IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

17/2/2015

CASE NO.: 73422/13

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

17/02/2015

In the matter between:

MILK SOUTH AFRICA — Applicant

and

W J JORDAAN t/a PEGAMOO DAIRY — First respondent

DWARS EEN EIENDOM CC — Second respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This is an application for an order directing the first and second respondents to comply with the regulations relating to the statutory measures promulgated in terms of the Agricultural Products Act, No. 47 of 1996.

2. The applicant, Milk South Africa, is an association incorporated under section 21 of the Companies Act, 1973.

3. In terms of section 14 of the Marketing of Agricultural Products Act, 47 of 1996, the applicant was entrusted with the implementation, administration and enforcement of statutory measures described in the respective Schedules to R1219, R1220 and R1221, all of 23 December 2005.

4. In similar fashion, the applicant was entrusted with the implementation, administration and enforcement of statutory measures described in the respective Schedules to regulations No. 55, 56 and 57, all of 30 January 2009.

5. On 10 May 2010, under case no 26014/10, the applicant launched an application to compel the first respondent to comply with his obligations under the Act. In view of the opposition that was raised by the first respondent, the applicant proceeded to launch on 12 December 2013 a separate application, under case no 73422/13, against the second respondent.

6. This court on 6 August 2014 granted an order that the two aforesaid applications be consolidated and proceed as one application under no. 73422/2013.

7. The relief sought against the first and second respondents are the same, save in respect of the second respondent, the applicant in addition seeks payment by second respondent of an amount of R117 140.45 and interest thereon. It is common cause that the second respondent registered with the applicant as role player during May 2012.

8. The applicant attached copies of GG no 28329 of 23 December 2005 relating to notice R1221 of 23 December 2005 and the schedule attached thereto; notice R1219 of 23 December 2005 and the schedule attached thereto; notice R1220 of 23 December 2005 and the schedule attached thereto to the respective applications. Notice R1221 establishes the statutory measures as set out in the schedules.

9. In addition, the applicant also attached copies of GG no 31813 of 30 January 2009 relating to notice no. 55 of 30 January 2009 and the

schedule attached thereto; notice 57 of 30 January 2009 and the schedule attached thereto to the respective applications.

10. In respect of the second respondent, a copy of regulation No. 56 of 30 January 2009 was attached. No copy of this regulation was attached to the application in respect of first respondent, although an oblique reference thereto appears in the founding affidavit.

11. The respective clause 6 of the Schedule in respect of R1219 and R1220 and clause 7 of R 1221, all of 23 December 2005, provided as follows:

> "7. *The statutory measures described in this schedule shall*
> *(a) apply within the geographical area of the Republic of South Africa;*
> *(b) come into operation on the date of publication hereof and shall lapse after four years from the date of implementation."*

12. The respective clause 6 of the Schedule in respect of regulations no. 55 and no. 57, and that of no. 56, all of 30 January 2009, provided as follows:

> *6. The statutory measures described in this schedule shall*
> *(a) apply within the geographical area of the Republic of South Africa;*
> *(b) come into operation on the date of publication hereof and shall lapse on 23 December 2013."*

13. When the matter was called on Monday, 9 February 2015, counsel for the first respondent advised that this court on 19 September 2014 granted a final winding up order in respect of the second respondent. (A copy of that order was attached to the Supplementary Heads of Argument filed on behalf of first respondent). It is common cause that no opposing affidavit was filed on second respondent's behalf.

14. When the matter was first called, counsel appearing were requested to address the court in respect of two issues, namely, whether the fact that the aforementioned regulations lapsed after a stipulated period, i.e. after four years in respect of the regulations of 23 December 2005, and by 23 December 2013 in respect of the regulations of 30 January 2009, the respective applications could have been brought at the date that the applications were so launched and/or whether the relief sought was not academic in the circumstances.

15. To this end, the matter stood down to Friday 13 February 2015 for counsel to prepare an address to court on the aforesaid issues.

16. When the regulations that relate to GG no 28329 of December 2005 are read purposively and in context, it is clear that the regulations only endured for a period of 4 years and it is expressly stated therein that the regulations shall lapse after that period. The four-year period expired at the latest by 24 December 2009.

17. Regulations 55, 56 and 57 clearly stipulated that the statutory measures referred to in the Schedules shall lapse on 23 December 2013.

18. None of the regulations contained any punitive provisions, should there be no compliance therewith.

19. In my view, when the regulations of 23 December 2005 lapsed by 24 December 2009, any obligation imposed thereby on the respondents ceased. The applicant could not enforce compliance with the regulations after 24 December 2009.

20. The Interpretation Act, no. 33 of 1957 defines "*law*" as:

> "'*law' means any law, proclamation, ordinance, Act of Parliament or other enactment having the force of law*"

The definition of "law" does not expressly mention regulations and purposively it should be included either under the reference to *'law'* or *'other enactment having the force of law'*.

21. That Act in section 12 provides:

> "*(1) Where a law repeals and re-enacts with or without modifications, any provision of a former law, references in any other law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provision so enacted.*
>
> *(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-*
>
> > *(a) revive anything not in force or existing at the time at which the repeal takes effect; or*
> >
> > *(b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or*
> >
> > *(c) affect any right, privileged, obligation or liability acquired, accrued or incurred under any law so repealed; or*
> >
> > *(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or*
> >
> > *(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,*
>
> *and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.*"

22. In this regard, Mr Möller, for first respondent, referred to *R v Sutherland* 1961(2) SA 806 (AD). The Appellate Division, as it then was known, held at 814B-C in dealing with section 12 of the Interpretation Act as follows:

> "*It must be conceded that a law which expires automatically by effluxion of time or, equally automatically, upon the happening of a prescribed event, other than an act of repeal, cannot be said to have been repealed by another law within the meaning of that expression in section 12 (2) of the Interpretation Act.*"

23. It follows from the aforesaid judgment, by parity of reasoning, where the regulations are not "repealed" but expire by efflux of time any enforcement thereof cannot be achieved after the regulation had lapsed.

24. The word *lapse* as it is used in the aforementioned regulations, enjoys its normal grammatical meaning, even if read purposefully.

25. The Shorter Oxford Dictionary, the two volume version, defines the word *lapse* as:

> "*lapse, noun,*
>
> *1 The termination of a right or privilege ...*
>
> *lapse, verb,*
>
> *1 ...*
>
> *2 ...*
>
> *3a law. Of a right, privilege, etc.: become void, ...*"

26. I find support for the foregoing in *Association of Meat Importers and Exporters et al v International Trade Administration Commission et al* [2013] 4 All SA 253 (SCA) and in particular at [63] to [65]. That matter concerned the anti-dumping duties. At the aforesaid passages the following was said:

> "*[63] The regulations create a regime for the imposition of anti-dumping duties from the time the regulations took effect.*

Included in that regime are the restrictions placed on their duration by articles 38.1 and 53. Both must be taken to have been inserted for a purpose and neither can simply be ignored if the language allows for each to be given a meaning.

[64] Article 11 of the WTO Agreement does not contain an equivalent of regulation 38.1 and the reason is obvious. It does not purport to direct the means by which contracting countries should bring about the termination of the anti-dumping duties. It merely obliges them to bring that about. This country has chosen to do so by the means provided for in the two regulations.

[65] Regulation 38.1 reads then as follows:

'38.1

Definitive anti-dumping duties will remain in place for a period of five years form the date of the publication of the Commission's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five-year period'.

For convenience of comparison I repeat regulation 53:

'53.1

Anti-dumping duties shall remain in place for a period not exceeding 5 years from the imposition or the last review thereof.

53.2

If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalised.'"

27. Section 12 of the Interpretation Act does not find application in the present matter in view thereof that the regulations under consideration in this matter were not "repealed", but had lapsed due to the efflux of time as expressly provided in the said regulations. Neither of the

regulations contained a provision that any proceedings instituted during the existence of the regulation, in respect of such regulation, would continue after the regulation had lapsed.

28. Counsel on behalf of the applicant submitted that when read purposively, the regulations impose "taxes" in the sense of levies and hence the lapsing of the regulations do not affect obligations to continue to comply with the measures described in the Schedule 1 to the respective regulations. He further submitted that it was comparable to the law relevant to Revenue, where each year the schedules lapse and are amended the following year. Counsel for the applicant did not rely any authority for that proposition. In the present matter, the regulations were not amended, they lapsed as expressly provided therein.

29. The fallacy of counsel's proposition lies in the fact that after the expiry of the first set of regulations, there was a hiatus before the second set of regulations came into effect. If it were intended that the regulations would continue after the lapsing, the legislature would have expressly stipulated to that effect. No such intention can be implied on a purposive interpretation of the regulations. The regulations simply lapsed in terms of the expressed provisions thereof.

30. It follows that where the applications for enforcement of the said regulations, in respect of the two respondents, were instituted on 10 May 2010 and 12 December 2013 respectively, the regulations of 23 December 2005 had lapsed, and no proceedings for the enforcement of those regulations could have been instituted during 2010 and 2012 respectively.

31. Accordingly, the applicant cannot succeed in respect of the attempted enforcement of the regulations of 23 December 2005.

32. In respect of the regulations of 30 January 20009, those regulations, by the efflux of time, lapsed on 24 December 2013. For what has been said earlier in this judgment, section 12 of the Interpretation Act does not apply and in any event those regulations were not "repealed", but had lapsed by efflux of time as expressly provided in the regulations.

33. On the expiry, i.e. the lapsing thereof, of the second set of regulations on 23 December 2013 there were no longer any obligations to be adhered to for what has been said earlier in this judgment. See *R v Sutherland, supra.*

34. I find further support for the foregoing in *Association of Meat Importers and Exporters, supra,* at the passages referred to above. In that matter the relevant regulation, [53], specifically provided that after the lapsing of the regulation at the relevant date, any sunset review that had been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review had been finalised. No such similar provision appears in any of the regulations under consideration in this matter.

35. It follows that the proceedings for the enforcement of the regulations of 30 January 2009 instituted prior to the lapsing of the said regulations cannot be continued with after the lapsing thereof on 23 December 2013.

36. Accordingly, the applicant cannot succeed in the relief it seeks in respect of the regulations of 30 January 2009.

37. There remains the issue of the second respondent. It is common cause that a final winding up order was granted by this court on 19 September 2014. It is trite that no litigation can continue against the second respondent until a liquidator has been appointed.

38. In view of the approach followed above, it would be an exercise in futility to postpone the application against the second respondent until the appointment of a liquidator and thereafter to proceed against the second respondent. To indeed proceed in this manner would require separating the two applications that were combined in terms of the court order of 6 August 2014. Neither of the parties requested such separation and the applicant proceeded with its case against the second respondent, albeit that the court was requested to impose compliance with the obligations of the second respondent upon the first respondent premised upon a finding that the first respondent was the "driving mind" or "*alter ego*" of the second respondent.

39. The applicant, by proceeding in this manner, seeks to obtain information in order to be in a position to formalise its claim against the insolvent estate. Such information can be obtained by other means and do not require an order against the first respondent under the present circumstances.

40. Counsel for first respondent submitted that the applicant's aforesaid submissions are not supported by any legal principle. Counsel for applicant did not rely on any such principle, other than a reliance on the judgment of *ABC LTD v Commissioner for the South African Revenue Service* 2013 JDR 0339 (Tax). In this regard counsel for applicant specifically relied upon the passage appearing at [46] to [50] of the said judgment.

41. Counsel for applicant submitted with reference to the said passage of the judgment of *ABC LTD, supra,* that the court must find that the first respondent was the "driving mind" or *alter ego* of the second respondent and to hold the first respondent accountable to submit the required information on behalf of the second respondent.

42. The argument in that regard was, as I understood Mr Vorster, the first respondent throughout participated in negotiations subsequent to the

launching of the first application (albeit against the first respondent in his personal capacity), had submitted certain information and had undertook to comply with the prescribe obligations and in 2012 had indeed registered the second respondent as a role player in the milk industry. The court was requested to infer through such conduct of the first respondent, that the first respondent was the "driving force" and *alter ego* of the second respondent.

43. Counsel for the applicant further relied on the application for registration that was lodged in May 2012 with the applicant in respect of the second respondent and specifically relied on the notes appearing as footnotes at the bottom of the application form. These notes read as follows:

"*1. The business, which has to register in terms of Regulation 1221 of 23 December 2005.*

2. The most senior official of the business/business unit or owner.

3. Person who will be responsible for the submission of the monthly returns."

44. The aforesaid notes related to the rubrics of *Name of business, Head of business and Contact Person"* in the registration form.

45. The said regulations contained a description of the format of the application form for the registration a role player. No mention was made in the regulations in respect of the information or requirements contained in the aforementioned footnotes. Those are simply administrative notes. They have no legal binding effect.

46. I do not agree with the interpretation advanced by counsel for applicant premised upon the judgment of *ABC Ltd, supra.* In that matter there was direct evidence that the person who was regarded as the *alter ego* or "driving mind" of the relevant company, although not the person who had been assigned to attend to the submitting of

annual revenue returns, was the *de facto* person who steered the company as if it was his own affairs. All relevant persons or authorised personnel and other parties in and to that company acquiesced in what was done by the said person and never refused to do what he had asked or instructed to be done or had objected thereto.

47. In the present matter there is no such direct evidence that the first respondent had regarded the second respondent as his own affairs or that he was simply obeyed in what was to be done, etc. The applicant's own letter of 23 September 2011 and the first respondent's response thereto clearly points the other way. The inference that the applicant seeks to be drawn from the alleged conduct of the first respondent can simply not be drawn on the facts in this matter and as clearly contradicted by the applicant's own letters. The *ABC LTD, supra,* matter is clearly distinguishable.

48. Neither the Agricultural Products Act nor the regulations promulgated there under provided that any officer of a corporate entity, or other person in its employ, is bound in his or her personal capacity in respect of the statutory measures described in Schedule 1 to the relevant regulations.

49. Even if the aforementioned interpretation of the said regulations is wrong, the applicant has not shown cause why the first respondent is to be held personally liable for the actions of the second respondent, it being common cause that the second respondent is the true role player.

50. It follows that the applicant in the applications under case numbers 26014/10 and 73422/2013, consolidated under no 73422/2013, cannot succeed

51. I grant the following order:

(a) The applications against first and second respondents instituted under numbers 26014/10 and 73422/2013, and consolidated under no 73422/2013, are refused with costs.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Applicant: A Vorster
Instructed by: Gildenhuys Malatji Inc.

On behalf of Respondents: J Möller
Instructed by: Dawie Beyers Inc.