IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

21/9/16

Case Number: 39597/2016

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

21/9/16 — DATE

SIGNATURE

In the matter between:

SOUTH AFRICAN POULTRY ASSOCIATION	APPLICANT
And	
THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	1ST RESPONDENT
THE RED MEAT INDUSTRY FORUM	1ST INTERVENER
ASSOCIATION OF MEAT IMPORTERS AND EXPORTERS	2ND INTERVENER
MIKON FARMING CC	3RD INTERVENER
AD-LUCK HOLDINGS PROPRIETARY LIMITED	4TH INTERVENER
SOUTH AFRICAN	

NATIONAL CONSUMER UNION 5TH INTERVENER

JUDGMENT

Fabricius J,

1.

In terms of the Amended Notice of Motion, the Applicant seeks an order reviewing and setting aside ***Regulations*** Regarding Control over the Sale of Poultry Meat made by the Respondent in terms of the ***Agricultural Products Standards Act 119 of 1990*** ("the ***Act***") as published under Government Notice R471 in Government Gazette 39944 of 22 April 2016. In the alternative, an order is sought reviewing and setting aside ***Regulation 5,*** and the Annexure to the ***Regulations***. Further, an order is sought suspending the implementation of the Regulations until eight weeks

after the grant of an order in the review application. The intervening parties were granted leave to intervene by an order of this Court on 2 August 2016.

2.

The parties hereto managed to produce some 4000 pages of affidavits with annexures, including various reports, submissions, Minutes of meetings, electronic mails and reports emanating from various media. All types of topics were dealt with, debated and discussed in the greatest possible detail over a period of at least five years. In February 2011, the Department issued a notice referring to the abuse by a certain producer by injecting excessive quantities of brine into chicken, in some instances ranging from 30 to 60% in individual quick frozen portions. The Department regarded this abuse as a threat to consumer safety and stated that it had asked the Agricultural Research Council ("ARC") to conduct a research on brine injection of chicken meat. Interim results indicated an excessive moisture loss during defrosting and cooking, and brine injection also resulted in elevated salt levels that

could cause a risk to consumers. One envisaged solution would be accurate labelling of products.

3.

In Applicant's Heads of Argument it was stated that at the heart of this case lies the question of the maximum brining levels imposed in the new ***Regulations*** in respect of chicken portions. Such portions are brined as "Individually Quick Frozen". It was said that in simplest form, brine is a salt-water solution used to preserve vegetables, fish, meat and poultry for long periods of time. It can also be mixed with other flavourings such as spices, to enhance the taste, succulence and over-all appeal of the food products. "Brine" is defined in the ***Regulations*** with reference to the ***Regulations on Labelling and Advertising of Food Stuffs (R146 of 1 March 2010 in GN 32975)***, published under the ***Food Stuffs, Cosmetics and Disinfectants Act 54 of 1972*** as "A solution of Sodium Chloride in water where the solution is used for curing, flavouring, and/or preserving the food". Brining can be done by soaking meat or poultry in a brine solution, or by injecting the poultry or meat with brine.

There is no dispute that the most common method amongst South African producers of brining Individually Quick Frozen (IQF) chicken, is by injection. Until the promulgation of the new ***Regulations*** on 22 April 2016, there was no brining limit imposed in respect of the individual chicken portions. These ***Regulations*** will come into being on 22 October 2016, giving the relevant producers therefore a period of six months to adapt whatever processes are followed by then.

4.

It was said that it was common cause that brining introduces a range of benefits which include the following:

4.1 Brining restores and enhances the organoleptic characteristics of the product, such as succulence, texture and tenderness;

4.2 Brining adds flavour and taste to the product;

4.3 Frozen chicken portions are juicier and more tender when injected with brine, provided that the brine injection was done responsibly; brined chicken was not unhealthy.

It was said on behalf of Applicant that SAPA has no difficulty, in principle, with the regulation of brining and the imposition of a maximum brining limit for chicken portions. It contended however that the Minister did not act lawfully when making the ***Regulations*** that impose a new brining limit of 15%. In the Founding Affidavit under "Grounds of Review", the Applicant summarized the following grounds:

1. The process which preceded promulgation of the new ***Regulations*** was procedurally unfair and flawed;

2. The permissible brine limit as stipulated in the ***Regulations*** is arbitrary and/or irrational and/or unreasonable, for the following reasons:

2.1 There was no scientific basis for the brine limits;

2.2 Alternatively, the scientific basis relied on for the determination of the brining limits was fundamentally flawed;

2.3 There was no consideration of the economic impact of the brining cap;

2.4 There was no consideration of the reports that were submitted by SAPA;

2.5 The considerations that the Minister did have regard to, were irrelevant;

2.6 The ***Regulations*** make arbitrary distinctions in respect of different categories of poultry;

2.7 The Regulations are incapable of proper enforcement.

3. The Minister failed to exercise an independent discretion and acted under the unauthorized or unwarranted dictates of another person.

5.

The first and third grounds were not argued during the hearing, although Mr G. Budlender SC on behalf of the Applicant said at the end of the hearing that these grounds were not abandoned.

6.

Having regard to the contents of the affidavits and annexures, and all the relevant or irrelevant topics that were debated in great detail, any Court would be delighted to hear that its duties were not concerned what the relevant brining level should be, either 15 or 25%, whether there were losses in the weight of chicken resulting from

thawing and cooking processes, whether or not any particular process resulted in loss of nutrients, and whether or not brining contributed to the taste or texture of an individual portion.

7.

In the very detailed Heads of Argument filed by the Applicant only two grounds were relied upon, namely the procedural challenge, as it was put, and on a substantive level whether the new ***Regulations*** are rational and/or reasonable.

8.

It was contended that the making of the new ***Regulations*** constituted administrative action and Applicant therefore relied in the first instance on the ***Promotion of Administrative Justice Act 3 of 2000*** ("*PAJA*"), and in the alternative it relied on the principle of legality. It must however be remembered that *PAJA* must apply where it is applicable, and general norms such as legality may only be resorted to once it has been determined that *PAJA* does not apply.

See: ***Comair v Minister of Public Enterprises 2016 (1) SA 1 (GP) at par. 21.***

9.

Where administrative action that affects the public is relevant, the provisions of Section 4 of ***PAJA*** must be followed. In this particular instance, the Minister decided to follow the process provided for by Section 4 (1) (b), namely a "notice and comment procedure in terms of Sub-section (3)".

According to Sub-section (3), if a notice and comment procedure is followed, the particular administrator must –

a) Take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and called for comments from them;

b) Consider any comments received;

c) Decide whether or not to take the administrative action, with or without changes; and

d) Comply with the procedures to be followed in connection with notice and comment procedures prescribed.

10.

It would at this stage be appropriate to describe Applicant's status herein. In the Founding Affidavit it said that it was a voluntary Association representing the interests of all sectors of the Poultry Industry in South Africa. One such sector is the broiler producers. SAPA's membership has at various times during the period preceding the promulgation of the new ***Regulations*** represented between 50% and 80% of broiler production in South Africa, which are directly affected by the new ***Regulations***. By broiler produce, they referred broadly to the commercial production of chicken products available for consumption. Within the category of broiler production, there are producers who focus on the fresh poultry market, the general frozen poultry market and the IQF market. The IQF producers, so it was said, produce at least 63% of all poultry products consumed in South Africa. It was their

interests that were fundamentally threatened by the new Regulations and these also had a serious adverse impact on the price of IQF chicken.

11.

It is however clear that there were many other stakeholders in the poultry industry that were involved in the relevant process. On 7 August 2015, the Minister met with interested parties and the Minutes of that meeting are annexed to the Answering Affidavit as well as the attendance register. This indicated that there were 13 stakeholders in the poultry industry present. These included representatives of Nando's, the South African National Consumer Union, the Heart and Stroke Foundation, the Red Meat Producers Organisation, the AIME, the Association of Meat Importers and Exporters, NRCS, Astral Foods, Rainbow Chicken and Department of Health. I will deal with this Minute again hereunder, but I may just add at this stage that Mr Lovell on behalf of SAPA, and also the deponent to the Applicant's Founding Affidavit, stated that Applicant supported the Poultry Regulations and the regulation of the poultry industry. The Minutes also reflect that

SAPA was not opposed to the 15% brining limit, but needed clarification of how this level was determined. From Respondent's Answering Affidavit it appears, with reference to these Minutes, that from 13 stakeholders in the poultry industry who voiced or raised issues in the meeting, only two were clearly opposed to the brining limit of 15% for chicken portions.

12.

On behalf of the Interveners, Mr Epstein SC submitted that there could be no serious quarrel with the proposition that Government was entirely correct in deciding that appropriate levels of brining in frozen chicken pieces had to be regulated. As I have said, even Applicant recognised this. Numerous other organizations and citizens have also called for the regulation of this particular industry, mostly in the context of consumer protection.

13.

The Department therefore embarked upon a process in terms of ***PAJA*** by calling for comments on a new proposed ***Regulation***. The "Old" Regulations appear in Government Gazette Notice R988 dated 25 July 1997 in Government Gazette 18155. On 10 March 2006, the Directorate: Food Safety And Quality Assurance published a notice stating that the Office was in the process of amending the ***Regulations*** concerning control over the sale of poultry meat as published by Government Notice No. R946 of 17 March 1992 as amended. It stated that the Regulations needed to be adjusted to be in line with the ever-changing needs of the industry. The Office therefore required the inputs of the Industry regarding proposed standards for the injection of moisture in frozen products and grading of portions. It also stated that "Food Safety" would also be addressed. On 21 April 2006, Applicant accepted the invitation to comment and said the following: "The process of enhancing animal protein by injecting brine into meat has been standard practice for many years throughout the world."..."Today the majority of raw frozen poultry products in the form of whole birds, portions and individually quick frozen (IQF)

products produced in South Africa are injected with brine. Most of the responsible bigger producers have ensured that the process of brine injection is done in a controlled manner that enhances the natural flavour and texture of the product."..."Unfortunately there are irresponsible operators that abuse the process of injecting poultry products solely to maximize financial gain. Unofficial reports indicate that some poultry is extended by up to 40% resulting in a poor quality product with high thawing and cooking losses."..."It is therefore of utmost importance that some form of regulation and declaration be formalised to prevent unfair competition and to protect consumers from being exploited". It then made certain proposals which clearly indicate that it was not against the process of brine injection.

14.

As I have said, on 1 June 2012 the Department published its proposed Regulations for comment. Even prior to that, on 26 July 2011, Applicant had written a letter to the Deputy Director-General of the Department referring to a meeting that was held on 18 July 2011. It said amongst others, that the Organisation was 100% supportive

of the concept that the best way forward for the development of appropriate regulations "which we desire", was for all regulatory bodies to be properly and factually informed of the processes used by the Industry, both locally and elsewhere.

15.

The chronology of events between 2006 up to the publication of the new ***Regulations*** in 2016 indicated, on my count, that the process followed by the Department involved the holding of 19 meetings with all possible stakeholders and the writing and receiving of 52 letters and emails. In this particular context, I have a *dictum* of Sachs J in mind in ***Minister of Health and Another v New Clicks South Africa (Pty) Ltd 2006 (2) SA 311 (CC) at par. 630***: "The forms of facilitating an appropriate degree of participating in law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is afforded to members of the public and all interested parties to know about the issues and to have an adequate say". Also, in ***City of Tshwane Metropolitan Municipality v Afri Forum [2016] ZACC 19*** of 21 July 2016, the following was said

in par. 67: "Public participation should not be elevated to co-governance or equal sharing of executive budgetary responsibilities". The chronology of events was also part of the Interveners' Answering Affidavit, and its correctness was not an issue herein. It presented in chronological order all that had occurred during a five year consultation period. Every possible item was debated during this period and, again with reference to the ***New Clicks*** decision *supra* it must be remembered that what is necessary is that the nature of the concerns of different sectors of the public must be communicated to the law-maker and taken into account in formulating the regulations. Hearings before parliamentary committees are also involved, as well as debates in Parliament. The particular Minister does not have to read thousands of pages received from the general public and respond to them. An analysis of any such responses must be left to officials whose responsibility is to consider the comments received and to report to the Minister on them. No perfect process under Section 4 of ***PAJA*** is required, but only a fair process. Not every procedural flaw will invalidate the consultation process. It is clear that the ***Regulations*** were also incrementally developed during the relevant period. Although a notification was given

to the WTO of what the Department intended to do, further consultations took place thereafter. All relevant factors were considered by the Department who ultimately put a proposal before the Minister. A holistic view of the five year consultation process leads me to the conclusion that a fair process was followed. It would be an impossible burden to simply repeat the chronology of events herein, and to comment thereon by way of reference to each individual meeting, letter and email. I have considered the process as a whole and deem it to be fair. The following was said in this context in the Heads of Argument on behalf of the Interveners: "Ultimately, it is difficult to conceive of a more thorough consultation process than the five years process embarked upon by DAFF in this case. The evidence suggests that SAPA viewed the process as unfair because it was denied opportunities to co-direct the process. This is evidence by the fact that on numerous occasions SAPA forgot that it is part of the "regulated" and not a part of the "regulator"...Yet, despite its position in society qua citizen, it took it upon itself to bombard the Government with its own research and took it upon itself to suggest that to draft a code of good practice and draft regulations for the Minister to consider *after* DAFF had already made its

recommendations...That the Minister does not agree with SAPA does not render the process unfair". I agree with those submissions, whilst at the same time lauding Mr Lovell's commitment, though it was unduly dogmatic.

One such example of Applicant's approach is a letter written to the Minister on 23 February 2016 ("KL71"). The letter consists of 15 pages and annexed to that are scientific reports of some 58 pages. The first such report concerned "THAWING AND COOKING LOSSES AND SENSORY EVALUATION OF THREE DIFFERENT TREATMENTS OF IQF MIXED CHICKEN PORTIONS". Part 2 of this report consisted of "SENSORY EVALUATION OF THREE DIFFERENT TREATMENTS OF IQF MIXED CHICKEN PORTIONS". A further annexure was the G:ENESIS report of 19 March 2014. This report addresses the likely impact of brining regulations on domestic producers of Individually Quick Frozen chicken portions. It did not concern the interests of the consumers.

No doubt this is one example of why Counsel for the intervening parties suggested that the Minister must have been overwhelmed by SAPA's productive efforts, whilst

at the same time forgetting that the power to draft regulations lies with the Minister and not a voluntary association, however well-meaning its efforts may be.

16.

The result of the above is that I find that there is no merit in the submission that the process which preceded promulgation of the new Regulations was procedurally unfair and flawed.

17.

Is the permissible brine limit as stipulated in the regulations arbitrary and/or irrational and/or unreasonable?

I have mentioned the individual points of criticism under this heading in par. 4 above. At the outset I must immediately say that it is not for a Court to decide what the optimum brining percentage ought to be, assuming that this percentage can be scientifically determined. Fortunately that is not my function. Were it otherwise, a Court would no doubt in due course be asked to hold whether, and to which extent,

the addition to peri-peri and garlic would make a chicken kebab more tender or tasteful. It may well be that a different percentage to 15% is more appropriate. Having regard to all the documentation, reports and analysis produced, the level seems to range between 8 and 25%. The fact that the Minister chose a 15% cap on brining cannot make his decision either arbitrary, irrational or unreasonable, unless a Court can find that the decision is not rationally related to a legitimate Government purpose.

18.

In ***Pharmaceutical Manufacturers of SA in re: Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC) at par. 90***, the following was said: "The setting of this [rationality standard] does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively is rational, a Court cannot interfere with

the decision simply because it disagrees with it or considers that the power was exercised inappropriately". In similar vein, in ***Minister of Health v Treatment Action Campaign (No. 2) 2002 (5) SA 721 (CC)***, it was said at par. 98: "This Court has made it clear on more than one occasion that, although there are no bright lines that separate the rules of the legislature, the Executive and the Courts from one another, there are certain matters that are pre-eminently within the domain of one or other arms of Government and not the others. All arms of Government should be sensitive to and respect the separation..." Another illustrative decision is ***South African Association of Personal Injury Lawyers v Minister of Justice and Constitutional Development 2013 (2) SA 583 (GNP)*** and ***2014 (3) SA 134 (CC)***. In this case the Government had imposed a 25% cap as a maximum contingency fee that legal practitioners (Attorneys) were entitled to receive in litigation conducted on a contingency basis. The Association of Personal Injury Lawyers had argued that a 25% cap was too low to provide a sufficient incentive for practitioners to take on risky cases on contingency basis. The Constitutional Court held that it needed only to decide whether the 25% imposed by Government was rationally connected to the

purpose of regulating contingency fees. The Court held that the Act, which imposed a 25% maximum, did achieve this purpose and that it mattered not whether this was the best cap that it could have imposed. It could well have been that a 30 to 35% limit was preferable, but this did not matter. All that was relevant was whether the particular cap imposed by Government was reasonably capable of achieving the legitimate purpose for which it was created.

19.

With the above in mind Counsel for the intervening parties argued that the relevant dicta, applied to the facts of this case, meant that it matters not whether a 5% brining limit would be better than a 15% limit, or that 15% was even better than 8%. The only relevant question was whether or not the cap ultimately imposed by the Minister, namely 15%, was reasonably capable of achieving DAFF's stated purpose, namely to protect consumers. On behalf of Applicants it was conceded by Mr Budlender SC that a Minister would have had a discretion to impose a particular limit after a scientific process had been followed. In this particular case, according to his

argument, the ***Regulations*** and the 15% limit was not aimed at deceptive practices of producers, but rather at the quality of the particular products. He suggested that the Minister ought to have said that there was no scientific basis for a zero percentage, for argument's sake, and should have accepted the 25% proposal contained in certain scientific reports presented to the Department. Great play was made of the later comments of Prof. Hugo in this context who referred to a brining percentage in the context of taste, and suggested that more research be done regarding the aspect of quality. The purpose of his report was therefore not to suggest an optimal brine limit. I must immediately interpose to say that in my view there is no duty on the Minister to impose an optimal brining level (if such even exists). It is abundantly clear that even well-qualified scientists differ on that particular point, and practices in foreign states also show a great variation. His duties and powers are misconceived if it is suggested that he could only impose a 15% limit if the scientific research indicated, almost beyond a reasonable doubt, that the 15% was the optimal limit for the protection of consumers. Mr Budlender SC therefore suggested that on the evidence of the scientific reports presented to the

Department, the Minister was obliged to find a capping range of between 20 and 25%. I do not agree with that approach at all. It is clear from the ***Agricultural Products Standards Act 119 of 1990***, read as a whole together with either the old or the new ***Regulations,*** that they are substantially made for the protection of the consumer. Why else would there be repeated references to "quality control", "false or misleading descriptions for products", and similar phrases in the same vein? It is clear from the provisions of Section 15 of the ***Act*** that the Minister may make regulations which, in his opinion, may be necessary or desirable in order to achieve or promote objects of this ***Act***.

20.

After representations by the Industry were received, the relevant percentage was increased from 8% to 15% in the revised Draft Regulations. This is clear from the Minutes of the meeting held on 23 October 2015 with Applicant and other stakeholders. Having regard to the duties of the Minister/Government in this context, it is my view that the Minister was lawfully entitled to have stipulated the

15% limit as a compromise after having considered the views of at least 20 stakeholders. The Minutes of a meeting with the Minister of 7 August 2015 is particularly instructive in this context. I have referred to these Minutes previously ("BMM15"). In the preamble to the Minutes, it was stated on behalf of the Department that the main purpose of the meeting called by the Minister was to provide the various stakeholders an opportunity to air their views on the proposed amendment, with special emphasis on the brining issue. As I have said above, the Minute clearly indicates that Lovell on behalf of Applicant stated that he supported the Poultry Regulations and the regulation of the Poultry Industry. He also stated that Applicant needed clarity on how the 15% level for portions came about. He also mentioned that due to the high levels of illiteracy in this country, accurate labelling of brine injection on packaging should be considered. On behalf of the National Consumer Union it was said that no brine should be added to chicken at all. The Heart and Stroke Foundation in turn expressed concerns about the salt content in brine with reference to consumers' health issues. The Red Meat Producers Organization, with reference to a maximum of 10% injection for meat, suggested

that this level should be standardised across all regulations. The Association of Meat Importers and Exporters wanted to see lower levels of brine injection. The Legal Metrology submission was that brining levels should be kept as low as possible, because consumers would otherwise be misled since chicken was sold by mass. Dr Louis Theron, a consultant for Applicant stated that the exact levels of brine injection cannot be scientifically determined. The only way to resolve the brining issue was for all parties involved to come to an agreement. Rainbow Chicken, a major producer in South Africa, supported the draft and the capping of the brining levels. In the context of tenderness, it was stated that 20% was the optimum level.

21.

The response of the Minister was significant in the context of the argument that he was obliged to take a decision only on the basis of conclusive scientific submissions made to him. He said the following:

- "The Department will ensure an environment where all different views are taken into account;

- The Minister also emphasized the fact that there is no place for self-speculation;
- The issue of labelling may not solve the problem with respect to sodium in that there is also an illiteracy problem;
- The public looks upon the Ministry to take into account the issue of food security alongside food safety;
- The interests of the consumers will be taken into account in finding a way forward;
- The Minister stated that a decision will not be taken on the spot since he has to engage the Minister of Health, parliamentary processes and also find a balance between all the expressed views."

22.

The submissions of the intervening parties on this topic were the following:

22.1 Government has been entrusted with the task of considering whether a cap ought to be imposed on brining and, if so, what an appropriate cap ought to be;

22.2 Expertise of highly qualified functionaries was relied upon in order to discharge this task;

22.3 They deemed a 15% cap on brining to be appropriate, because it could adequately protect the rights of consumers whilst at the same time preserving the succulence and/or quality concerns raised by those who believed that the individual quick freeze process dries out the chicken pieces;

22.4 SAPA was itself content as far back as 22 February 2011 with the brining cap of 15%, meaning that it had no concerns over succulence and/or quality when chicken pieces were brined at that level;

22.5 The Minister, duly advised by DAFF and its qualified team, embarked on a lengthy consultation process that extended over a number of years in

order to receive and consider as many material views on the matter as it reasonably could;

22.6 The competing views of interested and affected parties were all considered, even though the ultimate decision made by the Minister may not have found favour with everybody;

22.7 Just because an industry participant, like SAPA, does not like the outcome of a decision to impose a cap at 15%, does not mean that the decision is reviewable.

23.

I agree with these submissions. They are based on accurate *dicta* of the Constitutional Court decisions that I have referred to and the interpretation of the ***Agricultural Product Standards Act*** and its ***Regulations***. The Department considered all relevant views and research findings and arrived at a compromise percentage of 15%. It is my view, as I have said, that it was not obliged to wait until a scientifically proven – or arrived at percentage indicating the optimal level was

presented to it. The determination of such level is not an exact science, and neither the Act, nor the Regulations envisaged thereunder require such an exact scientific conclusion. The Minister was only obliged to consider all views, including views and opinions expressed by experts, and that he did. It is clear from all relevant documentation that the 15% was a compromise determination and I specifically hold that he was entitled to make such. The Minister could obviously not say on his own accord whether a percentage of 10 or 15% was the optimal percentage or any higher or lesser percentage. He relied on all opposing views and then exercised his own well-informed discretion. On 22 February 2011, a meeting was held with representatives of Applicant and certain producers of which meeting Mr Lovell from Applicant was the Chairman. Under the heading of a paragraph titled "Flavour Enhancement", Mr Lovell said "15% is acceptable for the equivalence mark and above that to be seen as extra". There can be no doubt from a proper interpretation of all the relevant Minutes of meetings, expert reports and correspondence that both flavour enhancement issues, and consumer protection issues were discussed repeatedly over a lengthy period of time.

24.

On 15 September 2015, the Minister approved the new ***Regulations***. Apart from this not being the end of the consultation process, inasmuch as further meetings were held with the Department and the Minister, Applicant also addressed another letter to the Minister on 23 February 2016. I have referred to this letter together with its extensive annexures in paragraph 15 above. The letter dealt with the technical and economic effects of brining at a 30% level. It mentioned a discussion around the quality of the product at a 25% brining level, and refers to the proposition that a 30% brining level does not lead to consumer deception. In its conclusion, its suggestion was that "the indisputable consequence of a 15% portion brining limit is an increase in the price of production". In the context of consumer deception, it suggested a process of adequate labelling so that the consumer would not know what he/she is purchasing. On 4 April 2016, the Minister then granted permission to proceed with the immediate publication of the new ***Regulations***. On 6 April 2016, the Minister wrote to Applicant, acknowledging certain previous correspondence, and stating that the new ***Regulations*** were a bi-product of a broad consultative process

involving other equally important stakeholders. As I have said, the new ***Regulations*** were published on 22 April 2016.

25.

After the publication of the ***Regulations***, Prof A. Hugo from the University of the Free State made the following comment on certain statements made by the Applicant Association. He said amongst others that it was extremely important that brine injection levels must be regulated. He did not think that it was necessary to do research to regulate brine injection. He thought that it was possible to make a realistic recommendation on brine injection level based on international good manufacturing practices and international literature. He also mentioned that there were some poultry companies that were in favour of accepting the 15% maximum level proposed by the Department. Another significant comment is the following, which obviously was made *ex post facto*, but at the same time it is clear that it does relate to issues that were actually considered before the ***Regulations*** were approved and published: he said that the development of methodology to accurately determine

the quantity of added brine in chicken is challenging and problematic. The essence of the problem is that it is basically impossible to differentiate between the +/- 70% water that occurs naturally in chicken and the water added in the form of brine. Weighing before and after injection was the only really accurate method to determine the added brine level. The chicken industry must realise that it is just as difficult to regulate the 15% brine injection level proposed by DAFF as it is to regulate the 25% brine injection level proposed by SAPA.

26.

Another report was that of "Econex", dated 2 August 2016. It commented amongst others on the G:ENESIS report that I have mentioned, which only deals with the interests of IQF producers. It also deals with the costs aspect. The final and most important conclusion, according to the author, was that "the price that consumers will pay to receive the same nutritional value as prior to the regulations will not increase, while they will experience the benefits of reduced sodium in their diet."

27.

In the light of the above references, which are not intended to be all-embracing, I find the following:

27.1 According to law, there needs to be no absolutely correct scientific basis for the brine limits, and indeed it seems to be common cause upon a proper analysis that such cannot be scientifically determined as if it were the speed of light;

27.2 The scientific basis relied upon by the Department was generally of such a nature as to have enabled the Department and ultimately the Minister to have determined a limit of brine on the basis of compromise and reasonableness;

27.3 Although there was no formal "regulatory impact assessment or economic study", that Applicant sought or demanded, the economic impact of the brining cap was indeed considered by the Department. Again, the Applicant has asked the wrong question in this context. It is extremely unlikely that any of the stakeholders could with a degree of absolute

precision say what the likely impact of the new ***Regulations*** on the producing stakeholders will be. This depends on a number of invariables and in fact, a number of large producers of frozen chicken pieces in South Africa do not agree that the new ***Regulations***, as a matter of course, would make the purchase of chicken pieces less affordable for consumers and more expensive for producers. The following is said in the Respondent's Answering Affidavit in this context (par. 352): "Although it is admitted that DAFF had not conducted an economic study of the impact of the brining percentage of 15%, DAFF was presented with arguments and presentations regarding the economic impact and, furthermore as appears from pages 1507 and 1508 of the record, the economic impact was taken into consideration by the Minister when approving the Regulations". On the basis of the so-called Plascon-Evans test, I must accept this answer.

See: ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 635 C.***

The G:ENISIS report was not only sent to the Department, but also to the Minister himself on 23 February 2016. The Minister in fact acknowledged receipt thereof. One can therefore reasonably infer from this as well, apart from the statement under oath, that economic factors were considered.

27.4 Upon a holistic reading of all the debates concerning all the relevant issues, it is clear that the Minister did have regard to the interests of the consumers. Whether one would label these interests as "preventing deceptive practices" or not, is not the issue. It is abundantly clear from all the submissions made to the Departments that there were numerous objections to the habit of certain producers to inject excessive volumes of brine into chicken portions. The alternative of accurate labelling was also considered in the greatest possible detail in this context, and it was justifiably found that the largest number of consumers of chicken in South Africa were either not sufficiently literate to read and interpret the scarcely visible labels in small print, alternatively did not read them, but rather

concentrated on the price. I therefore hold that the new ***Regulations*** were issued in the interests of the consumer to prevent excessive brining.

27.5 I also do not agree that the 25% limit is incapable of proper enforcement. As Prof Hugo stated: the same level of enforcement for a 15% limit is required as would be for a limit of 25%, or any other percentage. The ***Agricultural Products Standard Act*** deals with topics of enforcement and it cannot be said that merely because a 15% limit was now introduced by way of the Regulations, that any existing enforcement process has suddenly become ineffective or impossible.

28.

The Amended Notice of Motion, as I have said, seeks the setting aside of the ***Regulations***, alternatively, setting aside ***Regulation 5*** and the Annexure to the ***Regulations***. I have already concluded that there is no basis for such, especially not in respect of the first mentioned prayer. A further order is sought that the implementation of the ***Regulations*** be suspended until eight weeks after the date of

my order. The position at the moment is that the ***Regulations*** come into effect on 22 October 2016, and I indicated to the parties in Court that I would deliver judgment before that day. The suspension of the coming-into-effect of the Regulations was opposed by the intervening parties. Mr Budlender SC submitted that I could make this order in terms of the provisions of Section 8 (1) (e) of ***PAJA***. This section provides for remedies in proceedings for judicial review, and states that a Court could grant a temporary interdict or other temporary relief. Mr Budlender SC suggested that the latter part of this section granted me a power of a *sui generis* nature. In the original Notice of Motion an interdict was sought in this context. Whether or not this power is sui generis or not, I do not need to decide for present purposes. The Applicant submitted that if the review application did not succeed, its members would need time so that they could adjust their business practices and deal with the sizeable stocks of chicken that had been brined at level higher than those permitted by the ***Regulations***. They therefore needed a "window period", and suggested an eight week period which would suffice to design new packaging, prepare a new nutritional statement, manufacture printing plates, develop new

standard operating procedures and training measures to bring their businesses in line with the ***Regulations***, and reformulate their brine recipes. On behalf of the intervening parties, it was submitted that SAPA did not explain why its members would only take these steps after my judgment. It is clear that the Minister foresaw the need for an "adjustment period" and thus included into the ***Regulations*** the six months window period. It is also clear from the affidavits that RCL, the second largest producer, indicated that they would be compliant as at 22 October 2016. Astral, the largest producer, also said that it would be compliant and would adjust their business by 22 October 2016. These two producers have 68% of the market for brine IQF chicken according to the Intervener's Answering Affidavit. Furthermore, all producers should have taken all relevant steps to adjust their businesses on the basis that ***Regulations*** are valid, binding and enforceable. In this context reference was made to the decision in ***Oudekraal Estates (Pty) Ltd v City of Cape Town 2004 (6) SA 222 (SCA) at par. 26***, where it was held that "the proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending on the view the subject takes of the validity

of the Act in question". Mr Budlender SC suggested that the ***Oudekraal*** decision was distinguishable on the basis that the producers are acting lawfully at the moment. They were not ignoring the ***Regulations.*** In my view, that is not the relevant consideration: they know that the ***Regulations*** will come into effect on 22 October 2016, and had no way of knowing when I would be able to give judgment in this application, having regard to the term roll, and other duties that I have to perform. In that context however, I was asked to make an order as soon as possible and certainly well in advance of my judgment on the whole of the application. I am of the view that I certainly do have a discretionary power in this context taking into account the provisions of ***PAJA*** that I have referred to. Whether or not I am dealing with an interdict, or a power related thereto, is not the decisive question. There is no doubt that the ***Regulations*** are of a poly-centric nature. I have previously held that it is usually not competent for a Court to substitute its own opinion for a policy decision lawfully made by Government.

See: ***Comair v Minister of Public Enterprises 2016 (1) SA 1 at 26.***

I see no reason for deviating from that sound principle which was also said to be the following, in ***Minister of Home Affairs and Others v Scallabrini Centre and Others 2013 (6) SA 421 (SCA) par. 59***: "It is not the province of Courts when judging the administration, to make their own evaluation of the public good, or to substitute the personal assessment of the social and economic advantage of a decision. We should not expect Judges therefore to decide whether the country should join a common currency or to set a level of taxation. These are matters of policy and the preserve of other branches of Government and Courts are not constitutionally competent to engage in them".

29.

The Minister deemed it fit to grant a window period of some six months. On the facts of this case I deem this to be a reasonable period and there is no reason to extend it, having regard to what other major producers either have done or are able to do before the relevant date. The Applicant has certainly not made out a clear case in this context and in the exercise of my discretion I do not deem it proper to suspend

the ***Regulations*** for any period beyond 22 October 2016. I deem the *dictum* in ***National Treasury and Others v Opposition to Urban Tolling alliance 2012 (6) SA 223 (CC) at par 63***, to be an appropriate consideration. The Minister considered the implications of the ***Regulations*** and provided for a six month window period. There is no good reason why a Court should simply impose its own such period. This would not be constitutionally appropriate.

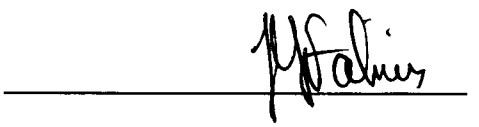
30.

Mr Budlender SC did not argue in Court that the Minister failed to exercise an independent discretion when approving the ***Regulations***, and in any event there is no basis for such.

31.

The result of all of the above is that the following order is justifiable upon the facts, having regard to the relevant legal principles:

31.1 The application is dismissed with costs including the costs of two Counsel.



JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 39597/2016

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	Instructed by: The State Attorney
Counsel for the Interveners:	Adv H. Epstein SC
	Adv K. Hopkins

Adv T. Govender

Instructed by: Fairbridges Wertheim Bekker

Date of Hearing: 12 September 2016

Date of Judgment: 21 September 2016 at 10:00