

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 20/44414

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
30/04/2024	
DATE	SIGNATURE

**SOUTH AFRICAN AGRICULTURAL
MACHINERY ASSOCIATION**

First Applicant

VALTRAC (PTY) LTD

Second Applicant

and

**MOTOR INDUSTRY OMBUDSMAN OF
SOUTH AFRICA NCP**

First Respondent

JOHAN VAN VREDEN N.O.

Second Respondent

THE MINISTER OF TRADE AND INDUSTRY

Third Respondent

NATIONAL CONSUMER COMMISSION

Fourth Respondent

JUDGMENT

FINE AJ

INTRODUCTION AND RELIEF SOUGHT

[1] The applicants (SAAMA and Valtrac) seek declaratory relief to the effect that the first respondent MIOSA is not entitled to claim payment of compulsory contributions ("the contributions") from members of the automotive industry in terms of either:

- (1) The Consumer Protection Act¹ ("CPA"); or
- (2) The South African Industry Automotive Code of Conduct ("the Code")²

[2] The relief claimed is set out in the notice of motion which reads as follows:

(1) Declaring that the first respondent is not entitled to claim the payment of contributions from the first applicant's members or from the second applicant in terms of the Consumer Protection Act 68 of 2007, or in terms of the South African Industry Automotive Code of Conduct published under Government Notice 817 in Government Gazette 38107 of 17 October 2014;

(2) That the first and second respondents be ordered to pay the costs of this application, jointly and severally.³

[3] For convenience, I will refer to the first applicant as SAAMA, the second applicant as Valtrac (and collectively as the applicants), the first respondent as MIOSA and the third respondent, the Minister of Trade and Industry, as the Minister.

[4] A more precise formulation of the dispute between the parties is better understood if deferred until the role of each of the parties is explained and the relevant background facts sketched.

BACKGROUND

[5] SAAMA is a voluntary association with limited liability and perpetual succession whose members, including Valtrac, are engaged in commercial business activities which include the manufacture, building, importation, distribution and retailing of agricultural machinery and equipment.⁴

¹ 68 of 2008

² Published by regulation in the Government Notice 817 in Government Gazette 38107 of 17 October 2014 ("the regulation")

³ Irrelevant parts of the notice of motion omitted.

⁴ Agricultural machinery and equipment cover a vast array of machines and equipment used to plant, cultivate and harvest crops and husband livestock. See para 9 of the founding affidavit, CaseLines 001-6

Members of SAAMA, including Valtrac, either promote or supply agricultural services and are "suppliers" as contemplated in terms of the CPA.

- [6] MIOSA⁵, a non-statutory accredited industry ombud ("the ombud") was established in terms of the Code, enacted by the Minister in terms of section 82 of the CPA on recommendation of the Commission⁶. The Code became effective in and during January 2015.
- [7] The function of MIOSA as set out in the Code is to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner in accordance with principles of natural justice and by reference to what was regarded as equitable in the circumstances in accordance with the CPA and its regulations. In short, the Code provides for an alternative dispute resolution procedure to regulate interactions between or amongst persons conducting business within the automotive industry and persons conducting business in the automotive industry and consumers.
- [8] In addition, the Code included within its ambit provisions relating to the funding of MIOSA. These are contained in schedule 5 to the Code read with sections 12.1.5⁷ and 13.⁸
- [9] In relevant parts schedule 5 reads:

2. Funding from date of accreditation:

From the first anniversary of the date of accreditation, the MIOSA will be funded as follows:

⁵ Motor Industry Ombudsman of South Africa

⁶ Section 82 of the CPA deals with industry codes and provides as follows:

82. Industry Codes

- (1) In this section:
 - (a) 'Industry Code' means a code:
 - (i) regulating the interaction between or among persons conducting business within an industry; or
 - (ii) regulating the interaction, or providing for alternative dispute resolution between a person contemplated in subparagraph (i) and consumers; and ...
 - (b) ...

⁷ In terms of section 82:

- (a) 'Industry Code' means a code:
 - (i) regulating the interaction between or amongst persons conducting business within an industry; or
 - (ii) regulating the interaction or providing for alternative dispute resolution between a person contemplated in subparagraph (i) and consumers ...

⁸ Section 13.2 provides that "MIOSA is funded by the Automotive Industry in the manner as set out in Schedule 5".

- 2.1 the OEM's and importers shall be liable to contribute 20% of the approved budget and each individual OEM or importers contributions shall be calculated by dividing 20% of the approved budget by the total number of entities who directly import or manufacture goods.

("the OEM and importers' contribution")

- 2.2 The retailers shall be liable to contribute 80% of the approved budget and each individual retailer's contribution shall be calculated by dividing 80% of the approved budget by the total number of retail premises from which business is being conducted in the automotive industry.

("the retailer's contribution"⁹)

These provisions are referred to as the "impugned provisions".

- [10] For a considerable period of time, and since at least 2018, MIOSA on the one hand, and SAAMA on the other, have been in dispute in relation to the entitlement of MIOSA to claim contributions from members of the automotive industry through the mechanism of the impugned provisions.
- [11] SAAMA contended that in relation to the funding of MIOSA the Minister did not have the authority and was not empowered to enact the impugned provisions which are *ultra vires* the CPA. In addition, SAAMA contended that in certain instances, the manner in which the contributions were claimed from members of the automotive industry was *ultra vires* the Code.
- [12] Attempts to reach a practical solution to the impasse between SAAMA and MIOSA did not come to fruition. MIOSA threatened to initiate legal proceedings against SAAMA members and gave effect to that threat by instituting action against one of SAAMA's members VB Agri (Pty) Ltd ("VB Agri"). The present application comes in the wake of the VB Agri litigation.

⁹ The OEM and importers' contributions and retailers' contributions are collectively referred to as "the contributions"

THE ISSUES AND THE DISPUTE

[13] The applicants challenge the conduct of MIOSA and its entitlement to claim contributions on three principal grounds, namely:

- (1) Where the Code provides for the payment of contributions from participants in the automotive industry through the impugned provisions, the Minister exceeded his powers in terms of the CPA and to that extent the Code is *ultra vires* the CPA and the attempt by MIOSA to enforce payment of the contributions amounts to unlawful administrative action ("the first issue");
- (2) In the alternative and if the provisions in the Code are not *ultra vires* the CPA, then the applicants contend that the contributions claimed by MIOSA are based on a formula that is not authorised by the Code and to that extent MIOSA is acting *ultra vires* the Code and its conduct amounts to unlawful administrative action ("the second issue");
- (3) The Code Apart – the formula applied by MIOSA, in determining the amount of contributions payable to SAMA - has been applied irrationally and amounts to unlawful administrative action¹⁰. ("the third issue").

[14] The application is in the form of a reactive collateral or defensive challenge to the legality of the impugned provisions in the Code and the manner in which MIOSA has applied the impugned provisions. The challenge arises in circumstances where MIOSA seeks to coerce members of SAAMA into paying the contributions provided for in terms of the impugned provisions but in circumstances where the validity and enforceability of the impugned provisions are challenged. In essence, a coercive or collateral challenge is a defence to the enforcement of an unlawful act and squarely raises the issue of legality.

THE FIRST ISSUE

[15] The first issue raises the crisp question of whether the Minister was empowered in terms of the CPA to regulate for the funding of MIOSA by imposing obligations on members of the industry to contribute to the MIOSA budget through the mechanism of the impugned provisions. The first

¹⁰ This is the manner in which this issue is formulated in both the affidavits.

issue engages the principle of legality in the form of a reactive collateral or defensive challenge to the legality of the impugned provisions in the Code.

[16] In TT and Another v Minister of Social Development and Others¹¹, the court¹² said the following

[146] “It is trite that a functionary may exercise no power and perform no function beyond that conferred on it by the law. The exercise of power beyond that conferred by law offends the principle of legality and is *ultra vires*. In exercising the power to make regulations, it is the Minister, and not any other functionary who is empowered to do so. In doing so, the Minister would be obliged to comply with the Constitution and the empowering provisions of the Act. Any failure to do so would result in such regulations being *ultra vires*.

[147] As explained by the Constitutional Court in Affordable Medicines Trust and Others v Minister of Health and Others¹³

‘[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law and the doctrine of legality, which is part of that law. The doctrine of legality, which is an instant of the rule of law is one of the Constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the Executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law’. In this sense, the Constitution entrenches the principle of legality and provides the foundation for the control of public power’.

[17] The nature and circumstances of a coercive or reactive challenge to the validity was explained in Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd¹⁴ in the following terms
“... It will generally avail a person to mount a collateral challenge to the validity of an

¹¹ 2023 (2) SA 565 GJ

¹² At paragraphs 146 and 147

¹³ case reference omitted

¹⁴ 2021 (4) SA 436 SCA

administrative act where he or she is threatened by a public authority with coercive action precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.¹⁵

- [18] The parties accept a) that the first issue must be resolved by reference to the principle of legality and that a coercive or defensive challenge to the validity of the impugned provisions is in the circumstances appropriate and b) that the CPA does not in express terms empower the Minister to enact as part of the Code the impugned provisions.
- [19] MIOSA contends, however, that the absence of an express provision providing for the funding of MIOSA is not decisive of the issue at stake since the CPA, properly interpreted and applied, contains an implied primary power to provide for the funding of MIOSA.
- [20] In the alternative, MIOSA contends that the primary express power of the Minister to prescribe a code to regulate the interaction between or amongst members in the industry and to provide for alternative dispute resolution cannot be exercised properly if the ancillary implied power to prescribe for the funding of MIOSA does not exist. Stated otherwise, the ancillary implied power to prescribe for the funding of MIOSA through the mechanism of the impugned provisions is both reasonable and necessary to give effect to the express provisions of the CPA, and in particular, section 82 thereof.
- [21] Both the concept of an implied primary power and an implied ancillary power were explained by the Constitutional Court in Amabugane¹⁶ in the following terms: A primary power is either express or implied. It is express if specifically provided for in the Act. An implied primary power is implied if it is not expressly provided for in the Act but can be inferred from a reading of the Act and a consideration of all that must be factored into the interpretive process. It owes its existence to the provisions of the Act and everything that is relevant to the interpretive process. An ancillary implied power arises where the primary or express power cannot be exercised if the ancillary implied power does not also exist.

¹⁵ See also National Credit Regulator v Getbucks 2021 [2] ALL South African Reports 747 SCA at paragraphs 25-28

¹⁶ Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services: Minister of Police v Amabugane Centre for Investigative Journalism 2021 (3) SA 246 CC

[22] Whether there exists within the structure of the CPA a primary implied power which empowers or entitles the Minister to regulate for the funding of MIOSA or whether there is an ancillary implied power to that effect requires a brief analysis and overview of the relevant provisions of the CPA. In what follows is a reference to the relevant sections of the CPA with comment where necessary.

(1) The stated object of the CPA is the promotion and advancement of social and economic welfare of consumers¹⁷. This is achieved by providing “a legal framework for the achievement, and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally”¹⁸ and by “providing for a consistent, accessible and efficient system of consensual resolution of disputes arising from consumer transactions”¹⁹ and Section 2(1) of the CPA provides that it must be interpreted and construed in a purposive manner.

(2) Effect is given to the imperative of consensual dispute resolution through the following provisions in the CPA, and the alternative dispute resolution scheme (“ADR”):

- Sections 82(2) and (3) of the CPA which provide for enactment of an industry code by the Minister on a recommendation of the Commission (“NCC”)²⁰;
- An ombud with jurisdiction established under national legislation;
- An industry ombud accredited in terms of section 82(6) of the Act;
- A person providing conciliation, mediation or arbitration services to assist in the resolution of consumer disputes.
- The Minister is granted wide discretionary powers in relation to the Code which are:
 - The Minister, on the recommendation of the NCC, is empowered to both prescribe and withdraw industry codes²¹;

¹⁷ Section 3(1) of the CPA

¹⁸ Section 3(1)(a) of the CPA

¹⁹ Section 3(1)(g) of the CPA

²⁰ Section 82(6) of the CPA stipulates that the NCC when recommending the Code must further recommend to the Minister that the scheme be accredited as an “Accredited Industry Ombud”.

²¹ Section 82(2)(b) of the Act

- The NCC is empowered, inter alia “on the request of the Minister” to review industry codes periodically²²;
- Finally, “If-
 - (a) a proposed industry code provides for a scheme of alternative dispute resolution; and
 - (b) the NCC considers that the scheme is adequately situated and equipped to provide alternative dispute resolution services comparable to those generally provided in terms of any public regulation,

the NCC, when recommending that code to the Minister, may also recommend that the scheme be accredited as an 'accredited industry ombud'²³.

(3) There are, however, limitations imposed on the Minister in relation to his powers to promulgate a Code. These are prescriptive and which must be adhered to²⁴.

[23] A paramount consideration in the CPA, properly interpreted and applied, is consumer protection and the advancement of consumer interests which is achieved by, *inter alia*, providing for an effective, consistent, accessible and efficient system of consensual resolution for disputes arising from consumer transactions. This is achieved through the establishment of the alternative dispute resolution process in which ombuds, and *in casu* MIOSA, play a pivotal role.

[24] MIOSA is responsible for the carrying out and implementation of the dispute resolution procedure in terms of the Code which has an extensive dispute resolution structure and procedure and which entails the following:

- (1) The establishment of MIOSA as a non-statutory body, as motor industry ombudsman of South Africa, to assist in resolving disputes that arise in terms of the CPA in the automotive industry; and

²² Section 82(5)(a) of the Act

²³ Section 82(6) of the Act

²⁴ Sections 82(2), 82(3) and 82(4) of the CPA

(2) A hierarchy with procedures streamlined to achieve the aim and objective of the CPA in terms of which MIOSA is required to consider and dispose of complaints in a procedurally fair, informal, economical and expeditious manner, giving effect to the principles of natural justice and equity.²⁵

[25] Given these facts, it is difficult to understand how MIOSA, which must be “sufficiently resourced”, would be able to carry out its functions in terms of the CPA and Code or give effect to the stated objectives of the CPA, without adequate or proper funding. In my view, on a proper conspectus of the CPA read as a whole and having regard to its aim, scope and purpose, it is clear that there exists a primary implied power for the Minister to regulate for the funding of MIOSA. Without this funding, it seems clear that at least a very important objective of the CPA would not be achieved and MIOSA’s functions impeded. But in any event, even if the interpretive process having regard to the CPA read as a whole does not establish the existence of the primary implied power, it seems to me that the power to legislate for funding of MIOSA in the Code, by way of the impugned provisions, is necessary to achieve the objective of the CPA and, specifically, section 82 thereof. Stated otherwise, the power to legislate for the funding of MIOSA is reasonably and necessarily incidental to the exercise by the Minister of his powers to establish an effective alternative dispute resolution mechanism available to all participants in the automotive industry in a manner which further promotes an important the aim and objective of the CPA.²⁶

[26] It follows in my view that the first issue must be resolved in favour of MIOSA, and the collateral defensive challenge based on *ultra vires* of the Code falls to be dismissed.²⁷

THE SECOND AND THIRD ISSUES

[27] Before dealing with these issues, it is necessary to say something about the manner in which these issues were presented and which were unhelpful.

²⁵ See items 6, 7 and 8 of the Code

²⁶ There is of course no challenge to the manner in which the Minister has provided for the funding of MIOSA – 20% by OEMs and importers and 80% by retailers.

²⁷ National Director of Public Prosecutions and Another v Mohammed N.O. and Others 2003 (4) SA 1 CC and City of Cape Town v Clairmont Union College 1934 AD 414 420 at 421

- (1) Firstly, it is trite law that in motion proceedings the affidavits serve not only to place the evidence before the court but also to define the issues between the parties. The parties must accordingly raise and define the relevant issues with clarity and set out the evidence upon which they rely in simple and clear terms and in a chronological sequence, without argumentative matter. They must define the relevant issues with reference to the relief sought²⁸. In the present matter, applicants have given little or no heed to this well-entrenched principle and which makes identification of the issues extremely difficult.
- (2) Secondly, the CPA *ultra vires* issue and the second and third *ultra vires* code issues were coupled together in the notice of motion without any attempt whatever to separate the relief sought in respect of each of these separate and discrete issues. In relation to the second and third issue, which are dependent upon different facts and conclusions, no attempt was made to provide for separate relief in relation to each of these issues. The separate requirements in relation to the second and third issues are simply ignored in the notice of motion. Applicants simply overlook the special function which an order of court fulfils, and which defines what the court requires to be done.
- (3) In Administrator, Cape and Another v Ntshwaqula and Others²⁹, the then Appellate Division, emphasising the importance of the court order, said the following:

“... Similarly, the order with which the judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it.

It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the court’s directions must be found in the order and not elsewhere. If the meaning of an order is clear and unambiguous it is decisive and cannot be restricted or extended by anything else stated in the judgment.”

²⁸ Swissborough Diamond Mines v the Government of the Republic of South Africa and Others 1999 (2) SA 275 TPD at pgs. 323 F – 324 G and the cases therein referred to

²⁹ 1990 (1) SA 705 A

In this case, that simple requirement has not been followed.

- (4) Thirdly, the respondents, in lengthy heads filed on their behalf, dealt only with the first issue and no argument was addressed to me in relation to the merits of the second or third issues³⁰. In the course of oral argument, the respondents complained of the change in front where the basis of the complaint mutated from irrationality to arbitrariness and that the form of the notice of motion did not provide for relief in terms of the third issue. The objection to the change of stance is ill-founded as arbitrariness and irrationality are species of the same thing and a legality review is also permissible in relation to an arbitrary decision³¹.

THE SECOND ISSUE

[28] The complaint in relation to the second issue is that despite the specific categorisation and criteria established by the Minister in Schedule 5, in the form of the impugned provisions, MIOSA has claimed contributions from members of the automotive industry on a basis which is not congruent or consistent with the categories and criteria established by the Minister in terms of schedule 5. Put otherwise, it has created its own criteria and categories and attempted to enforce payment of contributions based on its own criteria and formula and which are inconsistent with the criteria prescribed in the impugned provisions.

[29] In MIOSA's formula, contributions are calculated with reference to eight categories as follows:

- (1) *"Vehicle Manufacturers/Importers/Distributors"*;
- (2) *"Retailers/Service Providers/Parts and/or Component Suppliers"*;
- (3) *"Original Component Manufacturers/Importers/Distributors: Consumer Interactive"*;
- (4) *"Original Component Manufacturers/Importers/Distributors: Supplying directly to Vehicle Manufacturers/OEM [sic]/the aftermarket/the trade"*

³⁰ Applicants filed heads of argument on 23 January 2023 and the first respondent filed heads of argument on 2 November 2023 in which it dealt only with the first issue and not the second and third issue.

³¹ Pharmaceutical Manufacturers Association of South Africa and Another in re ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 CC, Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC) and Democratic Alliance v eThekweni Municipality 2012 (2) SA 151 SCA

(5) *"Recreational Vehicle Manufacturers/Importers/Distributors"*

(6) *"Lawnmower Manufacturers/Importers/Distributors";*

(7) *"Fuel/Lubricant/Additive Producers/ /Importers/Distributors";*

(8) *"Fuel/Lubricant/Additive Retailers".*

(*"the MIOSA categories"*)

[30] In relation to the MIOSA categories which relate to the OEM and importers' contribution, it appears that MIOSA accepts that it has created the MIOSA categories but asserts that this was done on the basis of input from role players in the industry which requested this categorisation.

[31] The justification relied upon is in my view irrelevant. The only question which arises for determination is whether the MIOSA categories fall within the scope of the impugned provisions which, clearly, they do not.³²

[32] It follows therefore in my view that the creation of the MIOSA categories in relation to importers and OEMs is not sanctioned by the Code and any attempt to enforce payment of contributions based on the MIOSA categories and formulation is unlawful and in contravention the Code and the second issue must accordingly be resolved in favour of the applicants.

THE THIRD ISSUE

[33] The underlying premise and facts in relation to the third issue are difficult to follow. They appear to be the following, namely that, Valtrac, which conducts its business from five premises, and imports and sells tractors and associated agricultural equipment, does so under the aegis of fourteen different brands. On the formula applied by MIOSA, Valtrac is required to pay contributions per brand, and which will render it liable to payment of a contribution in respect of the importation and sale of tractors and equipment of R1 034 008 per annum arrived at by multiplying the fourteen brands by the applicable rate of R73 872 00 per brand.

³² As a last resort, MIOSA contends that there is nothing irrational in the subcategorization of importers and distributors and seeks legal advice whether the general scope and Act allows for it to introduce a favourable subcategorization model pending a formal amendment to schedule 5 of the Code. This is obviously irrelevant.

- [34] In contrast to Valtrac, Mercedes Benz South Africa, who sold 200 878 vehicles, Volkswagen who sold 80 896 and Ford Company of South Africa who sold 50 901 vehicles in 2019 only pay R73 872 in contributions since they are charged on the basis of the importation and sale of a single brand. Applying this formula, they pay only the amounts referred to above as contrasted with Valtrac, who pays R1 034 208 since it sells 14 brands. This categorisation, so the applicant contends, is arbitrary.
- [35] The allegations of disparity between Valtrac's contributions based on a brand formula and those of Mercedes Benz, Volkswagen and Ford, are denied by MIOSA. There is a clear dispute of fact in relation to the core issue which cannot be resolved in motion proceedings on the affidavits as they stand.
- [36] Little or no attempt was made by the applicants to address the disputes of fact material to the resolution of the third issue, in either the replying affidavit or heads of argument. Instead, the replying affidavit engages argumentative matter and matters irrelevant to the disputed issue which do not help resolve the core underlying issue.

CONCLUSION

- [37] Accordingly, the applicants are not entitled to relief in respect of the first and third issues but are entitled to relief in relation to the second issue which I will deal with in the order which follows.
- [38] In relation to the issue of costs, it seems to me that both parties have achieved limited success but in the exercise of my discretion, and in view of the factors referred to in paragraphs 27.1 to 27.4 above, it seems to me that a fair and equitable order in relation to the costs, in the circumstances, is that each party bears its own costs.
- [39] In the circumstances, I grant the following relief:
- (1) It is declared that the first respondent, MIOSA, is not entitled to claim payment of contributions based on the MIOSA categories and is only entitled to claim contributions based on the formula and criteria referred to in schedule 5 of the Code;
 - (2) Each party is to pay its own costs.

[REDACTED]

D M FINE SC
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:

Adv HA Van Der Merwe SC

Instructed by:

Redfern and Findley Attorneys

For the respondent:

PC Cilliers SC

Instructed by:

Burger and Associates

Heard on 06 March 2024

Judgment on 30 April 2024