IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 28608/2019

Date:

In the matter between:

SAWMILLING SOUTH AFRICA **APPLICANT**

AND

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS **1ST RESPONDENT**

THE MINISTER OF ENVIRONMENTAL AFFAIRS **2ND RESPONDENT**

JUDGMENT

TOLMAY J:

INTRODUCTION

[1] The applicant (Sawmilling) sought to review an environmental Regulation designed to govern air quality control. These Regulations were made by the second respondent (the Minister) under the National Environmental Management: Air Quality Act 39 of 2004 ("AQA").

[2] The primary relief sought by Sawmilling was an order to declare a provision in the Regulations unconstitutional and invalid, in so far as it purports to apply to sawmills on the ground that the Regulation violates the rule of law as contemplated in section 1(c) of The Constitution of the Republic of South Africa, 1996 ("the Constitution"), because it was alleged that it is irrational.

[3] In the alternative, an order was sought by Sawmilling to review and set aside the Minister's aforementioned decision to implement the impugned provision in the Regulation on grounds contained in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[4] An order was sought in the following terms:

1. Declaring that the listed activity in sub-category 9.5 of the regulations made in terms of section 21(1)(b) of the National Environmental Management: Air Quality Act of 2004 published in Environmental Regulation, GN R1207, GG2647, 31 October 2018 ("the 2018 regulations") is unconstitutional and invalid to the extent that it requires a sawmill that dries wood in an indirectly fired kiln with an external heat source in the form of a boiler with a design capacity of 50 MW or lower than that to obtain an atmospheric emission licence.
2. Alternatively to para 1 above, reviewing and setting aside the decision of the second respondent to publish the listed activity in sub-category 9.5 of the 2018 regulations in its current form.

[5] The respondents opposed both the rationality review based on the Constitution, as well as the administrative review based on PAJA.

[6] In the joint practice note four points were raised by the respondents in *limine,* they were the following:

6.1 In relation to the PAJA review, it was contended that there was no "administrative action" capable of being reviewed. This was based on the argument that the regulated activity in sub-category 9.5 remained as it was in the Environmental Regulation, GN R893, GG 3705, 22 November 2013 ("the 2013 regulations") and was not changed in the 2018 Regulations. There was thus no decision that could be reviewed. This point is dealt with under the merits of the application in the judgment, as the answer to this question is inextricably linked to the PAJA review.

6.2 It was submitted that the declaratory relief sought by Sawmilling in prayer one was fallacious.

6.3 Assuming that there was an administrative action, whether Sawmilling was limited to bring its review under PAJA or whether it could permissibly still review the impugned conduct under section 1(c) of the Constitution.

6.4 Whether the applicant's application was late.

[7] In relation to the merits of the review, the parties were in agreement that the following must be decided:

7.1 Whether listed activity sub-category 9.5 in the 2018 regulations is unconstitutional on the basis that its inclusion, in its current form, was irrational;

7.2 Whether the Department's 'decision' to publish listed activity sub-category 9.5 in the 2018 Regulations in its current form was unlawful on the basis that –

7.2.1 section 6(2)(f)(ii) of PAJA is contravened because the decision was irrational; and/or

7.2.2 section 6(2)(c) of PAJA is contravened because the decision was procedurally unfair; and/or

7.2.3 section 6(2)(h) of PAJA is contravened because the decision was so unreasonable that no reasonable regulator would have made it.

BACKGROUND

[8] Sawmilling is a voluntary association, whose members are predominantly saw millers and business associates of Sawmilling.

[9] Sawmilling explained that sawmills' basic operation is the harvesting of trees in a plantation which are felled and turned into logs. The logs are then taken to a sawmill where they are sawn into planks and then dried out so that naturally occurring moisture is removed from the wood. The drying is done in kilns. A kiln is a thermally insulated chamber. There are two types

of kilns. The first type is known as directly fired kilns, where the heat is generated through combustion (burning of fuel) within the kiln chamber itself. The second type is known as indirectly fired kilns, where the heat source is external to the kiln and no fuel is burned (no combustion takes place) within the kiln chamber.

[10] The applicant explained that the sawmilling industry in South Africa uses indirectly fired kilns which are also known as externally heated kilns. Moist timber is stacked inside the kiln and heat is then supplied to the kiln from an external source. The external source is a boiler, which is located some distance away from the kiln, usually about 50 metres. The boiler is heated by burning biomass fuel usually in the form of wood chips, off-cuts and bark. The heated boiler then boils water to generate steam. The steam makes a 50 metre trip from the boiler to the kiln in steel pipes. When the hot steam gets to the kiln, it passes through a system of closed pipes inside the kiln. Acting like a radiator does, the steam filled pipes heat up the air inside the kiln. The warm air dries out the stacked timber. It was stated that it is extremely important to note that the kiln does not, itself, produce any heat. The heat is all produced externally by the boiler. Sawmilling stated that all sawmills in South Africa, and certainly all of Sawmilling's members, use boilers with a design capacity of less than 50 MW.

THE LEGISLATIVE FRAMEWORK

[11] The second respondent ("the Minister") has the responsibility of administering environmental laws, including the National Environmental Management Act 107 of 1998 ("NEMA"). She also has the power to enact

Regulations under NEMA and other NEMA related legislation. In this instance the Minister enacted Regulations that have impacted sawmills and in particular on the way that they dry timber.

[12] Environmental management finds its origin within the Constitution. Section 24 of the Bill of Rights provides as follows:

"Everyone has the right:

a. (a) To an environment that is not harmful to their health and wellbeing; and

b. (b) To have the environment protected, for the benefit of present and future generations, through legislative and other measures that –

i. (i) Prevent pollution and ecological degradation;

ii. (ii) Promote conservations; and

iii. (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[13] The legislation contemplated in section 24(b) of the Constitution is, amongst others NEMA. It provides a general framework for how environmental management must be undertaken. It makes provision for the tools in the integrated environmental management system, namely environmental impact assessments (EIA).

[14] It is stated as follows in paragraphs 15 to 21 of the founding affidavit and this at least, is uncontested by the respondents:

"15. The EAI process is an inter-disciplinary and multi-step procedure designed to ensure that environmental considerations are properly taken into account when decisions are made about whether or not to authorise activities that may impact harmfully on the environment. Thus, where an activity is likely to have an adverse impact, NEMA and some of the related legislation requires that an EIA process be followed. Essentially, this means that an environmental assessment practitioner must carefully consider the impact of the proposed activity on the environment and prepare a report to motivate to the relevant environmental authority why, notwithstanding the potential harm to the environment, the activity should be authorised. The authorisation will then also regulate the activity, sometimes with conditions.

16. Significantly, not all activities require an EIA. Only those that involve a regulated activity require authorisation. Regulated activities are controlled. Thus, under NEMA, the Minister has published a list of regulated activities that require an environmental authorisation. These are referred to in environmental management parlance as 'listed activities'.

17. Thus, South Africa has a system of integrated environmental management which envisages that the government will protect the environment by creating, through Regulations, lists of regulated activities and if any project is undertaken which triggers one of these

listed activities, the project or activity needs environmental authorisation …

18. As stated above, NEMA is the broad legislative framework that regulates environmental management in South Africa. However, specific NEMA-related statutes have been enacted to regulate particular aspects of the environment such as soil, water, forests, marine areas and air quality.

19. …

20. Air quality control is an important part of environmental management. Polluted air is damaging to people's health, the environment and ultimately the economy…

21. The need for government to regulate air quality control is a legitimate governmental purpose of the National Environmental Management: Air Quality Act 39 of 2004 ("the AQA") …

[15] The aforesaid sets out the framework within which the Minister and the first respondent (the Department) need to provide an appropriate framework to ensure reasonable measures are put in place for ecological sustainable development, while at the same time promoting justifiable and social development

[16] This case is concerned with air quality control and the Regulation, by the government, of listed activities included in the AQA Regulations.

[17] The EIA process, as explained by Sawmilling, is an inter-disciplinary and multi-step procedure, designed to ensure that environmental considerations are properly taken into account, when decisions are made about whether or not to authorise activities that may harmfully impact on the environment.

[18] In its founding affidavit, Sawmills explains that not all activities require authorisation, only those that are regulated. Environmental laws, it was explained, therefore revolve, to some extent, around lists of regulated activities, referred to as "*listed activities*". Different environmental statutes have different listed activities, all depending on what the purpose of the legislation is and on what needs to be regulated.

[19] Listed activities are incorporated into the environmental protection system via Regulations. As stated above, the Minister makes these Regulations under some of the environmental statutes. This is the case with the legislation that governs air quality control, the AQA, where the Minister's power to make Regulations originates in section 21 of AQA, which reads as follows:

"Listing of activities**.** –

(1) The Minister must, or the MEC may, by notice in the Gazette-

(a) publish a list of activities which result in atmospheric emissions and which the Minister or MEC reasonably believes have or may have a significant detrimental effect on the environment, including health, social conditions, economic conditions, ecological conditions or cultural heritage; and

(b) when necessary, amend the list by-

(i) adding to the list activities in addition to those contemplated in paragraph (a);

(ii) removing activities from the list; or

(iii) making other changes to particulars on the list.

(2) A list published by the Minister applies nationally and a list published by the MEC applies to the relevant province only.

(3) A notice referred to in subsection (1)-

(a) must establish minimum emission standards in respect of a substance or mixture of substances resulting from a listed activity and identified in the notice, including-

(i) the permissible amount, volume, emission rate or concentration of that substance or mixture of substances that may be emitted; and

(ii) the manner in which measurements of such emissions must be carried out;

(b) may contain transitional and other special arrangements in respect of activities which are carried out at the time of their listing; and

(c) must determine the date on which the notice takes effect.

(4) (a) Before publishing a notice in terms of subsection (1) or any amendment to the notice, the Minister or MEC must follow a consultative process in accordance with sections 56 and 57.

(b) Paragraph (a) need not be complied with if the notice is amended in a non-substantive way.

(Date of commencement of s. 21: 1 April, 2010.)"

[20] The need for government to regulate air quality control is unquestionably a legitimate governmental purpose, and there cannot be any question about that. In terms of the AQA, the Minister, from time to time, identifies various harmful activities and publishes them in a national list in the Government Gazette. Section 21(1)(a) of the AQA, clearly includes a list of activities that cause atmospheric emissions that have a "*significant detrimental effect on the environment*". In keeping with the general licensing model of environmental law, if one of these listed activities is triggered by a project, then authorisation for the project is required from the relevant licensing authority in terms of section 22(*a*) of the AQA which provides that, "*no person may without an atmospheric emission licence conduct any activity listed on the national list*".

THE HISTORY OF THE REGULATIONS ON SAWMILLS

[21] The majority of the provisions of the AQA came into force on 11 September 2005. It ushered in a new legislative regime for controlling air pollution. Since then, the Minister has made various Regulations under the AQA relating to various aspects of air pollution.

[22] It is appropriate to begin with the Regulations that were published on 31 March 2010 in Environmental Regulation, GN R248, GG33064, 31 March

2010 (“the 2010 regulations”). Listed activity sub-category 9.5 was couched in the following terms in the 2010 Regulations:

“Description: the drying of wood by an external heat source…

Application: all installations producing more than 10 tons per month.”

[23] In terms of the 2010 Regulations the listed activities targeted the external heat source, that is the boiler that generates hot steam in the case of indirectly fired kilns. Sawmills argued that the boiler is the only part of the wood drying process that emits pollutants into the atmosphere.

[24] Then, in 2013 two further sets of relevant Regulations were published. The first was published on 1 November 2013 in Environmental Regulation, GN R831, GG 36973, 1 November 2013 (“the small boiler Regulations”). The effect of the small boiler Regulations was to regulate all small boilers, defined to mean “*any boiler with a design capacity equal to 10 MW but less than 50 MW net heat input…*”. This means that, as of 1 November 2013, the boiler component of wood drying installations used at sawmills were separately regulated, if they were between 10 MW and 50 MW.

[25] Later that same month, November 2013, a second set of Regulations were published by the Minister. The Regulations effectively updated the national list. Thus, on 22 November 2013 the Minister published the 2013 Regulations. As it turns out, the wording of sub-category 9.5 in the 2013 Regulations did not change from what it was under the 2010 Regulations. Sawmilling stated that in light of the small boiler regulations, the sawmilling industry expected that wood drying installations that use a small boiler to

heat them up would be removed from the national list. It was stated that it was plain to the industry that no useful purpose could be served by requiring sawmills, whose drying installations were already regulated under the small boiler Regulations, to also have to undergo further regulation under the 2013 Regulations which would, if their drying installations were dealt within the ambit of listed activity sub-category 9.5, require them to obtain an atmospheric emission licence.

[26] Sawmilling argued that the result of the two sets of Regulations promulgated by the Minister in 2013 was that a sawmill's wood drying installation was regulated in two instances. Firstly, in the small boiler Regulations and in the 2013 Regulations, if the boiler was between 10 MW and 50 MW. Boilers smaller than 10 MW, although not regulated by the small boiler Regulations were nevertheless regulated at local government level.

[27] The sawmilling industry complained to the Minister and the Department and pointed out that there was no need to regulate the wood drying installations in different places. Numerous engagements between the industry and the Minister followed.

[28] Sawmilling's argument was that for the purposes of this application, they were already regulated, in relation to the second category, boilers between 10 MW and 50 MW, these are referred to as "*controlled emitters*" and are regulated in terms of the small boiler regulations which were promulgated by the Minster on 1 November 2013.

[29] In relation to the third category, that being boilers bigger than 50 MW, Sawmilling stated that most South African sawmills do not use boilers this

big. In South Africa, Sawmilling argued the boilers used as an external heat source for indirectly fired kilns all fall into either the first or second category, both of which are already regulated. Boilers with a design capacity of 50 MW or more are, in any event also regulated as listed activities 1.1, 1.2 and 1.3 in the 2018 Regulations.

[30] In a letter dated 28 August 2017, Sawmilling suggested that listed activity sub-category 9.5 should be amended. Instead of referring to "*the drying of wood by an external heat source*" it was suggested that the regulated activity be "*the drying of wood using direct-fired kiln."* The Minister, at that time, notified the industry that he intended amending the wording of listed activity sub-category 9.5 to read as follows:

"Description: the drying of wood using direct-fired kilns, and the manufacture of laminated and compressed wood products.

Application: all installations producing more than 10 tons per month."

[31] The wording set out above was published by the Minister on 25 May 2018 in Environmental Regulation, GN R516, GG 41650, 25 May 2018. The notice called upon interested parties to comment on the aforementioned wording. The industry was, according to Sawmilling, satisfied with the wording and as a result did not comment.

[32] Despite the consultation process, and the notice of 25 May 2018, a new set of Regulations were promulgated during 2018 with a new national list. These new Regulations were published on 31 October 2018 in the 2018 regulations. Listed activity sub-category 9.5 in the 2018 regulations was then worded as follows:

"Description: the drying of wood; and the manufacture of laminated and compressed wood products.

Application: all installations producing more than 10 tons per month."

[33] The regulated activity was now couched in terms that were wider than before. Under both the 2010 and 2013 Regulations it only covered wood drying-installations that had an "*external heat source*". After the amendment it covered a broader phrase "*the drying of wood*" and this, according to the Minister in her answering affidavit, includes the drying of "*all"* wood in "*all"* installations subject only to the proviso that "*the installations produce more than 10 tons per month*". This specifically includes indirectly fired kilns even though the boiler that provides the external source of heat for the kiln was already regulated.

[34] The Minister was requested to explain the aforesaid deviation, but in her affidavit states that the Department has no obligation to produce evidence contrary to that stated by Sawmilling.

THE RELIANCE ON SECTION 1(c) OF THE CONSTITUTION

[35] The respondents argued that Sawmilling could not legally rely on section 1(c) of the Constitution. It was argued that, if the conduct constituted an administrative action, as defined in section 1 of PAJA, it was impermissible to seek declaratory relief and Sawmilling's cause of action should be founded on the provisions of PAJA.

[36] The respondents furthermore contended that if the Court should find that the 2018 Regulations constituted a reviewable action in terms of PAJA, it

was not open to Sawmilling to seek direct reliance on the provisions of the Constitution to set aside the decision.

[37] The Minister argued with reference to the *Minister of Defence and Another v Xulu* that the process to be followed was explained by the SCA and it was set out as follows:

> "Before dealing with the relevant grounds of review it must be said that the approach of the full court, in avoiding the question whether this was a case of administrative action and disposing of it on the basis of the principle of legality, was in principle incorrect and one to be discouraged. The right to just administrative action is the primary source of the power of courts to review the actions of the executive and the administration. The Constitution required legislation to be enacted to provide for this and PAJA is the result. It is specific, although not necessarily simple, in its provisions and prescribed procedures that must be followed in pursuing judicial review, while vesting rights in people dealing with the administration, such as the right to reasons. It imposes significant limitations in regard to the requirement to exhaust internal remedies and in regard to the time within which review proceedings must be brought. Litigants and courts should not circumvent these by proceeding directly to questions of legality. If action by the executive and administration is administrative action, then the jurisprudence of the Constitutional Court is clear in saying that this is the path that the litigation must follow."

[38] The respondents furthermore contended that if the Court should find that the 2018 Regulations constituted a reviewable action in terms of PAJA, it was not open to Sawmilling to seek direct reliance on the provisions of the Constitution to set aside the decision.

[39] In *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* Chaskalson CJ held that:

"Professor Hoexter sums up the relationship between PAJA, the Constitution and the common law, as follows:-

'The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act.'"

[40] The Minister argued in effect that if PAJA applies no reliance can be placed on section 1(c) of the Constitution. The aforesaid seems to be a correct interpretation of the law, and the review should, in the light of the

conclusion that the Court came to, be considered in accordance with PAJA, and not in terms of section 1(c) of the Constitution and prayer one of the notice of motion could accordingly not be granted.

WAS THE REVIEW APPLICATION BROUGHT OUT OF TIME?

[41] The Minister raised the point that Sawmilling brought the review out of time and failed to ask for condonation. The Minister pointed out that the review application was late in that the impugned Regulations were promulgated on 31 October 2018, but the review application was only issued on 26 April 2019. Sawmilling pointed out that the review application was instituted 178 days after the Regulations were made.

[42] The review was brought under section 1(c) of the Constitution and/or section 6(2) of PAJA. As far as the review in terms of PAJA is concerned, section 7(1) of PAJA states that a review under section 6(2) must be instituted within 180 days.

[43] Section 7(1) also states that the review "*must be instituted without unreasonable delay and not later than 180 days…*". In other words, there are some situations where applicants are not entitled to wait out the full 180 days. This will apply where there are special circumstances that require expedition. Those special circumstances must, however, be pleaded by the party who alleges that expedition was required. The Minister did not point out anything special about this case which required Sawmilling to have brought its review sooner than 180 days. There was no evidence on the papers suggesting that this application was anything other than an ordinary

review of administrative action taken which would entitle the applicant to bring its application within 180 days.

[44] The Minister should have at least explained why she claimed, that the review was brought late. Sawmilling did explain in its affidavit, that within a week of becoming aware of the new regulations, and within a week of them being made, it wrote to the Minister asking for clarity. In the founding affidavit reference was made to numerous letters, emails and telephone calls that were made to engage government. None of these were responded to. Only after all these attempts proved fruitless was the review application brought. These facts also support the conclusion that there was no undue delay in launching the review.

[45] The notion of "*delay*" was dealt with by the Constitutional Court in the context of reviews brought under section 1(*c*) of the Constitution in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*. In that case, the Constitutional Court explained that, unlike a review in terms of PAJA, there is no 180 day time period within which to institute a rational review. The review must, however, be instituted within a reasonable time. As to what is reasonable will depend on the facts and circumstances of each case. The CC explained that previous judgments which applied the 180-day period in PAJA as a yardstick for reasonableness in rationality reviews under section 1(*c*) of the Constitution were wrong. The question simply is whether or not the delay was reasonable in the circumstances of the specific case. The court in *Buffalo City* further held that:

“The standard to be applied in assessing delay under both PAJA and legality is thus whether the delay was unreasonable. Moreover, in both assessments the proverbial clock starts running from the date that the applicant became aware or reasonably ought to have become aware of the action taken. However, it is important to note that the assessment is not the same. A distinction between the assessments of the delay under PAJA versus the principle of legality turns on the prescribed time period of 180 days. This distinction was succinctly described by the Supreme Court of Appeal in Opposition to Urban Tolling Alliance, which found that section 7 creates a presumption that a delay of longer than 180 days is ‘per se unreasonable’:

‘At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned. Up to a point, I think, section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature’s determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been ‘validated’ by the delay.’

The approach to undue delay within the context of a legality challenge necessarily involves the exercise of a broader discretion than that traditionally applied to section 7 of PAJA. The 180-day bar in PAJA does not play a pronounced role in the context of legality. Rather, the question is first one of reasonableness, and then (if the delay is found to be unreasonable) whether the interests of justice require an overlooking of that unreasonable delay.

The second difference between PAJA and the legality review for the purposes of delay is that when assessing the delay under the principle of legality no explicit condonation application is required. A court can simply consider the delay, and then apply the two-step Khumalo test to ascertain whether the delay is undue and, if so, whether it should be overlooked."

[46] As stated above, Sawmilling explained the circumstances surrounding its 178 day delay in terms of launching the review application. Those circumstances, suggested that it was reasonable to institute the review when it did, as attempts to engage with government proved to be futile. Had it launched the application sooner, without first trying to engage the government, the litigation might have been viewed as premature. Under these circumstances the 178 days that it took to launch the application was not an unreasonable delay, under either under section 6(2) of PAJA or section 1(*c*) of the Constitution.

[47] In the light of the aforesaid there was no undue delay nor was the application brought out of time. In the light thereof this point *in limine* should be dismissed.

IS THERE ANY "ADMINISTRATIVE ACTION" CAPABLE OF BEING REVIEWED UNDER PAJA?

[48] It is trite that the purpose of PAJA is to give effect to the constitutional right that every person has to administrative action that is lawful, reasonable and procedurally fair. The purpose of PAJA is to codify the standard for permissible administrative action contemplated in section 33 of the Constitution, as was stated by the Constitutional Court, the purpose of section 6 of PAJA is to codify the grounds of judicial review as contemplated in section 33 of the Constitution.

[49] The Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* citing *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* with approval, defined an administrative action into seven components, it stated that there must be:

1. 1.1 A decision of an administrative nature;

2. 1.2 By an Organ of State and/or a national and/or juristic person;

3. 1.3 Exercising a public power or performing a public function;

4. 1.4 In terms of any legislation and/or empowering provision;

5. 1.5 That adversely affects rights;

6. 1.6 That has a direct external legal effect;

7. 1.7 That does not fall under any of the exclusions.

[50] A decision is defined as meaning *"any decision"*, of an administrative nature made, proposed to be made or required to be made, as the case may be under an empowering provision, including a decision relating to the making, suspending, revoking, refusing to make an order, award and/or determination. It includes giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission. Issuing, suspending, revoking or refusing to issue a licence, authority or other instrument or imposing a condition or restriction. It also means making a declaration, demand or requirement or retaining and/or refusing to deliver up an article, or doing and/or refusing to do any other act or thing of an administrative nature and a reference to a failure to take a decision.

[51] Against the aforesaid background, the Minister argued that the statement of the 2013 listing of *"the drying of wood by an external heat source"* in the 2018 Regulations, is not a decision as envisaged in Section 1 of PAJA. It was argued that the decision to list the drying of wood, using an external heat source was taken in 2013 and not in 2018 and therefore the challenge against such listing should have been directed against the 2013 Regulations and not the 2018 Regulations. The Minister based her argument on the following:

a) On 31 March 2010, the Minister promulgated the 2010 Regulations, in which certain activities were included in the list of activities, which may result in harmful atmospheric emissions or which have or may have a significant detrimental effect on the environment, including health, social, economic, ecological conditions or cultural heritage.

a. b)Wood drying and the production of manufactured wood products was listed as a listed activity in the 2010 Regulations mentioned above and was listed as follows:

"Description: The drying of wood by an external source of heat; the manufacture of laminated and compressed wood products: All installations producing more than 10 tons per month."

a. c)The 2010 description of the listed activities was later revised by the Minister in the 2013 Regulations.

b. d)The revision was part of the exercise to provide clarity to the 2010 listed activities, as well as to address the unintended consequences that were caused by the re-grouping and re-categorisation that was implemented earlier in terms of the International Best Practice.

c. e)The revised description of the listed activity was thus described in the 2013 Regulations as follows:

"Wood burning, drying and the production or manufactured products. The burning and/or drying of wood by an external source of heat and

the manufacture of laminated and compressed wood products. All installations producing more than 10 tons a month."

a. f) Thus, whereas the 2010 Regulations described the listing as *"the drying of wood by external heat source",* the 2013 Regulations changed the description to the "*burning of wood*". In other words, the 2013 Regulations were all encompassing of the listing activity applied to the wood drying process irrespective of the source of heat. The source could either be a direct heat source or an indirect heat source.

b. g)Also, in 2013, additional emission control tools were introduced, namely, the declaration of a Small Boiler as a controlled emitter established in terms of the small boiler Regulations.

[52] The Minister pointed out that the declaration of a small boiler as a controlled emitter brought about challenges to the licensing regime in the wood product industry sector, primarily because most sawmills in South Africa had indirectly fired kilns, which use small boilers as the energy source.

[53] It was common cause that the licensing authorities also applied the listed activities Regulations and the small boiler Regulations inconsistently, in that some authorities interpreted that sawmills that had an external source of heat i.e. small boilers, were exempted from atmospheric

emission licensing; and others had a different view and subjected it to both licensing and compliance with the small boiler emission standard.

[54] These discrepancies referred to above were brought to the Department's attention by both the industry and numerous testing bodies that conducted emission measurements and reporting on behalf of sawmills.

[55] As a result of these issues being brought to the Department's attention, the Department engaged all the stakeholders and implemented various measures in the regulatory review process to provide clarity in order to ensure consistent application of these tools in air pollution control.

[56] The Minister herself pointed out that it was on the basis of those engagements that the Department, on 25 May 2018 published the draft amendment notice for public comment (Environmental Regulation, GN R516, GG 41650, 25 May 2018). The notice was published in terms of sections 56 and 57 of AQA.

[57] The draft amendment notice proposed that the description of listed activities in sub-category 9.5. regulating sawmills be changed and be limited to processes involving direct fired kilns only.

[58] The Minister stated that having considered all the comments received from various stakeholders, it became evident that the proposal, if promulgated as proposed, would have resulted in the exclusion of the majority of sawmills from being licensed under the AQA. She declared

that it was then considered that the exclusion of the majority of sawmills from the licencing regime to be inconsistent with the objects of AQA and in particular, such exclusion would be inconsistent with the management of the impact sawmills have on air quality. She stated that the exclusion was considered to be ignoring the value of licence and management of the impact of sawmilling effectively. The proposal to amend the 2013 Regulation was then not accepted.

[59] On 31 October 2018, the then Minister, Mr Derek Hanekom, promulgated amendments to the listed activities and associated minimum emission standards identified in terms of section 21 of the AQA in the 2018 regulations. Notably without engaging or alerting the sawmilling industry of the about turn.

[60] The description of the listed activity in respect of drying of wood, remained unchanged, but for the special arrangements that were included in the description for the purpose of providing clarity and/or providing for special arrangements, where an external source of heat was used for the drying of wood and manufacturing of wood products.

[61] As a result, the 2013 description of the listed activity in sub-category 9.5 was retained in the 2018 regulations. i.e. *"the burning or drying of wood and the manufacture of laminated and compressed wood products."* The only change made in the 2018 Regulations, was the introduction of the special arrangement provision made in sub-category 9.5 (a)(i) and (ii).

[62] The Minister, concluded that because the proposal to amend the listed activity was not accepted, it meant that the 2013 description was retained (the law therefore was not changed) and the proposal, (as published for comment was rejected). As a result the law was, according to her interpretation of it, not changed.

[63] In its replying affidavit and quite correctly so, Sawmilling did not challenge the statements made by the Minister that the description of sub-category 9.5 was not changed in 2018, from how it read in 2013. It stated in its reply that:

> "I note the allegations made in para 150.13 of the answering affidavit, namely that the description of 9.5 was not changed in 2018 from how it read in 2013. Sawmilling's point however was that the description of the listed activity 9.5 needed to be changed. Indeed, that is why a change was proposed in 2017/2018. It was proposed because it was needed and the fact that the needed change was not implemented renders the 2018 regulations just as problematic as the 2013 Regulations. I should point out that the main reason why the position needed to change after 2018, is because it was in that year that the small boiler Regulations were introduced. Indeed, it is because of the introduction of the small boiler regulations that it becomes unnecessary for the listed activity 9.5 to be extended to Sawmilling SA members."

[64] According to the Minister the question that therefore arose was whether it was legally competent for Sawmilling to seek to challenge the listing of the wood drying process irrespective of the source of heat, in the 2013 Regulations as opposed to the 2018 Regulations.

[65] Counsel for the Minister submitted that it was incompetent and legally impermissible for Sawmilling to challenge the 2018 Regulation, as the listing of wood drying, irrespective of the source of heat, was made in the 2013 Regulations. The 2018 Regulations merely added special arrangements in case where an external heat source is used, The Minister therefore concluded that the challenge to the 2018 regulation was not competent.

[66] The Minister made the point in her answering affidavit that if Sawmilling had any cause of complaint, that complainant should have been directed against the introduction of a listed activity sub-category 9.5 (as incorrectly numbered) of 31 March 2013.

[67] The Minister contended that because Sawmilling did not seek to impugn sub-category 9.5, as was introduced by virtue of the 2013 regulations. Therefore, the application was ill-conceived because, so she alleged, no decision was taken by the promulgation of the regulations in the 2018 Regulations, which negatively affected the rights of Sawmilling and that of its members. The only decision taken, it was argued, in the 2018

regulations was the introduction of additional measures in the instance where an external heat source was used during the wood drying process.

[68] Finally the Minister argued that, if it was found that the listing of the wood drying process was reviewable on any of the grounds advanced, then the review should be directed against the 2013 Regulations and not the 2018 Regulations, as no decision that adversely affects Sawmilling rights was taken in the 2018 Regulations. In fact, no decision was taken in the 2018 Regulations except for the introduction of special arrangements.

[69] In *New Clicks* the Constitutional Couert confirmed that the enactment of Regulations under an empowering statute constitutes an administrative action.

[70] As a result the action of the Minister must meet the minimum standards prescribed in PAJA. Sawmilling relied on the following three grounds for review set out in PAJA:

(a) Section 6(2)(f)(ii), on the ground that the listed activity is allegedly irrational;

(b) Section 6(2)(c), on the basis that there was inadequate consultation pertaining to sub-category 9.5 and as a result it rendered the process unfair; and

(c) Section 6(2)(h), because the listed activity in sub-category 9.5 is so unreasonable that no reasonable regulator would have listed it.

[71] Section 6(2)(*f*)(ii) of PAJA reads as follows:

> (2) A court has the power to judicially review an administrative action if –
>
> (f) the action itself is not rationally connected to –
>
> (aa) the purpose for which it was taken;
>
> (bb) the purpose of the empowering provision;
>
> (cc) the information before the administrator; or
>
> (dd) the reasons given for it by the administrator."

[72] In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of South Africa and Others* the Constitutional Court explained that rationality is a minimum requirement for the constitutional validity of any law. When addressing the rationality and its relationship with the rule of law, the Constitutional Court held that

> "It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action [including legislation making action]. The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry."

[73] The Constitutional Court in *Pharmaceutical Manufacturers Association* formulated a two-prong test for determining whether a public power has been exercised rationally. The first part requires that the review court must

determine the purpose for which the power was given, which must be a legitimate governmental purpose. The second leg of the test requires that the court must determine whether the power so-given is exercised in a manner that is reasonably capable of achieving its stated purpose. This test has been applied in a number of cases by the Constitutional Court.

[74] The Minister set this purpose out in her answering affidavit, she stated that her duty, when compiling national lists, is to identify activities during which pollutants are emitted into the atmosphere that pose a threat to the environment. After identifying such threats, she must publish a list of all those activities so that they can be controlled. The Minister alleged that she identified the criteria to be used when identifying whether an activity should be listed or not. She said that "*only those activities that are likely to have a significant detrimental effect on the environment*" should be listed. The legitimate aim for identifying activities that emit harmful substances into the atmosphere, is to protect the environment. The question then arises whether sub-category 9.5 contributes to the stated purpose, by assisting in protecting the environment against the emission of harmful pollutants into the atmosphere.

[75] Currently sub-category 9.5 is triggered whenever more than 10 tons of wood is dried, there should be some evidence that something harmful is taking place during this process to ensure that the regulation is both rational and serves its intended purpose. After all the national list is intended to protect the environment from significant harmful emissions.

[76] In order to determine this, one needs to determine whether sub-category 9.5 in this instance is reasonably capable of preventing something harmful. It is in this regard where the Minister's lack of evidence becomes problematic. Neither this Court, nor the Minister is qualified to reach a conclusion in this regard without expert evidence. Such evidence needs to indicate that the environment would be at risk of suffering some "*significant detrimental effect*" as indicated in section 21(1)(a) of AQA. The only evidence available to this Court was the report and subsequent confirmatory affidavit of Dr Strőhr, who confirmed that no significant harmful pollutants are emitted by indirectly fired kilns. In the absence of any other scientific evidence, there was no evidence available that sub-category 9.5 will indeed prevent something harmful.

[77] Despite the Minister's assertion to the contrary, the Constitution requires from government to justify its Regulations. In *Border Deep Sea Angling Association vs Department of Agricultural, Forestry and Fisheries*, where the government relied on an outdated research report, the court held that there was no rational connection between the outdated research and, in this instance, the need to ban the catching of red Steenbras. It is clear that it is required from government to produce evidence to justify the manner in which it regulates. The Minister's assumption that she does not have to account to interested parties is not in accordance with the authorities.

[78] If no relevant evidence is provided the regulation may be declared arbitrary and unlawful. In *Fair Trade Independent Tobacco Association v The President of the Republic of South Africa* the reliability and content of the

evidence that government relied on to promulgate Regulations were challenged. The Court found that the government did produce evidence to justify the Regulations and did not want to second guess the wisdom of that evidence. In this instance however, the Minister failed to provide evidence to support her justification for the Regulation and as a result it is rendered irrational by default. Without any evidence at all, there is no way to determine the rationality of the Regulation. There is presently no evidence that sub-category 9.5 can achieve its intended purpose. The inclusion of sub-category 9.5 in the national list therefore did not achieve the stated purpose for which the national list was created.

[79] In this instance the only evidence before the Court regarding the emission of harmful emissions in significant quantities was the allegation by the Minister that it does occur. The only expert evidence available before the court was that of Dr Strőhr, which ironically emanated from the record supplied by the Minister, which she then proceeded to question. It is inexplicable that the Department would obtain a report from someone who is an expert and then question his expertise, without laying a foundation for the rejection of that evidence. The Minister raised the criticism that no affidavit by Dr Strőhr was attached. This was rectified in her reply. One must, when evaluating the facts take into consideration that this report was in the possession of the Department. Apart from the aforementioned, the Department provided no evidence to counter Dr Strőhr's evidence that an indirect fired kiln emits harmful emissions. As a result, the Court could not but find that the Minister's decision to regulate the whole wood drying

process was without any scientific foundation and therefore irrational. In this instance an objective enquiry points to an irrational decision.

[80] Section 6(2)(*c)* of PAJA provides as follows:

"A court has the power to judicially review an administrative action if the action was procedurally unfair."

[81] In this regard the Department gave a notice and requested comments from interested parties as provided for in section 4(3) of PAJA. The procedure denotes that the public will be given notice of a proposed Regulation and asked to comment on its suitability. In this instance the public was asked to comment on the formulation of sub-category 9.5 as it was initially proposed, when published in the Environmental Regulation, GN R516, GG 41650, 25 May 2018. The comments of the public were made with reference to the proposed regulation. However, the proposed Regulation was not adopted. A different formulation of sub-category 9.5 was promulgated on 31 October 2018. The public was never asked to comment on the promulgated Regulation, nor were they consulted on it. Accordingly, the input submitted by Sawmilling, or any other interested party did not reflect in the 2018 Regulations promulgated. If such a procedure is allowed, only lip service is paid to section 4(3) of PAJA and this will inevitably result in a procedurally unfair administrative action, as it circumvents the whole purpose of giving the public and interested parties the opportunity to give their input relating to administrative action that will have an impact on their rights. This could certainly not have been the intention of the legislature.

[82] It was argued that the only significant change to the 2018 Regulations is the introduction of a special arrangement provision made in sub-category 9.5(i) and (ii) and that actually no decision was made that stood to be reviewed, as set out above.

[83] However to inform the industry of a proposed Regulation, and then not to follow through with the proposal, can be nothing else than a decision. As set out above, the 2013 Regulation caused confusion and that was what led to the engagement with the industry and the proposed 2018 regulation. To argue otherwise is opportunistic. The decision was to not proceed with the proposed Regulation and to revert to the previous regulation with a minor adjustment.

[84] The Minister's belief that no comment was required, as she merely reverted to the 2010 Regulation is without merit and opportunistic. There is no point in giving the public an opportunity to comment on a proposed Regulation, which ironically was published by government, if that Regulation is not going to be implemented. To do so is to mislead the public. If a deviation from the published proposed regulation is considered, fairness dictates that the public must be given the opportunity to comment and give input on that Regulation. As a result, the Minister did indeed take a decision and the procedure followed was unfair and the review should succeed on this ground too.

[85] Section 6(2)(*h*) of PAJA provides as follows:

"A court has the power to judicially review an administrative action if the exercise of the power or the performance of the function authorised by the

empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or perform the function."

[86] The term reasonableness implies an element of proportionality. Sawmilling argued that a decision will be unreasonable where it visits a disproportionate hardship on a particular subject. It was argued that no reasonable administrator would double regulate sawmills in the manner that the Minister did. It was argued that the same activity now requires compliance with two regulatory instruments, each requiring its own study, monitoring and reporting and imposes additional costs, which are onerous and expensive. The hardship to sawmills, so the argument went, were disproportionate to the benefit that double regulation may confer on the environment.

[87] Sawmilling referred to an article by Plasket AJ in which he proposed that disproportionality is a hidden ground of review, because it is often referred in relation to the reasonableness of an administrative decision instead of by its own name. Plasket AJ quoted from Cora Hoexter's book on Administrative Law, which states as follows:

"Proportionality may be defined as the notion that one ought not to use a sledgehammer to crack a nut. Its purpose is to avoid an imbalance between the adverse and beneficial effects… of an action and to encourage the administrator to consider both the need for the action and the possible use of less drastic or less oppressive alternative means to accomplish the desired end."

[88] The disproportionality according to Sawmilling's argument, was based on the argument that the government over-regulates sawmills by imposing new Regulations with an expensive licencing regime, in circumstances where there are existing Regulations that are designed to achieve the same purpose. The 2018 Regulations did nothing to protect the environment any further and with no tangible added benefit to the environment.

[89] The Minister disputed both the costs imposed by the licensing regime and the fact that these costs are onerous for sawmills, in her answering affidavit. She criticised Sawmilling's costing by simply saying that it "*sets out a globular amount without giving any particularity as to how the costs are made up*" and that, without any particularity, she could not accept that the costs will be significant, nor that "*they will cause the shutting down of some of the sawmills*". The Minister said that Sawmilling SA's claim of high costs and adverse impact was "*nothing but conjecture and speculation*".

[90] The affidavits filed by Sawmilling made out a case for why the additional costs should not be imposed on sawmills. It also made out the case that these additional costs are unduly burdensome on many sawmills, especially the smaller ones. The Minister, without putting up any evidence to the contrary in her answering affidavit, simply denied these allegations. A bald denial of this type is unacceptable as has been stated in numerous decisions.

[91] Sawmilling responded with more particularity regarding these aspects in the replying affidavit. Mr Southey an expert in this field set out the financial burden that will be placed on the industry. The Minister gave no concrete

evidence that could counter his explanation of the costs involved and the impact that it may have on the sawmilling industry.

[92] The inclusion of the indirectly fired kilns used by sawmills on the national list, in Sub-category 9.5, will evidently, in the light of all the facts, place a financial burden on sawmills without any additional benefit to the environment. This equates to unreasonableness which, in turn, renders sub-category 9.5 so unreasonable that no reasonable regulator would have included it on the national list.

[93] In the light of the aforesaid, the sub-category 9.5 regulation and its impact on the sawmilling industry constitute unreasonableness as defined in PAJA.

CONCLUSION

[94] In the light of all the facts Sawmilling must succeed with the review based on section 6(2)(f)(ii), 6(2)(c) and/or 6(2)(h) of PAJA.

[95] In my view therefore PAJA's challenge to the Regulation should succeed.

[96] **I make the following order:**

1. **The Minister's decision to publish the listed activity in listed activity in sub-category 9.5 of the 2018 regulations are reviewed and set aside.**

2. **The respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.**

TOLMAY J

JUDGE OF THE HIGH COURT

DATE OF HEARING:	**5 NOVEMBER 2020**
DATE OF JUDGMENT:	
ATTORNEY FOR APPLICANT:	**KLAGSBURN EDELSTEINWINSTANLEY INC**
	BOSMAN DU PLESSIS INC
ADVOCATE FOR APPLICANT:	**ADV K HOPKINS**
ATTORNEY FOR RESPONDENT:	**WINSTANLEY INCSTATE ATTORNEY(MR S MOSITO)**
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	AND H MPSHE