IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

2010.05.21

DATE SIGNATURE

21/05/2010.

**CASE NO: 55379/2008**

In the matter between:

**MILK SOUTH AFRICA** Plaintiff

and

**HOMSEK ULTRA (PTY) LTD** Defendant

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**JUDGMENT**

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**MAKGOKA, J:**

[1] This is an opposed application wherein the applicant seeks the respondent to register with the applicant and comply with certain ancillary

statutory obligations pursuant to such registration. I may state at this stage that the respondent has, subsequent to the launching of this application, registered with the applicant. As a result, the applicant only persists with ancillary prayers relating to maintenance of records, submission of returns and payments of levies.

[2] The applicant has, in terms of section 14 of the Marketing of Agricultural Products 47 of 1996 ("the Act") by notice in the Government Gazzette, been entrusted by the Minister of Agricultures to implement, administer and enforce certain statutory measures in the diary industry wherein the respondent is a role-player.

[3] Section 19 of the Act empowers the Minister to direct that any person/entity mentioned with regard to an agricultural product or class thereof shall be registered. Any such person/entity so registered, shall keep record and returns as may be specified with regard to agricultural products or classes thereof, and to direct that such records and returns be furnished to the institution such as the applicant.

[4] The present application was initially launched against an entity described as Homsek Dairies (Pty) Ltd. In the answering affidavit deposed to by Mr. Anton Homsek, the existence of such an entity was denied. This resulted in an application for the amendment of the name of the respondent to Homsek Ultra (Pty) Ltd. The application for such an amendment was unopposed, and the amendment was granted.

[5] The effect of such an amendment is interpreted divergently by the parties, and could well influence the outcome of this application. I find it appropriate, at this stage, to set out what was sought, and granted. In the notice of motion in the interlocutory application for amendment, the applicant sought, in the main, for the substitution of Homsek Diaries (Pty) Ltd with the present respondent. In the alternative, the applicant sought that the name of Homsek Diaries (Pty) Ltd be amended to Homsek Ultra (Pty) Ltd, the present respondent. The court granted the latter alternative relief.

[6] In opposing the application, three defences were raised in the answering affidavit. First, that this court does not have jurisdiction to determine this application. Second, that the papers, as amended, do not disclose a cause of action against the respondent. Third, that the regulations upon which the application is founded, were superseded by new regulations. The defence on jurisdiction was however, abandoned by Mr. *Acker*, for the respondent, who confirmed that the respondent did not persist therewith. I turn now to consider the two contentions on behalf of the respondent.

**No cause of action**

[7] The argument here is that, the non- existing entity, Homsek Diaries (Pty) Ltd, having disappeared from the scene (as a result of the amendment) and replaced with the present respondent, the applicant had omitted to aver that the present entity was in breach of the statutory obligations set out in the application. The said allegations, so goes the argument, were made with reference to

Homsek Diaries (Pty) Ltd, the previous non- existing entity, and not against the respondent.

[8] It is clear what the import and effect of the amendment is: Homsek Ultra (Pty) Ltd (the present respondent) for all intents and purposes, came into the shoes of the former respondent, Homsek Diaries (Pty) Ltd. Therefore all allegations against, and reference to Homsek Diaries, would, post amendment, be in relation to Homsek Ultra, (the present respondent). In my view, there is no merit in this argument.

**Regulations superseded**

[9] The applicant relies on three sets of directives. For lack of a better description, I would refer to them as "regulations". They are numbers R1219, R1220 and R1221 published on 23 December 2005. The applicant's board of directors, in their resolution to bring this application, authorized the deponent to the founding affidavit, to institute legal proceedings aimed at enforcing the said regulations.

[10] On 3 January 2009, the said regulations were replaced by regulations 55, 56 and 57 respectively. It is therefore argued on behalf of the respondent that the applicant seeks to enforce regulations that already "expired", and so the argument proceeds, the applicant seeks to enforce defunct regulations. I do not agree with this submission. The application was launched in December 2008, and the regulations in force at that time, were those published in 2005.

[11] I understood Mr. *Acker's* argument to be: the amendment resulted in a new course of action against the present respondent. The amendment was granted in March 2009. The effective regulations then applicable, would be the January 2009 ones. I have already found, with regard thereto, what the effect of the amendment is. This ground of defence should, similarly, fail.

[12] As indicated in the introduction to this judgment, the main relief, as expressed in prayer 1 of the notice of motion, has become academic as a result of the registration of the respondent with the applicant. The residuary issue therefore, is one of costs.

[13] In that regard I take into account three factors: first, that the registration of the respondent was made subsequent to the launch of the application, albeit against a non-existing party. It should be kept in mind that the sole director of the present respondent, Mr. Anton Homsek is the one who deposed to the answering affidavit. In the said affidavit, not only did he address the question of non-existence of Homsek Diaries, but went on to deal with the merits of the application. My reading of his answering affidavit is that he knew exactly that the application was actually meant for Homsek Ultra. It is helpful to quote from paragraph 15 of the answering affidavit:

> "After service of this application in 2008 I made contact with one of the members of Applicant's executive management, Harry Hepton, in order to discuss this application with the view to resolve same. Hepton advised me that the applicant will not proceed with this application if Homsek (Pty) Ltd duly registers in terms of the Act and make payment of the levies due. I accepted the proposal, duly

registered Homsek (Pty) Ltd in February 2009 and made payment of the requisite levies..."

[14] It is clear from Mr. Homsek's statement that the registration of the respondent, was prompted by the application. In this regard, I agree with the submission of Mr. *Voster* SC, for the applicant, viz, the fact that Mr. Homsek, the sole director of Homsek Ultra, took steps to register it with the applicant during August 2009, justifies the inference that Mr. Homsek acknowledged that Homsek Ultra was liable to registration in terms of the Act, and thus also to furnish returns and pay levies.

[15] Taking into account all the consideration in this application, I am of the view that the applicant has made out a proper case for the relief set out in prayers 2.1, 2.2 and 3, (in view of prayer 1 having falling off). The respondent only commended business on 14 September 2007. That should be reflected in the order. The applicant has been substantially successful. Its application prompted compliance by the respondent. There is no reason why costs should not follow the cause.

[18] I therefore make the following order:

1. The respondent is ordered to comply with the provisions of Regulation R1219 published in the Government Gazzette No. 28329 of 23 December 2005, by:

1.1 maintaining the records referred to in paragraph 2 of the schedule to regulation 1219, from September 2007; and

1.2 submitting to the applicant in the manner set out in paragraph 4 and 5 of the schedule to regulation 1219, within 15 (FIFTEEN) days from the end of the month in which this order is served upon respondent, the returns for each month from September 2007 as referred to in paragraph 4 of the schedule to regulation 1219, and thereafter within 15 (FIFTEEN) days of the end of each successive month, subsequent returns.

2. The respondent is ordered to pay to the applicant within 15 days from the end of the month within which this order is served upon respondent, the levies prescribed in terms of Regulation 1220 published in Government Gazette No. 28329 of December 2005, calculated from September 2007, in the manner as set out in the schedule to the said regulation 1220, and thereafter with 15 (fifteen) days of the end of each successive month, subsequent levies.

3. The respondent is ordered to pay the costs of the application.

**T M MAKGOKA**
**JUDGE OF THE HIGH COURT**

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| HEARD ON | 11 MAY 2010 |
| JUDGMENT DELIVERED | 21 MAY 2010 |
| FOR THE APPLICANT | ADV J P VOSTER SC |
| INSTRUCTED BY | *GILDENHUYS LESSING MALATJI INC*, PRETORIA |
| FOR THE RESPONDENT | ADV C ACKER |
| INSTRUCTED BY | *RAUCH GERTENBACH ATTORNEYS*, BLOEMFONTEIN, AND *R. SWAAK ATTORNEYS*, PRETORIA |