IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)
CASE NO: 15201/2013

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

04/04/14 .....
DATE SIGNATURE

4/4/2014

In the matter between:

ASSOCIATED EQUIPMENT COMPANY CC	**APPLICANT**
and	
THE INTERNATIONAL TRADE ADMINISTRATION COMMISSION	**1ST RESPONDENT**
THE MINISTER FOR ECONOMIC DEVELOPMENT	**2ND RESPONDENT**

JUDGMENT

MASETI AJ:

[1] The applicant applies for the review of the decision of the first respondent to refuse the applicant an import licence for the importation of second-hand Tractor Loader Backhoes ("TLBs") and for the setting aside of the policy decision of the first respondent recorded in its letter dated 14 December 2012 that it will not permit the importation of used or second-hand TLBs while similar or substitute TLBs are available from local manufacturers.

[2] The grounds on which the review is sought are the following:

2.1 the decision to refuse the import permit was taken because irrelevant considerations were taken into account or relevant considerations were not considered and was arbitrary or capricious.

2.2 the decision taken amounted to the exercise of a power or the performance of a function which was so unreasonable that no reasonable person could have so exercised the power or so performed the function.

2.3 two further grounds for review raised by the applicant are:

2.3.1 the procedural unfairness as contemplated by section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA).

2.3.2 that the administrative action was not rationally connected to the purpose for which the decision was taken and or the reasons given for it by the first respondent as contemplated by section 6(f)(ii) of PAJA.

2.4 there was a further allegation by the applicant that the first respondent did not furnish full reasons in the record for its decision to refuse the import permit and only provided such reasons in the answering affidavit.

[3] The applicant's application for an import licence for TLBs was refused by the first respondent in July 2012.

[4] At the request of the applicant the first respondent forwarded the applicant reasons for the refusal of import licence on 14 September 2012.

[5] According to the applicant the reasons furnished were that: "the prevailing import control policy entails that the importation of used or second-hand goods is allowed only in the event of similar or substitute new goods not being available from local manufacturers. According to the information at the disposal of ITAC, there are local manufacturers of tractor loader backhoes (TLBs) for instance Bell Equipment Company."

[6] In response to applicant's notice of motion the first respondent provided the record for purposes of review which comprised of a report approved by the Minister of Trade and Industry on 3 October 2007.

[7] The report had two relevant features which read:

"It is a general rule that the importation of used and second-hand goods is not allowed in the event of similar or substitute new goods being available from local manufacturers.....The control is exercised for environmental reasons, for healthy reasons and for safety and quality reasons and to ensure that the local manufacturing industry is not eroded."

[8] In the answering affidavit delivered on behalf of the first respondent deposed to by one Collins, an import and export control manager of the first respondent the first respondent set out in general terms the manner in which applications for permits were considered granted or refused. He explained why the first respondent had adopted the general approach with reference to second hand and used goods in regard to TLBs. Collins gave additional reasons as to why the applicant's import permit was refused as follows:

[9] In June 2011, the Chief Commissioner of the first respondent approved a research project with the aim of identifying local manufacturers of local agricultural and horticultural machinery, one of the main objectives of which was to assist with the produce of adjudicating import permit applications for used or second-hand machinery.

[10] Collins visited the factory of Bell Equipment Company SA (Pty) Ltd in September 2011 as part of that project where the products manufactured and the processes used by Bell were considered.

[11] It was during this visit that the first respondent became aware of the fact that Bell was manufacturing TLBs something they had started only shortly before that visit. Bell had invested R400 million to expand its local operation and create jobs locally.

[12] Collins claimed that the decision not to approve the applicant's application for an import permit in 2012 was as a result of the facts set out in regard to his visit to Bell in 2011 having taken into account the following factors:

12.1 support to local manufacturers.

12.2 impact on job creation in South Africa and the economy in general.

12.3 erosion of local industry by imported used or second-hand goods.

12.4 the ability of local market to meet the demand.

12.5 no monopoly is created by supporting local manufacturers since the applicant or any would be applicants were fully entitled to import new TLBs without obtaining import permits from the first respondent.

[13] The applicant's contention was that Collins research project and the reasons thereof stated in paragraph 12 above after the research were not disclosed when the applicant

was furnished with the reasons by the first respondent's refusal to grant the import permit and only provided such reasons in the answering affidavit.

[14] In their response the respondents submitted that it is incorrect to say that the full reasons for the refusal were only provided in the Answering affidavit. The reasons for refusal remained as set out in the letter dated 14 September 2012 being that there were local manufacturers of TLBs and that the importation of used or second-hand goods was only allowed in the event of similar or substituted new goods not being available from local manufacturers. The fact that further ground was provided by Collins in the first respondent's Answering affidavit did not alter the reason that was provided for refusal of the permit.

[15] The respondents further contended that the grounds for renew as set out in paragraphs 2.2.1 and 2.2.2 of the applicant's Heads of Argument were nowhere to be found in either the applicant's founding or replying affidavit.

[16] The issues are:

16.1 whether the decision taken by first respondent to refuse the import permit constituted an administrative action which is reviewable under the Promotion of Administrative Justice Act 3 of 2000 on the grounds set out in paragraph 2 above; and

16.2 whether the policy decision of the first respondent recorded in its letter of 14 December 2012 should be set aside for lack of compliance with -PAJA.

[17] Concerning the Judicial review applicant's Counsel referred the ***Court to Council of Civil Service Unions and Others v Minister of the Civil Service 1984 (3) All ER 935 at 950h-951d*** where it was stated that at Common Law a judicial review of an administrative decision could be based upon three categories namely; illegality, irrationality and procedural impropriety.

[18] Applicant's Counsel further referred to Section 33 of the Constitution which provides:

"Every person has the right to

(a) Lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights on legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

[19] The Constitutional Court in ***President of the Republic of South African and Others v South African Rugby Football Union and Others 2000 (1) SA CC paragraphs 135 at page 65*** had this to say: "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the Common Law governing administrative review, it is not correct to see Section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a Constitutional control over the exercise of powers. Principles previously established by the Common Law will be important though not necessarily decisive in determining not only the scope of Section 33 but also its content."

[20] In ***Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Others 2004 (4) SA 490 (CC) at para 46 p.513*** O'Regan J in explaining deference cited with approval Professor Hoexters account as follows:

"(A) judicial willingness to appreciate the legitimate and Constitutionally ordained province of administrative agencies; to admit the expertise of phone agencies

in policy – laden on polycentric issues to record their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies, not to cross over from review to appeal."

O'Regan J further referred to Schutz JA in a Supreme Court of Appeal Case which calls for judicial deference and said: "Judicial deference does not imply judicial timidity or an un-readiness to perform the judicial function. I agree, the use of the word "deference" may give rise to misunderstanding as to the function of a review Court. This can be avoided if it is realised that the need for Courts to treat decision makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."

[21] In ***Computer Investors Group Inc and Another v Minister of Finance 1979 (1) SA 879 (T) at 898 C-E*** it was stated:

"where a discretion has been conferred upon a public body by a statutory provision such a body may lay down a general principle for its general guidance but it may not treat this principle as a hard and fast rule to be applied invariably in every case. At most it can be only a guiding principle, in no way decisive. Every case that is presented to the public for its decision must be considered on its merits. In considering the matter the public body may have regard to a general principle, but only as a guide, not as a decisive factor. If the principle is regarded as a decisive factor, then the public body will not have considered the matter but will have prejudged the case, without having regard to its merits. The public body will not have applied the provisions of the statutory enactment."

[22] In ***National Lotteries Board v SA Education and Environmental Project 2012 (4) SA 504 SCA in paragraph 28 at page 514*** Chachalia JA had this to say:

> "28 In the present matter the refusal of a funding application involves the exercise of a discretion. This means that the board could have exercised its discretion by waiving the requirement for signed statements in the guideline or simply condoning the failure to comply strictly with it. It failed to exercise its discretion properly by applying the guideline dogmatically. The fact that it may have had other reasons for having come to that conclusion does not change the fact that the board exercised its discretion unlawfully when it made the decision in fact it exercised no discretion at all. This cannot be remedied by giving different reasons after the fact. The High Court, in my respectful view, got it right."

[23] In her legal argument Counsel for respondents stated that it is trite law that all necessary allegations upon which an applicant relies must appear in his or her founding affidavit. However the Court has a discretion to allow a new matter in the replying affidavit giving the respondent an opportunity to deal with it in a second set of answering affidavits and referred to ***Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others 1974 (4) SA 362 (T)***.

[24] In Titty's case referred to by the respondent's Counsel the replying affidavit contained allegations which did not appear in the founding affidavit. In the founding affidavit the complaint simply was that the respondents were illegally conducting business which by reason of its proximity to the applicant's business caused damage to the applicant. A completely new and irrelevant matter raised in the Replying affidavit was to the effect that the respondents deliberately and improperly enticed the applicant's customers away from it. Viljoen J held that the Court was satisfied that the respondent in the main application would be gravely prejudiced if the allegations referred to were not struck off and the new paragraphs on the replying affidavit were according struck out.

[25] In my view Titty's case does not seem to support the respondents' case. Applicant in the present case was not aware of the research project by Collins and could not have included the results of the research in her founding affidavit since those factors listed in paragraph 12 above came into her knowledge only when served with the respondent's answering affidavit.

[26] In ***Johannesburg Liquor Licensing Board v Kuhn 1963 (4) SA (A) 666 (A) Witwatersrand Local Division*** set aside on review the appellant Board's decision refusing a new licence for the issue of a bottle store in a small township that was dominated or mostly inhabited by very poor coloured people. The Board questioned as to who was going to buy liquor and refused the application. On review in ***Kuhn v Johannesburg Liquor Licensing Board*** the High Court reversed the Board's decision. On appeal Holmes JA at pages 670-671 had this to say: "It is necessary at the outset to deal generally with the function and procedure of a board and the statutory powers of the Court on review. In considering an application a board must bear in mind, *inter alia*, the reasonable needs, convenience and amenities of the public and the community. The board as a judicial tribunal is not bound by the strict rules of procedure and evidence, may rely on its local knowledge and may make its own observations and investigations subject of course to the considerations of fairness and natural justice which *quasi-judicial* bodies must observe. The Board's decisions are subject to review in terms of Section 29 (1) read with Section 29 (2) of the Liquor Act No. 30 of 1928 which enables the Court to grant relief on the grounds of arbitrariness, mala fides on gross unreasonableness coupled with substantial prejudiced to the applicant. Arbitrariness connotes caprice, or the exercise of the will instead of reason or principle, without a consideration of the merits. Gross unreasonableness does not have to be such as to lead to an inference of features such as *mala fides*. Reasonableness means considering the matter as a reasonable man normally would and then deciding as a reasonable man normally would decide."

[27] In ***International Trade Administration v Scaw South Africa (Pty) Ltd 2012 (4) SA 618 (CC)*** the Constitutional Court had to decide as whether, the North Gauteng High Court had the powers to interdict and restrain the Minister from accepting ITAC'S recommendation and from requesting the Minister of Finance to terminate the anti-dumping duty. Moseneke DCJ in paragraph 90 at page 652 referred to ***First Certification Judgment 1996 (4) SA 744 (CC)*** and stated: "The principle of separation of powers on the one hand recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the Constitutional Order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another."

[28] In ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)*** the Constitutional Court made a point that: a Court

B "should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings, of fact and policy decisions made by those with special expertise and experience in the field."

[29] The Court having read legal authorities and facts referred to by both Counsel considered the facts and law and also referred to ***Makhanya N.O and Another v Goede Wellington Boedery (Pty) Ltd 2013 (1) SA 526 SCA*** wherein the Tribunal dismissed an appeal against the refusal by the then Department of Water Affairs and Forestry to grant a water licence to the applicant. In an application for review to the North Gauteng High Court, the High Court reviewed and set aside the tribunal's dismissal of the application and upheld the appeal and thereafter granted the water licence.

[30] The appeal was based on two issues. The first issue being whether the Tribunal's decision constituted administrative action reviewable under the Promotion of Administration of Justice Act ("PAJA") and whether it was appropriate for the Court *a quo* when setting aside the Tribunal's decision, to substitute its own, decision in place thereof rather than remitting the matter to the tribunal. Erasmus AJA at p538-539 paragraphs 40 had this to say: "The Act provided an open and transparent means by which applications must be assessed. Although much is left to the discretion of the decision maker who is allowed to take factors into consideration not mentioned in the list it is clear that Section 27(1)(b) and indeed the rest of the Act requires these factors to be assessed by finding an appropriate balance after evaluating all the factors expressly provided for and others. Neither the act nor the section attributes any significant weight to any of the factors. And to my mind, a decision maker, who would not be able to elevate one factor to add factors to a closed legislative list of factors, cannot on a whim decide to pre-eminence. The Court *a quo* was, therefore, correct in concluding that the decision not to grant licence sought had been unlawful."

[31] At paragraph 35 page 537 the Learned Judge of Appeal said: "Section 6(2)(h) of PAJA requires a simple test an administrative decision will be reviewable if it is one a reasonable decision maker could not reach. In the instant case, there the administrator was faced with a balance to strike, it is constitutionally endorsed and opportune to ask: did the administrator strike a balance fairly and reasonably open to him."

[32] At page 539 paragraph 41 the Learned Judge had this to say:

"I now turn to the substitution order made. PAJA provides that in Judicial review proceedings a Court may grant any order that is just and equitable. It expressly provides for orders which are included within the just and equitable rubric. An order setting aside an administrative action can be coupled with other remedies such as remitting the matter for reconsideration; varying an administrative action and correcting a defect. PAJA further provides that it would be just and equitable for a Court to substitute an administrative action with one of its own making in "exceptional circumstances."

[33] In terms of Section 6(2)(e)(iii) of PAJA an administrative action taken because irrelevant considerations were taken into account and relevant considerations were not considered, such administrative action is reviewable.

[34] The first respondent through Collin's answering affidavit, stated "after having taken all relevant factors into account" it did not approve the application for import licence.

[35] The answering affidavit of the first respondent through Collins reflected that the following factors though not limited to them, were taken into account.

35.1 support to local manufacturers.

35.2 the impact on job creation in South Africa and the South African Economy in general.

35.3 the erosion of local industries by imported use of second-hand goods.

35.4 the ability of local manufacturers to meet demand.

[36] The above factors are not supported by any evidence as they only appear to be guidelines. The following needed explanation:

36.1 what the impact on job creation would be and also on the South African economy in general?

36.2 whether Bell alone would be able to meet the demand for TLB's or not? Why the protection is only afforded to Bell by the policy of the first respondent?

36.3 whether the grant of import permits would erode the local industry or not?

These unanswered questions clearly showed that there was a lot of material factors that had not been taken into account whatsoever by the first respondent in refusing to grant the import licence to the applicant.

[37] When the reasons for the refusal of the import licence were furnished on 14 September 2012 the first respondent failed to disclose the research project conducted by Collins and the conclusions arrived at as a result of Collins project. This on its own constitutes grounds for review.

[38] The Court in arriving at a decision has considered the following factors:

38.1 The applicant's application for an import licence was refused in July 2012 by the first respondent. The research by Collins was conducted in 2011 prior to the consideration of the application for the licence. Then the reasons why the outcome of the project research and the conclusions arrived at were not communicated to the applicant as one of the factors considered in refusing to grant the import licence still remain unknown.

38.2 The applicant is entitled to involve the provisions of Section 33 of the Constitution as her existing rights of importing second-hand TLBs were affected or threatened.

38.3 Where a discretion has been conferred upon a public body such a body may lay down a general principle for its general guidance but it may not treat this principle as a hard and fast rule to be applied invariable in every case. See ***Computer Investors Group*** case in paragraph 21 above, ***National Lotteries Board case in paragraph 22*** above as well as ***Johannesburg Liquor Licensing Board in paragraph 20 supra.***

38.4 Concerning the filing of further affidavits, Titty's case referred to by first respondent does not support the raising of new facts in the replying affidavit.

38.5 The principle of checks and balances anticipates the unavoidable intrusion of one branch on the terrain of another. In this regard the Courts have a duty to pronounce on the exercise of powers or the performance of a function which is so unreasonable that no reasonable person could have so exercised. See ***International Trade Administration v Scaw South Africa*** in paragraph 27

above. Therefore this Court has the power to set aside the policy decision of the first respondent recorded in its letter dated 14 December 2012.

38.6 This Court has the power to review the decision of the first respondent which refused the applicant an import licence for the importation of second-hand Tractor Loader Backhoes (TLBs) on the grounds of arbitrariness, *mala fides*, gross unreasonableness coupled with substantiated prejudice to the applicant, illegality, irrationality and procedural impropriety and for lack of fairness and natural justice.

See ***Makhanya N.O v Goede Wellington Boedery*** cited in paragraph 29 above.

[39] In the premises the application for the review of the first respondent's decision to refuse the applicant the import licence for the importation of the second-hand tractor loader backhoes succeeds.

[40] The application for the setting aside of the policy decision of the first respondent recorded in its letter dated 14 December 2012 succeeds.

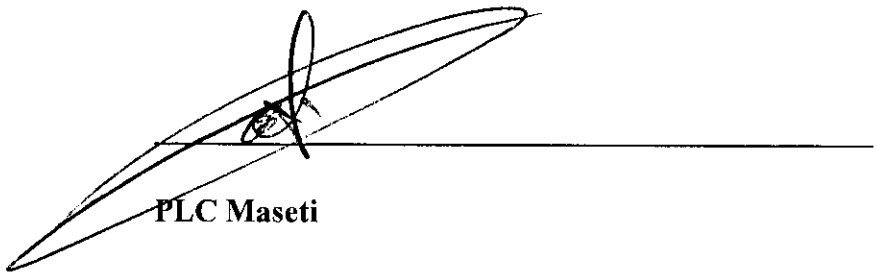
[41] I now make the following order:

(a) The decision by the first respondent to refuse applicant an import licence for the import of second-hand Tractor Loader Backhoes (TLBs) is reviewed and set aside.

(b) The policy decision of the first respondent recorded in its letter dated 14 December 2012 is set aside.

(c) The matter is remitted for re-consideration by the respondents. In reconsidering the matter the respondents should consider a letter of no objection recorded in March 2013 by Rokebrand, a commercial director of Bell Equipment SA (Pty) Ltd.

(d) The respondents should pay costs including costs of Senior Counsel.



PLC Maseti

Acting Judge of the Gauteng Division, Pretoria

Date of hearing:	13 March 2014
Date of Judgment:	4 April 2014
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