IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 49321/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

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

(3) REVISED. ✓

14/11/19
DATE

SIGNATURE

In the matter between:

TRADEMORE (PTY) LTD	APPLICANT
And	
MINISTER OF TRADE AND INDUSTRY	1ST RESPONDENT
NWK AGRI-SERVICES (PTY) LTD	2ND RESPONDENT

JUDGMENT

Fabricius J,

[1] In this application, and with reference to ***Rule 53*** of the ***Uniform Rules of Court***, the Applicant seeks the following orders:

"1. Reviewing and setting aside the First Respondent's decision, taken on 16 May 2017, in terms of s. 1 of the ***Protection of Business Act 99 of 1978***, in terms of which permission was given to the Second Respondent to enforce its foreign judgment against the Applicant in the South African Courts;

1. Remitting the decision to the Minister for reconsideration."

A cost order was also sought.

[2] Applicant is a private company with its registered place of business in Sandton, South Africa. In the Founding Affidavit, it was said that its business is the source and trade in raw materials, by-products, grain and oil seeds for the animal feed markets of Southern Africa.

[3] The Second Respondent is a company incorporated in accordance with the ***Companies Laws of the Republic of Zambia***, and trading in Makeni, Zambia.

[4] I will refer to certain allegations made in the Founding Affidavit, deal with arguments contained in the Applicant's written Heads of Argument, and thereafter deal with the Second Respondent's defence, also keeping in mind the oral argument however.

[5] The First Respondent, the Minister, has elected not to participate in these proceedings. The record of what material was before him is however before me.

[6] According to the Founding Affidavit, Applicant seeks to have the relevant decision reviewed and set aside on the basis that it was unlawful and/or unreasonable as required by the ***Promotion of Administrative Justice Act 3 of 2000*** ("***PAJA***") which gives effect to the right to lawful, reasonable and

procedurally fair administrative action contained in s. 33 of the ***Constitution***. It was said that the Minister in exercising his public powers, or in the performance of his public functions in terms of the ***Act***, must comply with the principle of legality contained in s. 1 (d) of the ***Constitution***. The Minister's decision to grant permission to Second Respondent was furthermore not in compliance with the principle of legality and fell to be reviewed and set aside on that basis as well.

[7] The litigation history in Zambia is set out and full details are fortunately not necessary. It is sufficient to say that Second Respondent issued summons against Applicant out of the High Court for Zambia and sought an order sounding in money to which it claimed to be entitled by virtue of the loss it has suffered with regard to the balance of a few hundred tons of cotton seed which it had sold at a reduced price per metric ton, after Applicant purportedly defaulted on an agreement between the parties, pursuant to which Trademore purchased the cotton from Agri-Services. It also claimed a further amount on

the basis that it was the damages that it had suffered as a result of the loss of a few hundred tons of cotton seed which had not been collected by Trademore in breach of the agreement between the parties, and which had then gone to waste.

[8] On 23 May 2016, the Zambian High Court handed down judgment against Trademore for the payment of an amount together with interest thereon. It was this judgment that Second Respondent seeks to enforce in South Africa and which forms the subject matter of the Minister's decision.

Details of the Minister's decision:

[9] On 16 November 2016, Second Respondent's Attorneys addressed correspondence to the Minister in which permission was sought to apply for the enforcement of the said judgment against Trademore in the South African Courts in accordance with the provisions of s. 1 of the said *Act*. Public Services indicated to the Minister that it was of the view that the judgment fell

within the scope of the *Act,* as it was a judgment of a foreign Court and the underlying transaction was one of those listed in s. 1 (3) of the *Act.* It is important to note for purposes of this judgment that this is now common cause between the parties.

Public Services further indicated to the Minister that he was the successor of the Minister of Economic Affairs, as referred to in the *Act* and accordingly, sought the relevant permission.

[10] On 17 March 2017, the Minister addressed correspondence to both Trademore and Agri-Services indicating that the latter had made the mentioned request and asking the parties to make written submissions within 14 days providing reasons as to whether or not such permission should be granted.

[11] On 10 April 2017, Trademore submitted its reply and requested the Minister to deny his permission on the basis that the judgment was not enforceable in

South Africa in terms of the applicable principles of South African law, including that the Zambian High Court lacked international competence (i.e. jurisdiction) as determined by South African law, and that the judgment may be contrary to South African public policy as the interest *pendente lite* might infringe the ***in duplum*** Rule.

Because Trademore's legal representatives were unable to ascertain from the ***Act*** what factors the Minister was to consider when exercising his discretion under s. 1 (1) of the ***Act***, and indeed why the enforcement of certain foreign judgments were restricted, Trademore also requested the Minister to make available to it the factors and guidelines which he would consider in determining whether or not to give permission under the ***Act***. Trademore then further asked specifically that those guidelines be made available to it so that it could amplify its submissions.

[12] On 11 April 2017, Agri-Services' Attorneys made submissions to the Minister in response to Applicant's views, to the effect that as the judgment does not

involve payment of "multiple or punitive damages" as prohibited by the *Act*, and as the issue of jurisdiction was for our Courts to decide in due course, the Minister should grant his consent.

[13] On 16 May 2017 the Minister communicated his decision to grant permission to the parties. In his written decision the Minister stated the following:

1. He was satisfied that the judgment involved a transaction falling within the scope of the *Act*;
2. The *Act* was silent as to the factors that needed to be considered in determining whether to grant permission or not;
3. The Minister accepted Agri-Services' view that Trademore's submissions concern factors that are subject to determination by a Court, and not facts which the Minister can take into account.

[14] Because the *Act* was silent as to the factors that needed to be considered, the Minister also stated that he relied on the submissions received from the parties.

[15] It was then said in the Founding Affidavit that the Minister did not himself seek to ascertain why he had been conferred the power in terms of s. 1 (1) to make the decision, and what factors he would take into account, but appeared to rely exclusively on the parties' submissions. Having considered those submissions, he could find no reason to refuse permission, the Minister said.

[16] It was said that on that basis, the Minister purported to exercise his discretion conferred upon him by the *Act* in favour of Agri-Services. It was also apparent that the Minister did not respond in so many words to Trsademore's explicit request to set out the factors and/or supply the guidelines that he would be using in deciding whether or not to grant permission.

Grounds of review stated in the Founding Affidavit:

[17] It was repeated that the Minister's decision constituted unlawful and unreasonable administrative action for the purposes of *PAJA* and/or was in contravention of the principle of legality. In plain terms, it was put as follows:

1. The Minister on his own admission could not find in the *Act* any factors that he had to consider when making a decision;
2. The Minister did not refer at all to what the purpose of the *Act* could be in restricting the enforcement of certain foreign judgments, so as to guide him in exercising his discretion;
3. The Minister appeared to rely exclusively on the parties' submissions in guiding him;
4. The Minister then simply concluded that there was no reason to refuse the request to enforce the judgment.

[18] It was further said in the Founding Affidavit that the *Act* had to have a purpose and with reference to its short title, it was presumably intended to

protect businesses in South Africa at least for present purposes in relation to businesses engaged in the type of transactions described in s. 1 (3) of the *Act*. It could well be that Trademore was deserving of that protection, but unless the Minister was able to elucidate why some businesses are to be protected and others not, he would not be in a position to properly make a decision in terms of s. 1 of the *Act*. The Minister could not do what he effectively did: namely to declare that because he could not find any relevant factors in the *Act*, he would look to the submissions of the parties, which did not purport to address the purpose of the *Act* in any event and then find "no reason" why the request should be refused. The conclusion was that self-evidently the legislature has a purpose requiring the Minister to consent to the enforcement of certain foreign judgments. It was for the Minister to ascertain what that purpose was, and what policy considerations and objectives were to apply, and then exercise his discretion in terms of s. 1 (1) after having afforded the parties an opportunity to make representations to him in relation thereto. This the Minister had not done.

[19] The Founding Affidavit then set out the legal argument relating to the specific grounds of review.

Applicant's Heads of Argument:

[20] It was submitted that the effect of the *Act* was that whilst foreign judgments may generally be enforced by South African Courts if the common law requirements have been met, the *Act* stipulates that any judgment in connection with any civil proceedings and arising from any act or transaction contemplated in s. 1 (3) may not be enforced despite the common law power of the Courts to do so, unless where the Minister had given permission.

[21] The common law requirements in this context were set out in ***Jones v Krok 1995 (1) SA 677 (A) 685B to E***, as confirmed ***Society of Lloyds v Price; Society of Lloyds v Lee 2006 (5) SA 393 (SCA) at par. 34***, where the following was said: "The present position in South Africa is that a foreign

judgment is not directly enforceable, but constitutes a cause of action and will be enforced by our Courts provided

i) that the Court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognized by our law with reference to the jurisdiction of foreign Courts (sometimes referred to as "international jurisdiction of competence");

ii) that the judgment is final and conclusive in its effect and has not become super-annuated;

iii) that the recognition and enforcement of the judgments by our Courts would not be contrary to public policy;

iv) that the judgment was not obtained by fraudulent means;

v) that the judgment does not involve the enforcement of a Penal or Revenue Law of the foreign State; and

vi) that enforcement of the judgment is not precluded by the provisions of the ***Protection of Businesses Act 99 of 1978*** as amended...".

[22] It was argued that apart from the actual provisions of s. 1 of the *Act,* nothing further could be gleaned from the wording of the *Act* itself to demonstrate its purpose beyond this. Its broader purpose was not "independently ascertainable" as suggested by Agri-Services, nor was it "objectively" identifiable.

[23] It is convenient to refer to the Second Respondent's written argument in this context where it was stated that the purpose of the *Act* was to protect South African businesses against the overreach of undesirable foreign policies, and that specifically the *Act* was intended to protect South African businesses from American anti-trust legislation, to block undesirable foreign policies and to protect South Africans from the draconian effects of certain foreign laws, particularly those allowing awards of penal or multiple damages. It must obviously not be forgotten that s. 1 A to 1 G, specifically refer to a number of reasons why these amendments were introduced into the original *Act* for which recognition of foreign judgments were prohibited. It was however

contended that there was nothing in the balance of the *Act* that set out any factors or guidelines to assist the Minister exercising his discretion to grant or refuse permission for purposes of s. 1 (1). The *Act* was simply silent in this regard and this is not in dispute. The conclusion was, according to Applicant's Counsel, that the nature of the discretion conferred on the Minister was a wide discretion rather than a narrowly circumscribed or defined one. Such discretions were however not infinitive and had to be bound by the principle of legality. Reference was made to ***Dawood v Minister of Home Affairs and Others 2000 (3) SA 936 CC, par. 42 to 56***, and ***Janse van Rensburg v Minister of Trade and Industry 2001 (1) SA 29 (CC), par. 21 to 26, and especially par. 25.***

It must however be remembered that in the ***Dawood*** decision, certain human rights were at stake and relied upon, whilst this was not the present issue.

[24] Returning again to the ***Dawood*** decision *supra*, it was argued that when faced with a broad discretionary power, it was an accepted principle that an

apparently wide discretion conferred on any authority must be narrowed down in light of the purpose of the legislation (par. 47). It was also held that this would be achieved by considering the purpose of the legislation, the way in which it sought to achieve that purpose, as well as the overall context which that purpose sought to achieve. This all presupposed that the decision-maker was aware of, and alive to the purposes of the particular legislation.

[25] In the light of those submissions, it was argued that in order to exercise his discretion constitutionally, the Minister was required at the outset to endeavour to understand why certain persons were to be protected under the *Act* against the enforcement of prohibited judgments, and, conversely, why such judgments may be enforced notwithstanding their prohibition. Without knowing why the prohibition existed in the first place, let alone why there was a ministerial permission exception granted by the Act in a certain context, the purpose of the *Act* could not be ascertained, and nor could the Minister place himself in the position to discern any factors or guidelines for the exercise of

his discretion. This was what the Minister was required to do from the outset. What the Minister did however fell far short of the mark that was required from functionally exercising a wide discretion. He did not ascertain the purpose however, let alone the context of the *Act,* and the manner in which his discretion ought to be exercised.

[26] In the alternative it was argued that if the Minister ultimately decided that it was unnecessary to ascertain the purpose of the *Act*, perhaps because it was opaque or not easily ascertainable, then he treated his own discretion as an unbounded discretion divorced from a consideration of the purpose of the *Act* and this was contrary to the principle of legality.

[27] It was also argued that in the light of the above, the Minister's decision was irrational in that there was no rational connection between the action and the purpose of the empowering provision (which was unknown).

As to the rationality requirement, see: ***Pharmaceutical Manufacturers Association of SA: In re: Ex parte application of the President of the Republic of South Africa 2000 (2) SA 674 (CC), paras. 85, 86 and 89***, and more recently, ***Black Eagle Project Roodekrans v MEC: Department of Agriculture [2019] 2 ALLSA 332 (GJ) at par. 26*** where the following was said:

"[26] In assessing whether the rationality threshold has been met the Courts have raised two pertinent questions: is the administrative action rationally related to the purpose for which the power was given to the functionary? and, is the administrative action, viewed objectively, rational? The first question "is really concerned with the evaluation of a relationship between means and ends." And for analytical convenience, the second question can be re-crafted as: is there a rational connection between the material made available to the functionary and the conclusion arrived at by the functionary?" (All footnotes omitted).

I agree that this is the correct approach.

[28] The record states that the Legal Services Department of the Department of Trade and Industry did appreciate that the ***Act*** had to have some underlying rationale, because it said to the Minister that "it is worth noting that the ***Act*** is silent regarding the factors that must be considered by the Minister in arriving at the decision...it is also not clear what the rationale is for requiring the Minister to consider such applications especially in the light of the fact that the applicant is still required to make an application to the Courts...it is worth noting that the ***Act*** is old, having been promulgated in 1978 and offers little guidance on the said issue".

[29] The said Department posed the same question to the State Law Advisors and sought advice on "which factors the Minister needs to take into account in deciding whether or not permission to enforce the foreign judgment". This question was however not answered.

[30] Having identified the crucial issue and the lack of assistance offered by the *Act* itself, the Department of Trade and Industry made no suggestion to the Minister as to the purpose of the *Act*, or how the exercise of his discretion was to be guided and rationally connected to that purpose. It was submitted therefore that a formulation of the purpose of the *Act* is antecedent to any decision to be taken in terms of the *Act* insofar as that decision is then to be rationally connected to its purpose.

[31] There was also no rational connection between the decision and the actual information before the Minister inasmuch as none of the submissions or recommendations made by the Department of Trade and Industry demonstrated why the Minister had the power to grant or refuse permission, what the objectives of the *Act* could be, or what the context was in which the Minister ought to consider their exercise of that discretion. The State Law Advisors' legal opinion also makes no mention of any factors to be considered.

[32] Applicant appeared to be the only party that was alive to these issues inasmuch as it expressly asked the Minister to indicate what factors and/or guidelines he would use.

[33] Accordingly the submission was that from the record there was no rational connection between the information that actually served before the Minister and the decision that was ultimately taken.

[34] It was submitted that other considerations had to be kept in mind:

1. The Minister's decision could not be justified after the event based on information, including any opinions or legal writings that were not actually before him when he made his decision.

   See: ***SA Predators Breeders Association v Minister of Environmental Affairs and Tourism [2011] 2 ALLSA 529 (SCA) par. 36.***

In Respondents' Heads of Argument a number of Court decisions and legal writings were mentioned and debated which, although interesting, were not before the Minister. Second Respondent's *ex post facto* attempt to supplement the Minister's reasons was therefore improper.

[35] It was also contended as a second ground of review that the Minister failed to apply his mind properly or adequately, in that he took irrelevant considerations into account and failed to consider relevant ones. The plainly relevant, and in fact essential consideration, was that the Minister ought to have taken into account the purpose of the ***Act*** and its objectives. Nowhere did it appear that the Minister considered which factors needed to be taken into account in deciding whether or not to grant the permission. Without being unduly repetitive, I need to state Applicant's conclusion under this topic which read as follows: "Even assuming that the purpose of the ***Act*** is "independently" or objectively identifiable as NWK asserts, it is difficult to see how the Minister could have assessed whether or not Trademore was a person deserving of

protection, or NWK's judgment was of a kind that warranted a departure from the otherwise stringent prohibition against enforcement of prohibited foreign judgments, when the record demonstrates that neither the State Law Advisors nor the Department of Trade and Industries, nor the Minister, applied their minds to these questions at all".

[36] Other arguments were that the said decision was taken capriciously because the Minister failed to appreciate the nature and limits of a discretion to be exercised, and that he also laboured under material error of law inasmuch as he applied the incorrect test, namely by concluding that permission is to be granted unless there is a reason not to do so.

[37] It was submitted that having regard to the provisions of s. 8 (1) of ***PAJA***, which grants the Court the power to make any order that is just and equitable, I ought to remit this case to the Minister with directions to ascertain the purpose and objectives of the ***Act*** more broadly, and s. 1 (1) in particular, so

as to narrow down what would otherwise be an unbounded discretion if afforded to the Minister. In the same breath however, Mr Gilbert said in reply that I must be careful that I "do not tread on the toes of the Minister by telling him what he must do and consider". The obvious contradiction speaks for itself.

Oral argument:

[38] Having regard to what was pleaded and submitted as set out above in some detail, the oral argument became interesting. I enquired from Mr Gilbert what else the Minister should have done? The answer was: to ascertain the purpose of the *Act*. The question was: how must he decide that? The answer: he must have regard to the *Act*. On the basis that no purpose could be found in the *Act* or no guidelines either, as had previously been submitted, I asked what then was the Minister to do? The answer was: the Minister had to do as best he could to ascertain such purpose or guideline, but it was not for the Applicant to suggest the answers. The Respondent sought to take away the

protection afforded to a litigant and, if the Minister did not know what to do, such protection had to remain, alternatively, had to justify depriving a litigant of such protection. Pressed further, Mr Gilbert suggested that the Minister should have referred to the history of the *Act*, *Law Reports*, *Hansard* and any literature on this topic, and debated such with his Law Advisors. He did not do that however, and Respondent could not do it for him now. The default position in Applicant's view was not to grant permission. I asked Mr Gilbert what rights the Applicant had been deprived of by the Minister's decision. His submission was the right of a business not to have a judgment against it enforced by a South African Court. This was a statutory right that appeared from the provisions of s. 1 (1) (a) of the *Act*. The Minister was not entitled to say, as he did, that there was no reason to refuse the request. The contrary was to: he had to look for reasons to grant the request and to deprive an Applicant of the relevant protection.

[39] The irony emerging from this argument in Court, seems to be that the longer it progressed, the clearer the purpose of the *Act* became, namely to grant permission as a first step for enforcement proceedings in a Court of law, unless the *Act* prohibited such. I will return to this particular topic when I deal Respondent's argument.

[40] As far as a remedy was concerned, it was submitted that it was not for me to tell the Minister what to do and how he had to determine the purpose of the *Act*. I simply had to remit it to the Minister and direct him to determine its purpose. Another surprising submission was that it was also not for me to determine the purpose of the *Act*. When I suggested that this is what the Courts usually do, depending on the context of any given case, Mr Gilbert suggested that this was not the issue at all. Whatever the purpose was, the Minister had to ascertain it.

Can I as just gently say: as far as the remedy sought was concerned, the wheel kept turning, and Applicant could not decide when to jump on or off.

Second Respondent's argument:

[41] It was contended that the crux of Applicant's argument was in fact that the Minister did not know or apply the purpose of the *Act* in reaching his decision. I agree that this is so. Second Respondent in that context submitted the following:

1. The relief sought by Applicant was unlawful because it wanted the Minister to look for the purpose of the *Act* beyond the actual text of the *Act*. This would give rise to law-making and it was for the legislature to decide, not the Minister or this Court. Applicant ought to have attacked the *Act* therefore, and not the Minister's decision;
2. The Minister did consider the purpose of the *Act*. It was before him and is taken up in the language of the provisions that he considered. The Minister was not required to spell out every step of his reasoning;
3. The Minister followed a thorough, rational process and reached the only available conclusion open to him, and any objective observer on the facts of this case. Even if I should find that the Minister acted

differently than he should have done, this was not material and did not give rise to a ground of review.

The original purpose of the Act in context:

[42] It was submitted that all available authority supported the original purpose of the *Act* namely to protect South Africans from the enforcement of foreign laws and/or judgments permitting payment of punitive or multiple damages and from the overreach of US Anti-Trust Legislation during the protectionist Apartheid era. No contrary authority was available. In ***Fattouche v Khumalo [2014] ZAGPJHC 102***, the learned Judge conducted an extensive analysis of the purpose of the *Act*. She found after an obiter analysis of the purpose of the Act that the explanation of South African Reform Commission, namely that the principle aim of the *Act* was "to protect South Africans from the draconian effects of certain foreign laws: in particular those allowing awards of protectionist or multiple damages", was sound.

See: ***SALRC Concerning its Investigation into Consolidated Legislation pertaining to International Co-operation in Civil Matters Report [December 2006].*** She also accepted the view that the ***Act*** was passed "during the Apartheid years, when South Africa had restricted dealings with the International Business Community", and that the ***Act*** was intended to block undesirable foreign policies.

In ***International Fruit Genetics LLC v Pieter Eduard Retief Redelinghuys [2017] ZAWCHC 6 at par. 16***, the High Court in the context of s. 1 (1) (a) and 1 (3) of the ***Act***, said the following: "This protectionist legislation was enacted at the time when an isolated Apartheid regime was anxious to shield domestic businesses from foreign interferences. It is questionable whether its provisions are justified in the current era and in view of the safeguards which our law recognizes in the recognition and enforcement of foreign judgments in general".

[43] The Court in the ***Fattouche*** case *supra* also relied on ***Forsyth Private International Law the 5th Edition (2012) at 402***, where it was stated that the ***Act*** was enacted "to protect South African businesses from the far reaching tentacles of American Anti-Trust legislation".

[44] In ***Law of South Africa, Arbitration, Vol. 2 (3rd Edition) at par. 51***, the author said the following:

"1 The major thrust of this legislation is directed at preventing recovery of excessive damages awarded in foreign Courts to externally based companies in business with South African citizens; a consequence which would adversely affect commerce in the Republic;

2 This extraordinary enactment cast widely enough to include foreign judgments given against both natural and juristic persons and if interpreted with a literest bent it has a wider reach than its short title: "***Protection of Businesses Act 1978***" would seem to indicate, for it covers virtually the entire gambit of commercial activity. However when emphasis is placed on three sections

added subsequently to the principal Act namely, s. 1A, s. 1B and s. 1D it is submitted that the legislature intends solely "to restrict the enforcement in the Republic of certain foreign judgments, orders, directions, arbitration and awards and letters of request", and that the aforementioned sections are statutory expressions of public policy rendered necessary in the main, by the tendency of the American Courts to interpret their federal Anti-Trust Legislation in such a way as to infringe the sovereignty of the Republic and other States".

[45] I was also referred to the relevant parliamentary debate in 1978 to be found in "***Hansard House of Assembly Debates 1978 Vol. 74 COL 9165***". However, the eminent jurist Schreiner JA said in ***Mavromati v Union Exploration Import (Pty) Ltd 1949 (4) SA 917 (AD)*** that such a course would be against all the principles of construction.

[46] With the above as a background, Second Respondent's Counsel, Ms H. Drake submitted, and in my view correctly so, that the ***Act*** must be interpreted today in the light of the ***Constitution*** and by all spheres of government in a manner that promotes the spirit, purport and object of the ***Bill of Rights*** (s. 8 (1) of the ***Constitution***). ***Forsyth supra*** at 468 said that save in the most extreme case: for instance, where the enforcement of the foreign judgment would inflict substantial damage on the economy as a whole – in cases where the Court would in any event refuse to enforce it on public policy grounds, it was difficult to conceive of any constitutionally proper ground on which the Minister could refuse permission.

I agree with that view.

See: ***S v Jordaan 2002 (6) SA 642 CC***, where it was said with reference to the wording of the ***Sexual Offences Act*** in its post 1994, rather than its original 1988 setting, that it must be decided whether it is reasonably capable of bearing a meaning which is compatible with the spirit, purport and objects of the ***Bill of Rights***.

[47] In the light of the above considerations, it was submitted that the successful party who obtains judgment and seeks to execute it in South Africa, seeks to invoke the following Constitutional rights and protections to avoid having a right and a judgment, but no remedy in terms thereof:

1. Section 34 of the ***Constitution*** that guarantees access to the Courts;
2. Section 165 of the ***Constitution***, which requires the Minister to assist and protect the Court; and
3. Sections 39 and 233 of the ***Constitution***, which require the Minister to facilitate the International Principles of Comity, reciprocity and orderly conduct and exigency of international trade.

In that context reference can be had to ***Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 CC at paras. 55 to 57.***

[48] I agree that this is the proper approach to the *Act* and the Minister's powers. It is important to note, as was submitted, that the granting of permission in terms of s. 1 (1) of the ***Act***, does not limit any Constitutional right of the party

against whom execution was sought. Decisions in terms of s. 1 (1) must today therefore be exercised in favour of access to Courts, and not against it. The constitutional dispensation fundamentally changes the circumstances in which a Minister can be said lawfully to withhold permission to enforce a foreign judgment. The conclusion was therefore that there is in particular no lawful interpretation or exercise of discretion, in terms of s. 1 (1) of the *Act* that prevents the execution of foreign judgments debt in ordinary commercial transactions. I agree with this conclusion.

[49] Second Respondent's Counsel could find no examples in case law where the Minister had refused permission in terms of s. 1 (1).

The relief sought is unlawful:

[50] It was argued that Trademore wants the Minister to determine the purpose of the *Act* beyond its four corners. It also wants the Minister to determine factors or guidelines to be used in the exercise of his discretion. It asks this Court to

remit the decision to the Minister, and if deemed necessary direct the Minister "to ascertain what objective factors he may take into account" in the exercise of his discretion. This does indeed appear from the Founding Affidavit (but not in reply during argument) and according to Second Respondent this was unlawful for the following reasons:

1. It is not for the Minister to determine the purpose and further criteria beyond the scope of the *Act*. Nor is it the Court's role. The creation of further criteria constitutes law-making which must be done by the legislature which must decide amongst several legislative choices. I agree with Second Respondent's Counsel;

2. Also, the Minister is not required to create guidelines. It is also not for this Court to direct the Minister on such guidelines. It remains for the legislature to decide whether, and how to, direct the exercise of a discretion, especially in the new constitutional dispensation;

3. The Minister could only have regard to what the *Act* says. He was not required or empowered to look for further criteria outside the scope of

the *Act* and try to divine a further purpose or elaborate on the purpose as contained in the *Act*;

4. Again, I agree with this contention.

[51] It was indeed so that the purpose of the *Act* on its face does not provide much detail. It does not unlock a list of criteria for the Minister to consider. But it is not required to do so, nor was it for the Minister to explain the purpose of the *Act* to Trademore merely because Trademore said that it could not find the purpose.

[52] If Trademore was entitled to any relief at all, it would lie in challenging the *Act* and not the Minister's decision making in terms of the *Act*. As a result, the relief sought by Trademore cannot be granted.

[53] The Minister did in fact consider the purpose of the *Act* and said in his reasons that he was "guided by the relevant provisions of the *Act*".

Furthermore he had regard to all the submissions made to him. I agree with Second Respondent's Counsel that there is no possible interpretation of the Act that would justify the lawful exercise of discretion against Trademore on the facts of this case. The relevant judgment relates an ordinary business transaction relating to the sale of cotton seed between two companies. The only constitutional exercise of discretion in terms of s. 1 (1) of the ***Act*** must favour access to Courts and not vice versa. It is also so that the consequence of granting permission to Second Respondent was not to infringe on any fundamental or other right of Applicant. It does not take anything away from it at all. In contrast however, for the Minister to refuse to grant permission to Second Respondent would limit its right of access to Courts in terms of s. 34 of the ***Constitution*** and would violate also the other sections that I have mentioned. The present facts therefore are substantially distinguishable from cases like ***Dawood supra***, where the consequences of the decision makers' discretionary decision infringed affected persons' fundamental rights.

[54] In the context of the grounds of review, I have considered the following dictum in ***Allpay Consolidated v Chief Executive Officer 2014 (1) SA 604 (CC) at par. 28 to 29***: "The proper approach is to establish, factually whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under ***PAJA***. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground had been established. Once that is done, the potential practical difficulties that may flow from declaring the administrative action constitutionally invalid must be dealt with under the just and equitable remedies provided for by the ***Constitution*** and ***PAJA***". It is of course so that not every defect results in invalidity.

See: ***Aurecon South Africa (Pty) Ltd v Cape Town City 2016 (2) SA 184 SCA,*** where the following was said: "It is firmly established in our law that administrative action based on formal or procedural defects is not always invalid and that legal validity is concerned not only with technical but also with

substantial correctness, which should not always be sacrificed for form" (par. [43]).

There were however no factual irregularities and it was particularly fatal for Trademore to be not able to answer the question what the Minister should have done further to determine the purpose of the *Act* beyond its text. Without the identification of this normative standard, no factual irregularity can be identified and no ground for review may result. I agree again with Second Respondent's submission in this regard.

Rationality:

[55] It is by now established law that rationality requires both of the Minister's process and the decision itself to be rational.

See: ***Democratic Alliance v President of South Africa 2013 (1) SA 248 (CC) par. 33 to 35.***

On the facts of the case, the Minister's decision was the only rational outcome in the circumstances of this case and again I agree with this

contention. The process in my view was also rational and it was not concerned whether there were any better means to achieve the purpose but only whether the means actually employed were rationally related to the purpose for which the power was conferred. See ***Democratic Alliance supra*** par. 32. In any event, it was not for the Court to replace the Minister's decision for its own preferred process. The means chosen to achieve a particular purpose must only reasonably be capable of accomplishing that purpose and need not be the best or only means.

See: ***Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) par. 51.***

[56] The absence of guidelines in the ***Act*** alone does not render the Minister's decision irrational. It was indeed rational for the Minister to accept the legal advice that s. 1 of the ***Act*** itself provides guidance of what factors must be taken into account. The need for the Minister to exercise his discretion seemed redundant in light of the fact that Second Respondent would still have

to persuade the Court to enforce it as was said in the context of the criteria set out in ***Jones v Krok supra.*** Other sections or prohibitions in the Act did not arise. And Applicant's objections of jurisdictions and public policy were properly to be assist by a Court in due course as it formed part of the common law criteria for the enforcement of foreign judgments. There was therefore no reason not to grant permission.

[57] It cannot be said that the decision was unreasonable. The test for reasonableness is whether the Minister's decision is "one that a reasonable decision maker could not reach".

See: ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 (4) SA 490 (CC) par. 44.***

What is reasonable depends on the circumstances of the case and applying the criteria in ***Bato Star*** supra the Minister reached the only reasonable decision in the circumstances. I agree with this contention.

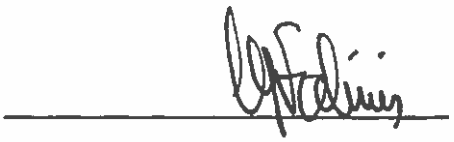
Applicant's reply:

[58] In reply Mr Gilbert, in the context of what right the Applicant sought to protect, submitted that he had overlooked a most fundamental right namely that contained in s. 33 of the ***Constitution***, which deals with fair administrative action. I have held that the process was fair and that could not be expected of the Minister to go beyond the four corners of the ***Act*** more than he did. He did not agree that the Minister could not go beyond the four corners of the ***Act***. If there were no guidelines then the Minister must refuse to give permission. I do not agree with this submission. It is not the proper constitutionally justifiable approach at all. It was added that if the Minister could get no assistance from his advisors and/or from the parties, he could not simply say: there is no reason not to grant permission. The Minister also said nothing about public policy considerations and it was not for the Court to say *ex post facto* that there was no reason not to grant it.

[59] It is my view that the Minister acted rationally, reasonably and that the process he followed was fair. As I have mentioned, it is not for a Court to put its preferred process into the place of the Minister's. The end result is that I agree with Second Respondent's Counsel that the *Act* must be interpreted and applied in the context of the present constitutional dispensation and that one was quite entitled to say, as I do, that there was no reason for the Minister not to grant permission.

[60] In the light of all of the above considerations, the following order is made:

The application is dismissed with costs, including costs of two Counsel.



JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 49321/2017

On behalf of the Applicant:	Adv B. M. Gilbert
	Adv J. L. Griffiths
	Instructed by: Fluxmans Inc Attorneys
Counsel for the 2nd Respondent:	Adv H. Drake
	Adv Ngqele
	Instructed by: Eversheds Sutherland (SA) Attorneys
Date of Hearing:	29 October 2019
Date of Judgment:	14 November 2019 at 10:00