



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

**Case No: 400/2022**

In the matter between:

**TOP LAY EGG CO-OP LIMITED**

**First Appellant**

**GEORGE SHWARTZEL  
BOERDERY (PTY) LTD**

**Second Appellant**

and

**MINISTER OF AGRICULTURE,  
FORESTRY AND FISHERIES**

**First Respondent**

**EXECUTIVE OFFICER: AGRICULTURAL  
PRODUCT STANDARDS, DEPARTMENT  
OF AGRICULTURE: FOOD SAFETY  
AND QUALITY ASSURANCE**

**Second Respondent**

**FOOD SAFETY AGENCY (PTY) LTD  
(REG:2013/130308/07)**

**Third Respondent**

**AGENCY FOR FOOD SAFETY AND  
QUALITY (PTY) LTD  
(REG:2016/258115/07)**

**Fourth Respondent**

**AGENCY FOR FOOD SAFETY**

**Fifth Respondent**

**Neutral Citation:** *Top Lay Egg Co-op Ltd & Another v Minister of Agriculture, Forestry and Fisheries & Others* (400/2022) [2023] ZASCA 67 (16 May 2023)

**Coram:** SALDULKER, MOTHLE AND MATOJANE JJA AND NHLANGULELA AND UNTERHALTER AJJA

**Heard:** 16 March 2023

**Delivered:** 16 May 2023

**Summary:** Administrative Law – delayed review – Agricultural Product Standards Act 119 of 1990 – designated assignees – whether the third respondent is the designated assignee – whether the assignee had the power to inspect products and charge the producers' fees – whether the provisions relating to the determination of fees are reviewable on various grounds in terms of the Promotion of Administrative Justice Act 2 of 2000.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Bokako AJ with Tlhapi J and Phahlamohlaka AJ sitting as Full Court of appeal):

- 1 The appeal is dismissed.
- 2 The appellant is ordered to pay the respondents' costs of appeal, including the costs of two counsel where applicable.

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## JUDGMENT

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**Mothle JA (Saldulker and Matojane JJA and Nhlangulela and Unterhalter AJJA concurring)**

[1] The central issue in this appeal is the interpretation of a letter written by the first respondent, the Minister of Agriculture, Forestry and Fisheries (the Minister), in which he designated Agency for Food Safety (the fifth respondent) as the assignee. The designation as assignee was made in terms of s 2(3) of the Agricultural Product Standards Act 119 of 1990 (the Act). Before dealing with the grounds of appeal, it is apposite to deal briefly with the scheme of the Act, the background facts and the trajectory of the litigation which led to this appeal.

[2] The purpose of the Act is to ensure that products sold to the public are in accordance with the prescribed class or grade, comply with the prescribed standards, and are packed, marked and labelled accordingly, do not contain prescribed prohibited substances or contain a prescribed substance. These requirements are for the benefit of both consumers and the producers or stakeholders involved. To give effect to this legitimate purpose, s 2 of the Act empowers the Minister to designate an official in the Department of Agriculture, Forestry and Fisheries (the Department) as an executive officer and designate a person, undertaking, body, institution association or board as an assignee.

[3] The scheme of the Act was succinctly stated by this Court in *Bertie van Zyl (Pty) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries And Others*<sup>1</sup> (*Bertie van Zyl*) as follows:

'The Act controls the sale, export and import of certain agricultural products. The first respondent (the Minister) may prohibit the sale of prescribed product unless it complies with prescribed classifications and standards. In terms of s 2(1) of the Act, the Minister may designate a person in the employ of the Department of Agriculture (the Department) as the executive officer to exercise the powers and perform the duties conferred under the Act. The minister may also, in terms of s 2(3)(a), designate a person,<sup>2</sup> with regards to a particular product, for the purposes of the Act. A person so designated is styled an 'assignee' in respect of that particular product. The Act permits the executive officer and an assignee to conduct inspections aimed at ensuring that certain agricultural products meet the prescribed classifications and standards. They charge fees to do so. In the case of the executive officer the fee is prescribed. In the case of the assignee, the Act stipulates in s 3(1A)(b)(ii), that 'the fee determined by such assignee shall be payable . . .' (Footnote added.)

[4] The following are the background facts and trajectory of the litigation that led to this appeal. On 15 July 2018, the Minister issued a public invitation for submission of bids regarding the appointment of assignees in respect of agricultural products. Eleven bids from prospective assignees were received. On 18 July 2018, the prospective assignees were invited to attend an information session concerning the minimum requirements necessary for the selection of assignees. Among the eleven bids was that of the Food Safety Agency (Pty) Ltd (third respondent). When the third respondent, as one of the prospective assignees, made its presentation for the bid in a public session, it mentioned that it is a registered company *trading as Agency for Food Safety*. I will return to this aspect in detail as it constitutes the first ground of appeal.

[5] In a letter dated 9 December 2016, addressed to Dr Nel of the third respondent, the Minister designated the third respondent, which had submitted the bid, as assignee, by referring to it by its trade name. The litigation

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<sup>1</sup> *Bertie Van Zyl (Pty) Ltd and Others v Minister of Agriculture, Forestry and Fisheries and Others* [2021] ZASCA 101; [2021] 4 All SA 1 (SCA) at para 2.

<sup>2</sup> Person includes a legal person, undertaking, body, institution, association or board.

between the parties and the grounds of this appeal arose from the Minister's letter designating the third respondent as assignee. The letter reads thus:

'Dear Dr. Hein Nel

DESIGNATION AS AN ASSIGNEE IN TERMS OF THE AGRICULTURAL PRODUCT STANDARDS ACT, 1990 (ACT NO. 119 1990)

I, Senzeni Zokwana, Minister of Agriculture, Forestry and Fisheries hereby in terms of section 2(3)(a) of the Agricultural Product Standards Act, 1990 (Act 119 1990), designate *Agency for Food Safety* for the application of section 3(1) and 4A with respect to the inspection of regulated animal products (poultry meat and eggs, as well as any other meat and meat products for which regulations maybe promulgated). The minister reserves the right to revoke the assignment should circumstances dictate otherwise.

I trust that you will execute your duties to the best of your abilities.

Yours Respectfully

MR S ZOKWANA, MP

Minister of Agriculture, Forestry and Fisheries

DATE: 9-12-2016'.

(Own emphasis.)

[6] Consequent upon the receipt of the letter of designation, the third respondent mandated its wholly-owned subsidiary company, Agency for Food Safety and Quality (Pty) Ltd (the fourth respondent), to conduct inspections and exercise the powers of assignee in respect of poultry products, on its behalf. Top Lay Egg Co-Op Limited (the first appellant), is a primary co-operative which markets and sells agricultural products on behalf of its 51 members, who conduct business as egg producers. The first appellant markets and supplies its members' eggs and other poultry-related agricultural products to major retailers such as Massmart Group, Shoprite Holdings, Pick 'n Pay and the Spar Group. George Schwartzel Boerdery (Pty) Limited (the second appellant), also conducts business in the production and sale of eggs. The control, sampling, packaging and quality assurance over the sale of poultry is regulated under the Act.

[7] On 19 March 2018, the first and second appellant, including two companies also conducting business in poultry products, namely, Eggbert Eggs (Pty) Limited (Eggbert) and WW Bartlet Poultry Farm (Pty) Limited (Bartlet), launched an application in the Gauteng Division of the High Court, Pretoria (the high court), against the Minister and four respondents. In essence, the appellants sought relief before the high court in the following terms: first, whether the Minister designated the third respondent or the fourth respondent as assignee; second, whether the powers in terms of ss 3A, 7 and 8 of the Act were also conferred upon the assignee; third, whether the determination of fees by the assignee was reviewable in terms of PAJA on the grounds that they were, allegedly, arbitrary; capricious or irrational.

[8] All five respondents opposed the application. The Minister was the first respondent and Mr BM Makhafola, a director in the Department who the Minister had designated as Executive Officer, was the second respondent. The second respondent deposed to the answering affidavit on behalf of the Minister and the Department (the government respondents). The three other respondents opposing the application were the third, fourth and fifth respondents (the assignee respondents). In their answering affidavit to the appellant's application, the government respondents, in addition, raised three points *in limine*, namely; that the first appellant lacked *locus standi*; that there was a delay in instituting the review proceedings and that the appellants had failed to exhaust internal remedies.

[9] Apart from the order to invalidate the invoices submitted for payment by the fourth respondent to the second applicant, the application was dismissed with costs by Davis J, who also refused to grant the applicants leave to appeal the order of the high court. The applicants petitioned this Court and on 26 August 2020 were granted leave to appeal to the Full Court of the Gauteng Division of the High Court (the full court), by Ponnar JA and Unterhalter AJA. The full court similarly dismissed the appeal with costs, except the order invalidating the invoices. Aggrieved by the decision of the full court on appeal,

the first two appellants<sup>3</sup> again approached this Court with a request for special leave to appeal. On 11 April 2022, Plasket JA and Phatsoane AJA granted the appellants special leave to appeal. It is thus with special leave to appeal that this matter comes before us.

[10] In their first ground of appeal, the appellants contend that the identity of the designated assignee letter caused confusion. The Minister's letter of designation refers to 'Agency for Food Safety', which the appellants contend, is a non-existent person or entity. On inquiry, so the appellants contend, they could not find an entity registered as 'Agency for Food Safety'. In addition, the fourth respondent exercised the powers to conduct the inspection at their premises, which also issued monthly invoices for the service, even though they were not designated as an assignee. In addition, the Executive Officer in the Government Gazette No 40545 dated 13 January 2017, and subsequent Government Gazettes 40621 of February 2017 and 40847 of 19 May 2017, referred to an entity known as 'Agency for Food Safety (*Pty*) Ltd', a company that was non-existent. Consequently, so continues the contention by the appellant, there was disparity and confusion as to the identity of the actual designated assignee.

[11] The Executive Officer appended the suffix '*(Pty) Ltd*' to the trade name. This connotes a different entity that resulted in confusion, particularly as published in the Government Gazettes. It conveyed that the trade name 'Agency for Food Service' is a registered company, separate and independent from the third respondent. In this regard, there is some merit in the appellants' contention. However, this occurred in 2017, just after the designation of the assignee. The institution of proceedings in the high court in March 2018, was preceded by the exchange of correspondence one year earlier during 2017, between the appellants' attorneys Moolman & Pienaar Ing, and the second and fourth respondents. The issue of the designated assignee's identity featured in the correspondence exchanged. In a letter dated 2 January 2018 and in reply

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<sup>3</sup> Eggbert and Bartlet, the third and fourth applicants in the high court, were not participants in the appeal in this Court.

to a letter of demand by the appellants' attorneys, VFV attorneys acting for the third and fourth respondents, wrote thus:

'1. We confirm that we act on behalf of both Agency for Food Safety and Quality (Pty) Ltd (AFSQ) [fourth respondent], a wholly owned subsidiary of Food Safety Agency (Pty) Ltd t/a Agency for Food Safety (AFS) [third respondent] ("our clients") whom has approached us for advice and assistance herein.

2. Kindly take note that AFS has been appointed as an assignee by the Department of Agriculture, Forestry and Fisheries in terms of the Agricultural Product Standards Act 119 of 1990 ("the Act"). . .

3. Although AFS is the appointed assignee as mentioned above, they render quality-check services through their wholly owned subsidiary being AFSQ. This was done in order for poultry inspections to be kept separate from abattoir (red meat) inspections.'

[12] The letter makes clear the issue of identity and the relationship between the assignee respondents. Therefore, before instituting the proceedings in the high court, the appellants were made aware that the designated 'Agency for Food Safety' is a trading name of the company Food Safety Agency (Pty) Limited, the third respondent. Further, any misunderstanding concerning the involvement of the fourth respondent was explained and reasons given. It is also evident from the appellants' founding affidavit, by their own admission, that they were aware that Agency for Food Safety is a trade name of Food Safety Agency (Pty) Ltd. The appellants' founding affidavit deposed to by Mr Petrus Jacobus Pienaar, stated as follows:

'The Fifth Respondent is AGENCY FOR FOOD SAFETY, an entity, the correct citation which is unknown, with offices at 296 The Hillside Street, Lynnwood, Pretoria, Gauteng. Alternative at 4A Garsfontein Office Park, 645 Jaqueline Drive, Garsfontein, Gauteng. Reference is also made *in documentation at the disposal of the applicants, to Food Safety Agency (Pty) Ltd trading as Agency for Food Safety.*' (Own emphasis.)

[13] The appellants' deponent pleaded the same address of the fifth respondent as being also the address of the third and fourth respondents respectively. In the same affidavit, the appellants provide a list of documents they relied upon to support the contention that there was a disparity and confusion about the identity of the entity. The list of these documents, notably,

excluded the 2 January 2018 letter from VFV attorneys. The relationship between the third respondent and both the fourth and fifth respondents was again explained in the answering affidavit of the government respondents, deposed to by the Executive Officer. The identity of the assignee respondents is clarified with reference to the copy of the public presentation made by the fourth respondent and other documents attached thereto, consistent with the letter from VFV attorneys.

[14] Further, in the answering affidavit deposed to by Mr Louis Visagie on behalf of the assignee respondents, the identity of the third respondent, with the fifth respondent as its trade name, is explicitly stated, with reference to the third respondent's business plan, which had been submitted in response to the bid. The business plan is attached as an annexure to the assignee respondents' answering affidavit, again, consistent with, and as proof of the January 2018 letter of VFV attorneys. Similarly, the identity of the fourth respondent in relation to the third respondent is explained in detail in the same answering affidavit. In essence, the fourth respondent is a wholly owned subsidiary of the third respondent, dedicated to executing the duties of the assignee. The third respondent is in fact the designated assignee.

[15] In reply, the appellants provided no evidence to contradict the proof of the identity and relationship of the assignee respondents as presented by both the government respondents and the assignee respondents in their answering affidavits. Having been provided with incontrovertible documentary evidence of the identity and relationship of the assignee respondents, there is no explanation for why the appellants persisted with this ground of appeal. Thus, the claim on appeal that the designation of the assignee caused disparity and confusion is contrived. Whatever confusion may initially have been caused was dispelled. This ground of appeal has no merit and stands to be dismissed.

[16] The second ground of appeal, also emanating from the Minister's letter, dealt with the powers conferred and those not conferred on the assignee. In the letter of designation of the assignee, the Minister, in pronouncing the designation of the third respondent by its trade name as assignee, wrote: 'I . . .

*designate Agency for Food Safety for the application of sections 3(1) and 4A with respect to the inspection of regulated animal products . . .*’ The appellants contend that the Minister only *delegated or assigned* the assignee the power in terms of s 3(1) and s 4A of the Act. These powers, it is further contended, exclude the power to: conduct inspections, grade and sample for quality control in terms of s 3A; determine and charge fees in terms of s 3(1A)(b)(ii); enter premises, investigate and sample in terms of s 7; and seize a product, material or books in terms of s 8 of the Act. The appellants’ approach to the interpretation of the letter is based on a presumption that what is specifically included, excludes what is not mentioned.<sup>4</sup>

[17] This presumption is not applicable in this case for the following reasons. First, the powers conferred upon the Executive Officer by the Minister, includes s 3A, s 3(1A), s 7 and s 8 of the Act. By law these powers are designated to the assignee, unless expressly (as opposed to impliedly) provided otherwise. This comes about for the following reason. The Minister did not expressly provide in the letter of designation that s 3A, s 3(1A), s 7 and s 8 of the Act are excluded. In the first sentence of the letter, the designation as assignee is made in terms of s 2(3)(a) of the Act, for the *purposes of the application of this Act*. Section 2(3)(b) of the Act provides:

‘(b) An assignee thus designated shall–

- (i) *unless expressly provided otherwise* and subject to the directions of the executive officer, exercise the powers and perform the duties that are conferred upon or assigned to the executive officer by or under this Act, with regard to the product referred to in (a);
- (ii) in the case of a juristic person, notwithstanding anything to the contrary contained in any other law or in the absence of any express provision to that effect, be competent to exercise the powers and perform the duties referred to in subparagraph (i); and
- (iii) unless the Minister *in a particular case otherwise directs*, have no recourse against the State in respect of expenses incurred in connection with the exercising of such powers or performance of such duties.’ (Own emphasis.)

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<sup>4</sup> The presumption arises from the maxim ‘*Expressio unius est exclusio alterius rule*, applied by this Court’ in *Faure en ‘n Ander v Joubert en ‘n Ander NO 1974 (4) SA 939 (AA)*.

[18] Second, s 3(1), s 4 and s 4A of the Act deal with control over the sale of the products of different classes. Section 3(1) deals with the locally produced class sold locally, s 4 deals with *exported* products, sold abroad, while s 4A deals with *imported* products sold locally. Therefore, the common feature in reference to s 3(1) and s 4A of the Act, is that *both classes of products are being sold and consumed locally, in the Republic of South Africa*. In all three classes of products, the Minister is authorised to exercise discretion to prohibit the sale of a product, subject to conditions applicable to each class of product. In order for the Minister to exercise such discretion, an inspection, grading, sampling, investigation or seizure of the product will first have to be made by either the executive officer or the assignee. The operative sections of the Act, namely ss 3A, 3(1A), 7 and 8, which the appellants contend have been excluded, are indispensable for, and cannot be logically severed from, the exercise of the power in s 3(1) and s 4A of the Act.

[19] Third, the Minister in designating the third respondent by its trade name as assignee, conveyed a clear intent and purpose for the application of s 3(1) and s 4A of the Act. He unequivocally declared in the letter that the application of the two sections of the Act referred to, was *'with respect to the inspection of regulated animal products . . .'* The assignee is thus expected to exercise the inspection powers in regard to regulated animal products, mainly poultry. This necessitates invoking the powers and duties in s 3A, which, logically as a consequence, triggers s 3(1A)(b)(ii) to charge fees, s 7 to enter into the premises to investigate and sample as well as s 8 to seize a product, materials or books. Therefore, by interpreting the reference to s 3(1) and 4A of the Act in isolation from the rest of the text in the relevant paragraph of the Minister's letter, the appellants failed to ascribe a proper meaning *and context* to what the letter sought to convey. This Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>5</sup> underscored the importance of the context in the interpretation of statutes and other legal instruments. This Court stated thus:

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<sup>5</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.<sup>6</sup> . . . The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, *having regard to the context* provided by reading the particular provision or provisions *in the light of the document as a whole* and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; *the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.*' (Own emphasis.)

[20] The purpose of appointing an assignee is to enable the Minister to control agricultural products that are being sold locally and those exported. The control of these products is to ensure that safe and healthy products are sold to the consumer. The assignee is appointed for the purposes of exercising the powers to inspect, grade and sample the products for purposes of quality control. To fulfil this task, assignees must exercise the relevant powers in the Act. Therefore, the appellants' contention that the Minister, in designating the assignee, excluded the power to inspect the product and to determine and charge a fee for the service, is wrong in law. The assignee derived these powers not only from the text of the letter by the Minister, but also *ex- lege*, in terms of s 2(3) of the Act. Therefore, this ground of appeal has no merit and falls to be rejected.

[21] The third ground of appeal is premised on the preceding two grounds. The appellants contend that only the fifth respondent, which is non-existent, was appointed assignee, but it was not designated with the power to carry out inspections and to determine and charge fees. Therefore, so continues the

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<sup>6</sup> Ibid at fn 13: 'Spigelman CJ describes this as a shift from text to context. See "From Text to Context: Contemporary Contractual Interpretation", an address to the Risky Business Conference in Sydney, 21 March 2007 published in J Spigelman *Speeches of a Chief Justice 1998 – 2008* 239 at 240. The shift is apparent from a comparison between the first edition of Lewison, *The Interpretation of Contracts* and the current fifth edition. So much has changed that the author, now a judge in the Court of Appeal in England, has introduced a new opening chapter summarising the background to and a summary of the modern approach to interpretation that has to a great extent been driven by Lord Hoffmann.'

appellants' contention, the high court and the full court erred in holding that fees may be levied as 'inspection fees' per month per egg produced or packaged, 'whether actual inspections had taken place.' There is no method of determination of the fees for inspection duties, and therefore the fees charged for the inspections conducted, stands to be reviewed and set aside in terms of s 6(2)(e)(ii) and (f) of the Promotion of Administrative Justice Act 2 of 2000 (PAJA), on the grounds of the assignee having acted arbitrarily, capriciously or irrationally.

[22] The second appellant alleged that it received two invoices from the fourth respondent, dated 11 December 2017 and the other on 29 January 2018, each payable at the end of that month. The invoices referred to precisely the same number of eggs. It further alleges that there was an invoice in November 2017 that it received from the fourth respondent, although, as it alleged, no inspection took place. The second appellant sought to have these invoices reviewed and set aside.

[23] In their answering affidavit, the assignee respondents deny that the determination of the fees was arbitrary, capricious and irrational. Their version, which was accepted by the high court and the full court, is that two consultative workshops were held on 20 April 2017 and 4 May 2017, with the role players in the industry. Significantly, Mr Gawie Rossouw, a director of the third applicant, Eggbert, attended the meetings and made proposals which led to the reduction of fees.

[24] There were two main proposals which came out of the workshops. First, because of the risk profile of eggs, the initial communication dated 21 February 2017, referring to holding monthly inspections, was substituted with a proposal that quarterly inspections be conducted. Second, a proposal that the relevant fee for inspections as published by the Minister at that time, was R 0, 0015 per egg, be reduced to R 0,005 per egg. After considering its budget, the assignee respondents adjusted the fee to R 0, 0006 per egg. The charge remained per egg, in that it was approved and supported by the role players because it catered for producers that do not package as well as those

that package. It is a fee based on the costs of providing the service across the industry, which were budgeted for, including inspection of packaging and labelling.

[25] Section 3(1A)(b)(ii) of the Act provides that an assignee is empowered to determine and charge fees for the performance of the duties in terms of the Act. The fees determined by such assignee shall be payable. Section 3(4) provides that the fees are recoverable from the owner of the product. As it stands, there are no Regulations published as to the procedures and a prescribed method of determining fees. The appellants' attack on these shortcomings or *lacunae* in the legal framework is misplaced, as no order is sought against the Minister or the Department. The absence of a proper legal framework cannot be attributed to the assignee respondents. The attempt by the Executive Officer to initiate such Regulations for consideration by the Minister, came under attack as soon as the initial draft was published in the Government Gazette, and the initiative was sadly aborted.

[26] There is no doubt, as expressed by this Court in *Bertie Van Zyl*<sup>7</sup> that the powers conferred upon assignees in terms of the Act, including to determine and charge fees, are public powers. The exercise of the powers to determine fees is an administrative decision and consequently it must comply with the provisions of s 4 of PAJA. It is not disputed that the assignee respondents went through a consultative process to determine fees, which the appellants did not attend, though other role players such as Eggbert did. In the absence of a legal framework that determines the procedure and method of calculation of the fee payable, the participation and contribution made by the role players at the meeting, met the requirement of procedural fairness. The proposals made by Mr Rossouw led to the reduction of the fee applicable at that stage, R 0,0015 per egg, to less than half of it, R 0,0006. The consultative process enabled the assignee, who bears the ultimate power to decide, to determine a fee based on a budget, the expected service and costs considerations. Therefore, the allegation that the determination of the fee was arbitrary, capricious and

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<sup>7</sup> Footnote 1 para 35.

irrational cannot be sustained and was correctly rejected by the high court and the full court. This ground of appeal is also unmeritorious and stands to be rejected.

[27] The high court ruled in favour of the respondents on the points *in limine*, but only after the court had adjudicated the matter on the merits. The high court's ruling on these procedural objections was confirmed by the full court. For the purposes of this appeal, it will thus be superfluous to deal with the procedural objections, in view of the considerations and the findings made on the merits in this judgment. Thus, the points *in limine* need not detain us further.

[28] There was an attempt by the appellants in this Court, seemingly inspired by the decision of this Court in *Bertie van Zyl*, belatedly to raise a new ground of appeal on procedural unfairness in terms of s 6(2)(c) of PAJA. Apart from the fact that the facts in this appeal are distinguishable from those in *Bertie van Zyl*, this new ground was not raised as part of the relief sought in the notice of motion and affidavits before the high court. In addition, the appellants did not seek and obtain leave from this Court to introduce a new ground of appeal. The respondents objected thereto, and correctly so. Therefore nothing further need be said of it.

[29] The appeal stands to be dismissed with costs and there is no reason why the costs should not follow the result.

[30] In the result, I make the following order:

- 1 The appeal is dismissed.
- 2 The appellant is ordered to pay the respondents' costs of appeal, including the costs of two counsel where applicable.

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SP MOTHLE  
JUDGE OF APPEAL

## APPEARANCES:

For the appellants: M G Roberts SC with E Roberts  
Instructed by: Moolman Pienaar Inc, Pietermaritzburg  
C/O Pieter Skein Attorneys, Bloemfontein

For 1<sup>st</sup> and 2<sup>nd</sup> respondents: C E Puckrin SC with KD Magano  
Instructed by: State Attorney, Pretoria  
C/O State Attorney, Bloemfontein.

For 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> respondents: G Naude SC with A Thompson  
Instructed by: VFV Attorneys, Ashlea Gardens  
C/O Symington De Kok Attorneys,  
Bloemfontein