IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
2021-12-13
DATE **SIGNATURE**

Case Number: 59673/2019

In the matter between:

LEDVANCE (PTY) LTD (formerly trading as OSRAM) Applicant

and

NATIONAL REGULATOR FOR COMPULSORY SPECIFICATIONS First Respondent

MINISTER OF TRADE AND INDUSTRY Second Respondent

MINISTER OF FINANCE Third Respondent

ILLUMINATING ENGINEERING SOCIETY

OF SOUTH AFRICA (IESSA) Fourth Respondent

JUDGMENT

POTTERILL J

[1] Ledvance (Pty) Ltd (formally trading as OSRAM) [Ledvance] is seeking a review and setting aside, alternatively correcting the decision by the first respondent, the National Regulator for Compulsory Specifications [the NRCS] and/or the second respondent, the Minister of Trade and Industry [the Minister of Trade] and/or the third respondent, the Minister of Finance [Minister of Finance]. 'whereby the items per unit for CFL's' [CFL's the acronym for compatible fluorescent lamps] was reduced from 100 items per unit to 10 items per unit. The fourth respondent is Illuminating Engineering Society of South Africa, a voluntary body that *inter alia* advises the industry and the NRCS. It was cited as far as it may have had an interest, but no relief and costs were sought against it. The fourth respondent did not participate in the application. The NRCS and the Ministers of Trade and Finance opposed the application.

[2] Due to the contentious nature of the other prayers I find it necessary to quote them verbatim:

'3. Declaring the actions and decisions of the First and/or Second and/or Third Respondents arbitrary and ultra vires the NRCS Act 5 of 2008 and Regulations pursuant thereto;

4. Setting aside all Government Notices promulgated in terms of which a levy/fee is payable for commodity Code 7214 for compulsory specification (VC9091) as arbitrarily established, alternatively correcting same to reflect commodity CFL Code 7214 and a unit to represent 100 items;

5. Setting aside all Government notices promulgated in terms of which a levy/fee is published and which purport to publish such fee/levy for commodity Code 7214, alternatively correcting same;

6. Directing and ordering the First, Second and Third Respondents jointly and severally the one paying the other to be absolved to repay to the Applicant all fees/levies paid to it in terms of Commodity Code 7214, alternatively whereby and from such time as the fee/levy was arbitrarily increased by in excess of 900% by reducing the items per unit from 100 to 10;

7. That the quantification of the sum/amount to be paid to the Applicant be postponed to a separate hearing, if the Applicant and Respondents cannot agree upon such sum/amount;

8. Costs of this application to be paid by the First, Second and Third respondents jointly and severally, the one paying the other to be absolved on the scale as between attorney and client;

9. Further and/or alternative relief.'

Background

[3] The National Regulator for Compulsory Specifications Act 5 of 2008 [NRCS Act] is the legal framework for compulsory specifications for products and services in South Africa. A compulsory specification prescribes the minimum requirements that a manufactured or imported product must comply with. The NRCS is the national regulator and has as its mandate to apply the NRSC Act and regulations to protect the public health and safety, the environment and promote fair trade.

[4] The NRCS makes recommendations to the Minister of Trade with regard to the compulsory specifications of a product or the amendment thereof in terms of sections 13(1)(b), 13(4)(b) and 13(5) of the Act. The Minister of Trade after considering the recommendations from the NRCS then has to follow the process set out in s 13(4) thereafter publishing the compulsory specification in terms of sections 13(1) and 13(2) of the Act.[1] The Minister of Finance has no role to play in the setting or amending of specifications.

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[1] Section 13(1) The Minister may, on the recommendation of the National Regulator, in respect of any commodity, product or service which may affect public safety, health or the environment, by notice in the *Gazette* –

(a) declare a SANS or a provision of a SANS to be a compulsory specification –
  (i) by referring to the title and the number of that standard only, without indicating the year or erudition number, and if that SANS is amended, the amended SANS is deemed to have been incorporated; or
  (ii) by referring to the title, number and year or edition number of that SANS;
(b) declare an amended SANS or an amended provision of a SANS to be a compulsory specification if the original declaration was made in terms of subsection (1)(a)(ii);
(c) declare or amend a compulsory specification if a SANS or a provision of a SANS is not available in terms of paragraphs (a) and (b); or
(d) withdraw a compulsory specification.

(2) A notice under subsection (1)(a), (b) or (c) –
(a) must contain full particulars of the specification, provision or amendment;
(b) comes into operation on a date fixed in the notice, which date may not be less than two months after the date of publication of the notice;
(c) may fix different dates on which different provisions of a compulsory specification come Into operation.

(3) …

(4) The Minister may not publish a notice under subsection (1)(a), (b) or (c), unless a preliminary

[5] The NRCS also has a process to set prescribed levies to be paid by the manufacturer or importer on compulsory specifications. The NRCS Regulation, 2010[2] sets out the process pertaining to the setting and increase of levies. The NRCS consults with the industry and levy payers. Pursuant to consultation the NRCS makes a recommendation for a levy for a compulsory specification in terms of in terms of regulation 2(9). The Minister of Trade then consults with the Minister of Finance in terms of s 14(3)(b) read with regulation 2(4). The fees and the levy periods are then published in terms of regulation 2(10). The NRCS also collects the prescribed levies in terms of s 14(3)(b) of the NRCS Act.[3]

[6] Ledvance is a global market player in the lighting industry and has distributed lamps in South Africa since 1969. It imports lamps from Ledvance GmbH Germany or from Ledvance Asia Pacific. The traditional globe [the incandescent lamp] was phased out to save energy and to reduce the impact on the environment. This brought about the advent of the CFL and Ledvance focussed its business on the importation of CFL's to South Africa.

[7] On 7 May 2010 the Minister of Trade introduced a compulsory specification for CFL's. On 6 August 2010 the Minister of Trade introduced a levy on CFL's. This was done under Code 7213 which was historically the levy Code for incandescent lightbulbs. This practically meant that the levy for CFL's and incandescent lightbulbs were levied exactly the same. The NRCS averred a higher levy for CFL's was necessary because the cost to monitor the CFL's was

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Notice has been published in the *Gazette* –

(a) setting out full particulars of the proposed compulsory specification or amendment; and
(b) in which interested persons are invited to comment on the proposed compulsory specification in writing by not less than two months after the date of the publication of the preliminary notice.

[2] Government Gazette Notice No R924 of 15 October 2015

[3] Section 14(3) Any person who imports, sells or supplies a commodity, product or service to which a compulsory specification applies, must –

(a) keep or supply to the National Regulator such records as may be prescribed by the Minister.
(b) pay such fees to the National Regulator as may be prescribed by the Minister after consultation with the Minister of Finance.

higher than incandescent lightbulbs. The reason proffered was that CFL's contain mercury and the handling thereof and the disposal of same requires specific care. The longer lifespan of CFL's means it takes longer for a regulator to test whether a CFL complies with the required standard set. At this juncture it must be mentioned that the affidavit of Mr Jonker, a former employee of the predecessor of the NRCS, the SABS, annexed to the replying affidavit of Ledvance disputed that these reasons for the higher levy have any merit. This led to CFL's to be removed from Code 7213 to Code 7214. Pursuant to a comedy of administrative errors by the NRCS the CFL's were finally on 17 October 2014 removed from Code 7213 and placed under Code 7214 increasing the levies payable on CFL's substantially.

[8] Ledvance is aggrieved by this higher levy. The higher levy resulted specifically because the unit description was amended. The tariff under Code 7213 was R1,30 per unit with a unit consisting of 100 items. Under Code 7214 the tariff was determined at R1,19 with a unit now only consisting of 10 items. The submission was that the decision was taken arbitrary, without consultation and is ultra vires the NRCS Act and regulations.

Condonation in terms of s9 of the Administration of Justice Act 3 of 2000 [PAJA].

[9] The first issue that requires addressing is the fact that Ledvance brought this review not within the 180 days prescribed by s7 of PAJA leaving Ledvance to seek condonation for bringing the review application late. Only if condonation is granted can the application for review be considered.

> *'7. Procedure for judicial review*
>
> *(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –*

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.'

'9. Variation of time

(1) The period of –

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 5 and 7 may be extended for a fixed period,

by agreement between the parties, or failing such agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection (1) where the interests of justice so require.'

[10] It has to be remarked that Ledvance made light of the time period required in s 7 of PAJA. In the condonation order sought it prayed for condonation *'insofar as it may be necessary'*. In the founding affidavit the averment is that *'insofar as this application may be "out of time" as prescribed by PAJA …'* In contradistinction the NRCS and the Ministers weighed in heavily that condonation should not be granted for the extreme time delay.

[11] Section 7(1)(b) of PAJA requires that proceedings for a review be instituted without unreasonable delay. The 180-day period within which to institute proceedings runs from the date that Ledvance was informed of the

administrative action or might reasonably have been expected to have become aware of the action and the reasons.

The administrative action

[12] On 10 September 2010 the NRCS hosted a levy consultation meeting. At that meeting the NRCS proposed a new levy for CFL's under Code 7213. The proposed levy could not be implemented because the submission by the NRCS to the Minister of Trade did not introduce this new levy code for CFL's.

[13] Levy consultations were held the following year in November 2011. The industry was once again informed that a new levy for CFL's would be introduced. Another administrative error occurred; again no such levy was proposed to the Minister of Trade resulting in no such levy being introduced.

[14] In November 2012 further consultations took place and the NRSC reintroduced the proposal for the new code CFL's under Code 7214. On 4 October 2013 Government Gazette [GG] promulgating Code 7214 was published. However, this GG contained an error and still under Code 7213 referred to 'Incandescent lamps(globes), compatible fluorescent lamps' setting out the unit still as 100 items at a tariff of R1,44. Reflected directly below Code 7213 is code 7214 at 10 items per unit at a tariff of R1,32 pertaining to single capped fluorescent lamps. The NRCS is dismissive of this ambiguous published GG, relying on the fact that the industry was informed of the error and persisted that this abortive GG informed Ledvance that a new levy was payable on CFL's. Due to the error in the GG Ledvance was charged the original rate. On 17 October 2014 the error was corrected and CFL's were removed from Code 7213. The levy payable on CFL's were increased.

When was Ledvance informed or might have been reasonable expected to have become aware of the action and reasons?

[15] In the founding affidavit Ledvance set out that 'The First respondent's *pro forma* return of commodities for the period 1 July 2013 to 31 December 2013 (2013 B) without reasonable explanation simply and arbitrarily reduced a unit from 100 items to 10 items. *'This arbitrary change was then perpetuated for each bi-annual return period to date …'* Pertinent to the condonation Mr Krause, the deponent to the founding affidavit and CFO of Ledvance set out that he became aware of the exorbitant increase in late 2015 while checking payments. The only other averment pertaining to when the decision to increase the levies came to Ledvance's attention is that Ledvance did not have *de facto* knowledge of the decisions and actions of the NRCS and Ministers until it made enquiries and attempted to resolve the matter.

[16] The argument on behalf of the NRSC that Ledvance knew of the decision on 4 October 2013 is rejected. Relying on an ambiguous GG as constituting knowledge, is spurious. Although it is possible that the commodities return of 2013 alerted Ledvance to the increase, this Court finds that Ledvance knew of the administrative action on 17 October 2014 when the ambiguity was removed and published in the GG. A court must take a broad view of when the lighting industry might reasonably be expected to have had knowledge of the administrative act, *'not dictated by the knowledge, or lack of it, of the particular member or members of the public who have chosen to challenge the act.'*[4] But, even if, the Court at best for Ledvance, accepted that the amended and corrected GG slipped through without the knowledge of Ledvance and the CFO only picked it up in late 2015, the delay from late September 2015 to 14 August 2019, the date of launching the review, has to be reasonable.

Is the delay unreasonable?

[17] The rationale for a review of a decision of a public body to be brought without due delay is to prevent prejudice to the public body and secondly the public

[4] *Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others* [2013] 4 All SA 639 (SCA) para [27]

interest element; ensuring finality of administrative functions.[5] A delay of 4 years is in itself unreasonable, but in terms of s7 of PAJA it is *per se* unreasonable. Whether or not the decision was unlawful no longer matters. The decision has been *'validated' by the delay'*[6] This dicta of the Supreme Court of Appeal was approved by the Constitutional Court in ***Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*** **2019 (4) SA 331 (CC)** para [49].

[18] It follows that I am only empowered to entertain the review application if the interest of justice dictates an extension in terms of s9. Absent such extension, I have no authority to entertain the review application. However, whether or not the delay was unreasonable and the extent thereof, is still relevant as a factor to be taken into account in determining whether an extension should be granted or not.[7]

[19] To ensure that the Court will grant an application for condonation an applicant has to set out that it took all reasonable steps available to it as soon as it became aware of the administrative decision. The steps taken by Ledvance from late September 2015 to August 2019 must show that it did not have an indifferent attitude to the decision.[8]

[20] A party seeking an indulgence is required to set out what steps it took when it became aware of the administrative decision and what caused the delay in bringing a review application. There is not a single averment in the founding affidavit as to what steps Ledvance took between the period *'late 2015'* and 21 September 2018. In this instance the steps are not just lacking; there were no steps taken. Seeking an indulgence for the delay requires setting out a sufficiently full explanation for the Court to ascertain whether the applicant addressed the adverse decision, in what way and what caused the delay before

[5] *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) paras 22-23
[6] *Opposition to Urban Tolling Alliance and Others v The South African National Roads Agency Limited and Others* [2013] 4 All SA 639 (SCA) para [27]
[7] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54
[8] *Associated Institutions Pension Fund and Others v Van Zyl* 2005 (2) SA 302 (SCA) para 51

applying for a review. Ledvance simply did not address that three-year period. There is a flagrant silence, despite the NRCS and the Ministers pertinently addressing the delay.

[21] In paragraphs 10.1 and 13.2 of the NRCS' answering affidavit it is submitted that Ledvance was not entitled to condonation for a six-year delay and the NRCS would suffer prejudice if the delay was condoned. These paragraphs in reply were boldly denied. In paragraph 39.4 the NRSC bemoans the fact that Ledvance's application for condonation had failed to disclose sufficient facts to justify the long delay. In reply a bare denial is all that is forthcoming. When the Minister of Finance specifically replies to the condonation application in paragraphs 58 to 63 there is in Ledvance's reply no response to these paragraphs.

[22] In the reply there is one vague, unsubstantiated averment that Ledvance did communicate with the HRCS in 2017. It is trite that in a reply a case cannot be made out for the first time, but there is not even an attempt by Ledvance to further their application for condonation or explain their blatant *lacuna* in their founding affidavit. An unexplained three-year period is per se unreasonable and with no reasons set out the court cannot entertain the review. The matter should end here and the application for condonation is to be dismissed.

The delay between the period September 2018 and August 2019 and the conduct of the parties in that period

[23] I do however address the period from 21 September 2018 to the date of the review and the reasons therefore is explored below. In the founding affidavit much is made of the correspondence from Ledvance to the NRCS that commenced in a letter dated 21 September 2018 wherein Mr McDonough of Ledvance raised the overstated levies and the difficulty the excessive fee tariff imposed on Ledvance. The NRCS responded that it will revert with a suitable date for a meeting, but that interest would be payable on unpaid levies and that

it would not hesitate to institute legal action to recover monies due. Ledvance addressed a further letter dated 15 November 2018 explaining its invidious position and its failed attempts to hold a meeting with the NRCS. There was no response from the NRCS. Ledvance's attorneys followed up with a letter dated 13 December 2018 reiterating the arbitrary conduct of the NRCS. After a series of emails, and postponement of the meeting, a meeting took place on 22 November 2018.The Court is not informed what transpired at the meeting except that Ledvance thereafter received an email with attached to it the levy schedules as gazetted. On 11 January 2019 it received an email setting out that further meetings are unnecessary because in the consultation process other companies agreed to the tariff increase. An internal suggestion is made that Ledvance be audited from 2011.

[24] Ledvance relies on these time frames and reaction of the NRCS as the reasons why the review was brought out of time. Ledvance deduced that the NRCS did not intend to engage on any bona fide terms with it but chose to threaten it with audits and actions. It then requested information that the NRCS provided on 2 April 2019. The period from January 2019 to August 2019 was taken up to obtain full reasons form the NRCS and it was required to discuss the way forward with its German office.

[25] Although condonation has already been denied for the unaccounted period from late 2015 to 2018, the delay from September 2018 to August 2019 would also have not afforded Ledvance condonation; one of the reasons why this period is discussed. Ledvance knew a levy had been published and that the only way to attack its legality was by means of a review. It may show *bona fides* in attempting to meet and negotiate, but to what result could it lead; it had been gazetted, validly or not. Especially so, when the NRCS's conduct in not answering emails and cancelling meetings just frustrated the process. The reasonable reaction would be to immediately proceed with legal action. There is no factual basis set out as to why it had to wait for the German office and why

it took so long before legal action was taken. Ledvance did not apply for condonation as soon as possible and condonation cannot be granted.

[26] From oral argument it was clear that there was no love lost between the parties. The conduct of the parties is a further reason why this time period is discussed. On the one hand Ledvance advanced that the NRCS's actions were taken in bad faith with threats of audits and legal actions including resorting to withholding Letters of Authority preventing importing CFL's. On the other hand, it was argued that Ledvance's submissions, without evidence, of unfair competition due their competitors making incorrect declarations under Code 7214, warranted adverse inferences against Ledvance.The fact that Ledvance expressed it had quality CFL's and a disproportionate levy could leave South Africans in the dark with inferior and cheaper products infuriated the NRCS because all CFL's had to comply with the minimum standard set. The NRCS denied that it abused its position of authority by threatening to refuse letters of authority, but did reiterate that it is one of the mechanisms to enforce compliance with the NRCS Act and regulations.

[27] The NRCS is in a position of authority and must act with responsibility in exercising its power. The irony is not lost on this Court that the NRCS' very existence is reliant on the levies charged and paid by *inter alia* Ledvance. Answering e-mails, attending meetings and acting bona fide would fulfil the NGCS's responsibility to its levy payers and the public at large There is also no gainsaying that Ledvance is a well-known entity in the South African lighting market and deserves respect from its regulatory body. However, for Ledvance to start engaging with the NRCS in 2018 when the levies where published in 2014 would frustrate any Regulator. A mutual respect would ensure a brightly lit future for South Africa.

The interests of justice

[28] The version of the NRCS must be accepted that it never received a request in terms of s5 of PAJA for reasons for its administrative decision.[9] A simple request in *'late 2015'* would have revealed all the information required. If the reasons where in Ledvance's opinion lacking, invalid and subject to review, the decision could have been subjected to judicial scrutiny close in time to the decision having been taken. It is not in the interests of justice to review a decision 6 years later with records not available any more with the NRCS only securing documents for a period of five years. The prayers sought in the motion of notice, inter alia, were an order that the NRCS and/ or the Ministers pay back all the fees/ levies paid under Code 7214. The quantification thereof was to be postponed if the parties should not agree. Such remedies inherently could not be in the interest of justice after such extreme delay, not to the NRCS or other role players in the industry. The NRCS is reliant on the levies to fulfil their function; they do not have a surplus of funds. An immediate response to the administrative action with an application to review would have solved this dilemma. How could this review be in the interests of justice to other levy payers? Must their levies be paid back even though they are not parties to this application to ensure fair administrative justice? It is not in the interest of justice to hear a review where other role players in the industry can be affected, or not, six years after the fact. The relief sought was repetitive, vague and incoherent, so much so that new prayers were forwarded after the hearing with comment by the NRCS and Ministers thereto. Granting such remedies is also not in the interests of justice. It is not in the interests of justice to grant condonation.

Costs

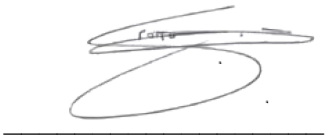
[29] Ledvance sought costs on an attorney and client scale. The NRCS and the Ministers requested that the application be dismissed with costs and where applicable the costs of two counsel. I find no reason to not follow the rule that the successful parties are entitled to their costs.

[9] *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[30] I accordingly make the following order:

[30.1] The application for condonation for the review application is dismissed.

[30.2] The applicant is to carry the costs of the respondents, including costs of counsel, and two counsel if so employed.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NUMBER: 59673/2019

HEARD ON: 4 and 5 October 2021

FOR THE APPLICANT: ADV. C.B. GARVEY

INSTRUCTED BY: Otto Krause Incorporated

FOR THE 1st RESPONDENT: ADV. P. NGCONGO

ADV. M. DAFEL

INSTRUCTED BY: Edward Nathan Sonnenbergs Inc.

FOR THE 2nd RESPONDENT: ADV. M.E. MANALA

INSTRUCTED BY: State Attorney, Pretoria

FOR THE 3rd RESPONDENT: ADV. H. RAJAH

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 13 December 2021