important in a modern State, and that courts should —

"therefore be cautious to avoid adopting unduly restrictive rules in this area which will limit the possibility of effective ordering of our society by organisations which may not form part of government".⁵⁰

[68] The PPECB submits that section 3(1A)(b)(ii) goes no further than providing that an assignee may determine fees for their services which must be paid by the persons subject to their regulatory authority.

[69] While the fixing of compulsory fees is the exercise of a (subordinate) legislative power or function, it is one that is incidental to the conferral of regulatory authority on the assignee and it must be done within the framework of the APS Act.

⁴⁸ *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para 260.

⁴⁹ 2007 (1) SA 343 (CC).

⁵⁰ *Ibid* at para 123.

[70] It is common cause that the fees determined by the first respondent are not contained in the regulations to the APS Act, but have been published in a General Notice. The Minister has been delegated the power to make regulations regarding the inspection fees that have been determined by the assignee and this has to be done with the concurrence of the Minister of Finance. The power given to an assignee is therefore not an unqualified or an unfettered discretion and is subject to the control and directions of the Minister. The assignee has been delegated powers in terms of the APS Act and delegation postulates revocable transmission of subsidiary authority.⁵¹

SECTION 217 OF THE CONSTITUTION

[71] In terms of section 217(1) of the Constitution, an organ of state, when it contracts for goods and services, must do so in accordance with a system that is fair, transparent, competitive and cost effective. The applicants contend that section 217 is infringed if it is held that assignees are empowered to determine and vary their inspection fees after they are designated by the Minister.

[72] The applicants submit that the Minister is, in terms of the APS Act, able to contract for services contrary to section 217, because the fees of the first respondent and the PPECB are not determined prior to its appointment. Once the first respondent is appointed, the second and third respondents exercise no oversight over the determination of the fees. It is argued that the provisions that allow for the first respondent to determine its fees essentially enable the second and third respondents to abdicate their duties set out in section 217. The applicants contend that the second respondent is not concerned with the determination of fees because the owners of the products are to foot the bill for these fees. Accordingly, it is argued that there was no compliance with section 217 when the first respondent was appointed and the APS Act permits the services of the first respondent to be procured in violation of section 217 of the Constitution.

[73] I need to emphasise that the State does not procure services from assignees. What the State does is assign regulatory authority to them, which otherwise the State

⁵¹ *Executive Council of the Western Cape Legislature supra* n.45 at para 173.

itself would exercise. Moreover, the State does not normally pay the assignee for their performance of those regulatory functions. Section 2(3)(b)(iii) of the APS Act provides that unless the Minister in a particular case directs otherwise, an assignee shall *"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"*.

[74] In my view, if inspection fees are to be determined prior to the appointment of the assignee, the whole process of public participation and fair procedure as contemplated in section 4 of PAJA will be circumvented. What the applicants are arguing under this heading is completely contradictory to what it has been advancing since the first publication of the proposed inspection fees by the first respondent. They even obtained an order restraining the first respondent from publishing its final inspection fees.⁵²

[75] It should be remembered that the first step is to designate or appoint an assignee in terms of the APS Act, which brings such an assignee within the definition of section 239 of the Constitution. The applicants are on the one hand complaining that the process is procedurally unfair, but on the other hand are advancing an argument that the inspection fees should be determined before the appointment.

[76] All organs of state are entities exercising powers on behalf of the State, and due to the fact that an assignee first has to be designated as such, it becomes part and parcel of Government and furthermore, due to the fact that no specific procedure is prescribed for the determination of inspection fees, the default provision for an assignee to determine its inspection fees after its appointment is in terms of PAJA.⁵³

[77] The applicants' argument that the APS Act permits the services of an assignee to be procured in violation of section 217 of the Constitution is without merit and should fail. Therefore, the applicants' declaratory relief is not appropriate and must be dismissed.

⁵² Court order dated 16 January 2008, case no 453/2018.

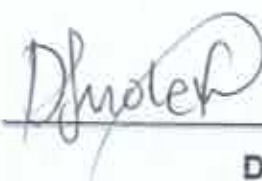
⁵³ *New Clicks supra* n 25.

[78] As regards costs, the PPECB submits that the applicants' opposition to the PPECB's intervention was unfounded and unreasonable and for that reason it should bear the PPECB's costs, including costs of two counsel where employed. At the hearing of this matter Counsel for the applicants confirmed that on the 20 March 2020 the applicants tendered the PPECB costs.

ORDER

[79] I therefore make the following order:

1. The first respondent's determination, publication and imposition of the inspection fees as set out in the Non-Governmental Organization Notice 509 of 2018 published in Government Gazette No 41870 of 31 August 2018 is reviewed and set aside;
2. The second respondent's decision to accept or impose or otherwise give effect to the first respondent's determination is reviewed and set aside;
3. The third respondent's decision to accept or impose or otherwise give effect to either or both the first and second respondents determination is reviewed and set aside;
4. The first respondent is directed to consider the determination of fees afresh;
5. The applicants' declaratory relief is dismissed; and
6. The first respondent is ordered to pay the costs of the application, such costs to include the employment of two counsel.



D S MOLEFE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgment 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 14 May 2021.

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Date of Judgment:

14 May 2021