IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 021530/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: ***YES***

(4) Date: 17 March 2025

Signature: _[redacted]

In the matter between:

BERTIE VAN ZYL (EDMS) BPK	
(T/A ZZ2)	First Applicant
TOMATO PRODUCERS' ORGANISATION	Second Applicant
NOORDELIKE UIE KOMITEE (PTY) LTD	Third Applicant
KORKOM POTATOES AND ONIONS	Fourth Applicant
LEBOMBO GROWERS (PTY) LTD	Fifth Applicant
CITRUS GROWERS ASSOCIATION OF SOUTHERN AFRICA	Sixth Applicant

And

PRODUCT CONTROL FOR AGRICULTURE First Respondent

THE MINISTER OF AGRICULTURE, FORESTRY & FISHERIES Second Respondent

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JUDGMENT

NYATHI J

A. Introduction

[1] The Agricultural Products Standards Act 119 of 1990 ("the Act") provides for control over the sale and export of certain agricultural products by an officer in the service of the Department of Agriculture ("the executive officer"). The Act also empowers the Minister to designate any person having particular knowledge in respect of an agricultural product, as assignee in respect of that product (Section 2(3)(a)). An assignee thus designated, exercises subject to the directions and control of the executive officer, the powers of the executive officer in respect of that product (Section 2(3)(b)).

[2] The first respondent, Product Control For Agriculture ("Prokon"), was designated as assignee in terms of Section 2(3)(a) of the Act. In discharging its duties as assignee, Prokon performs inspections on fresh fruit and vegetables to ensure compliance with the applicable regulations pertaining to the grading, packing and marking of such fresh produce.

[3] Assignees are entitled in terms of Section 3(1A) to determine and charge fees in respect of their services. Accordingly, Prokon determined its fees which it published on 11 March 2022 (hereinafter "Prokon's Fee Determination").

[4] The first applicant ("ZZ2") who is a producer of products listed in the Fee Determination and the Second to Fifth applicants whose members are also producers of certain listed products, seek the review and setting aside of Prokon's Fee Determination.

[5] Prokon's Fee Determination constitutes administrative action, and the applicants contend that such determination was unlawful and falls to be reviewed and set aside.

B. Applicants' contentions

[6] On 6 January 2017 Prokon published its initial fees in respect of the inspection services rendered by it. The first applicant (ZZ2) and others brought an application to review and set aside Prokon's determination of its initial fees. After four years of litigation, ZZ2 and its co-applicants were ultimately successful in their review based on the isolated ground that the notice and comment procedure followed by Prokon was flawed.[1]

[7] Following Prokon's second fee determination, published on 11 March 2022, ZZ2 and the other applicants have followed the same *modus operandi* as in the earlier application. They waited just under six months before launching this second review application, again applying for Prokon's fee determination to be reviewed and set aside.

[1] *Bertie van Zyl (Pty) Ltd t/a ZZ2 v Minister of Agriculture Forestry and Fisheries* [2021] 4 All SA 1 (SCA).

C. The purpose of the application

[8] The Applicants contend that Prokon's Fee Determination was unlawful, unreasonable and procedurally unfair. They seek to have the Fee Determination reviewed and set aside as contemplated in section 7 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") because:

8.1 Prokon's Fee Determination is ultra vires the provisions of Section 3(1A) read with Section 3A(1)(c) of the APS Act;

8.2 Prokon's fee determination was procedurally unfair in that Prokon deprived interested parties of the opportunity to comment meaningfully on a number of material issues; and

8.3 Prokon determined its fee in a manner that is irrational and/or arbitrary and/or capricious and/or Prokon's decision was not rationally connected to the purpose for which it was taken.

D. Prokon's contentions and conditional counter-application:

[9] Prokon denies the contentions by the applicants above and avers that:

9.1 the review application is an abuse of process;

9.2 that the applicants have an internal remedy that they ought to have exhausted first; and

9.3 that in any event, the review application was not brought within a reasonable time.

[10] Prokon also brought a Conditional Counterapplication wherein it seeks, in the event of the Court upholding any of the Applicants' complaints and electing to declare Prokon's Fee Determination invalid, that such a declaration of invalidity be suspended pending finalisation of a new fee determination process. The Applicants oppose Prokon's Conditional Counter Application. This issue must also be determined.

E. Genesis of Prokon's second fee determination from ZZ2's perspective

[11] On 14 September 2021, Prokon invited the first applicant to participate in a virtual meeting on 21 September 2021 "to discuss Prokon's application for the promulgation of new inspection fees on regulated fresh fruit and vegetables".[2] The invitation referred to a 'Memorandum in respect of the Determination of New Inspection Fees on Regulated Fresh Fruits and Vegetables' that was available on Prokon's website together with a summary thereof.

[12] Because the Memorandum (which purports to set out the methodology applied by Prokon to determine inspection fees to be charged) required a detailed study, the first applicant objected that a week' notice was inadequate under the

[2] Annexure FA1.

circumstances. The first applicant also expressed a desire to secure legal representation during the meeting, given the history of the subject-matter.[3]

[13] In response to the first applicant's objection, Prokon wrote back stating that the purpose of the meeting would be "purely and simply to explain the methodology implemented by Prokon in the determination of its fees" and that adequate opportunity to comment would be provided after the proposed fees have been published.[4]

[14] During the virtual meeting on 21 September 2021, which was attended on behalf of the first applicant, Mr Booysen (who is Prokon's Chief Executive Officer) summarised the contents of the Memorandum by way of a Power Point presentation. A copy of the Power Point presentation (that was mailed to participants prior to the meeting together with an Agenda), is attached as Annexure FA6. A copy of the agenda is attached as Annexure FA7.

[15] Mr Booysen thereafter invited the participants to participate in a question-and-answer session. Mr van Straaten (who represented the Pineapple Growers Association, asked Mr Booysen if a 20-ton consignment is received on the market, but only 10 tons are inspected, will the inspection fees be charged on the total consignment or only on the kilograms inspected. Mr Booysen gave the following answer:

> 'A: An inspection is conducted as per consignment as specified in the Act and the regulations. If a consignment consists of the same cultivar, same class, same size and comes from the same farmer it is regarded as a single

[3] A copy of the First Applicant's objection is attached to its founding affidavit as Annexure FA4.

[4] Annexure FA5 dated 20 October 2021.

consignment and the inspection fee will apply to the total consignment, notwithstanding the fact that only 10 tons were inspected'.

[16] Ms Rademeyer (who represented the first applicant) objected that insufficient time was allowed to prepare for the Zoom meeting and that it will comment at a later stage. The Chairperson Dr T Mutengwe who represented the Minister, then proposed that interested parties be given until 5 October 2021 to comment and this proposal was accepted by those present.

[17] In a letter dated 23 September 2021, Mr Bernhard Van der Hoven who is ZZ2's attorney, drew the attention of Prokon's attorneys to the fact that when ZZ2 objected to the short notice given for the meeting, Prokon answered that the purpose of the meeting was only to explain the methodology implemented by Prokon in the determination of its fees. Mr Van der Hoven requested Prokon to explain why Prokon deviated from the stated purpose of the meeting and if the question-and-answer session was intended to serve as public participation process. A copy of Mr Van der Hoven's letter is attached as Annexure FA9.

[18] On 5 October 2021, Prokon extended the date for submissions to Wednesday 13 October 2021. A copy of the Notice is attached as Annexure FA11.

[19] The first applicant did comment on the proposed inspection fees. A copy of Mr van der Hoven's letter dated 13 October 2021 with the comments attached fees on the following two grounds:

19.1 Prokon based its fees on the weight of products without justifying that it would cost more to inspect products with a higher weight per unit compared to those with a lower weight;

19.2 Prokon does not justify that “own regulated products inspections cost 50% more than shared regulated products inspections”.

[20] In their reply to the first applicant's comments, Prokon's attorneys invited the former to attend a further meeting during which the calculation of the fees will be explained. A copy of the letter dated 22 October 2021 is attached as Annexure FA13.

[21] The first applicant accepted Prokon's invitation to attend the meeting notwithstanding the fact that it had become clear that any further explanation could not affect or change Prokon's view.

[22] As pointed out, the first applicant did attend the follow up Zoom meeting held on Wednesday 20 October 2021 at 10:00 to further discuss the application for the promulgation of new inspection fees on regulated fresh fruits and vegetables. A copy of the Notice of the meeting is attached as Annexure FA14.

[23] On 5 November 2021 in Notice 646 of 2021 (Government Gazette 454/62), Prokon published its proposed inspection fees for public comment. A copy of the Notice (hereinafter referred to as “Prokon’s Notice of Proposed Fees”) is attached as Annexure FA15.

[24] Prokon’s Notice of Proposed Fees stated that its inspections would apply to two specified categories of products: (1) own regulation products inspections and (2) shared regulation products inspections. The products that fall into each of these categories are set out in a Table that also contains the inspection fee to be charged in respect thereof:

24.1 For shared regulation products: 1c/kg

24.2 For own regulation products: 1.5c/kg

[25] Prokon's Notice of Proposed Fees was accompanied by what Prokon described as the methodology applied to determine the inspection fees. The Notice also stated that the full memorandum pertaining to the proposed inspections fees was available on Prokon's website.

[26] After the publication of Prokon's Notice of Proposed Fees and its methodology, the applicants more fully commented thereon, by way of a letter written by Mr van der Hoven, attached to the papers as Annexure FA16. The nub of the applicants' objections was:

26.1 Prokon intends to base its inspection fees on the weight of a product without justifying that it would cost more to inspect products with a higher weight than those that weigh less;

26.2 Prokon does not justify why "own regulated products inspections cost 50% more than shared regulated products inspections".

26.3 Prokon did not meaningfully consider alternative methods to determine its fees and in particular the possibility of determining its fees based on the time required for the inspection;

26.4 No facts are provided why an inspection twice per week would be required.

26.5 Prokon should consider the possibility of conducting random inspections which would probably allow it to render its services in a more cost effective manner;

26.6 The classification into own products and shared regulation products appears to be arbitrary and it is not explained on what basis own regulation products would attract a higher fee; the arbitrariness of the classification appears (amongst others) from the fact that onions, shallots and tomatoes are classified as own regulation products and which would require a determination if these products are seeded or seedless, deep cutting to determine if split stone is present on stone fruits, determination of sugar/starch ratio, and destructive testing;

26.7 Prokon should rationally consider the possibility of determining inspection fees with relation to the time actually spent on the inspection; the determination of fees on this basis will result in

producers of products that weigh more (avocados, watermelons etc) not being unfairly discriminated against;

26.8 Prokon does not indicate if fees will be calculated with reference to product actually inspected and the weight thereof or if fees will be determined per total weight of the consignment delivered by the producer;

26.9 Inspections would be done only at markets in the bigger metropoles; it is not explained why inspections are required at these venues under circumstances where markets had already inspected the quality, grading, packing etc of the produce put up for sale; Prokon does not intend to exercise its statutory duties in smaller municipalities and in rural areas, thereby depriving the general public of the benefits of the Act; Prokon's entire funding model appears to be flawed as a result.

[27] On 10 December 2021, Prokon thanked the first applicant for responding to its invitation to comment on the proposed inspection fees and stated that it was in the process of evaluating the response and will communicate with it again. A copy of the letter is attached as Annexure FA17.

[28] Prokon followed-up with a letter dated 27 January 2022 (Annexure FA18), wherein it rejected the applicants' objections that fees should not be charged per kilogram.[5] Prokon asserted that the Memorandum on its website provided stakeholders with sufficient information as to how the inspection fees were determined[6].

[5] Para 3 and 8 2 of letter dated 27 January 2022.

[6] *Ibid* Para 2.

[29] Prokon also confirmed that after consideration of the comments received from industry stakeholders “against explanations provided in the methodology document” it shall persist with its proposal that there would be 2 categories and a difference in inspection fees (Paragraph 3).

[30] Prokon also insisted that inspections would be conducted at the most appropriate frequency, point and time to ensure that the inspection service remains cost effective and to ensure that Prokon who operates on a costs recovery basis, provide an inspection service in terms of its mandate as assignee (paragraph 4).

[31] Finally, Prokon stated that inspections would not be limited to fresh produce markets in the bigger metropoles and will be conducted on different fresh produce markets and at retail level (paragraph 9).

[32] Prokon then published the fees it imposed in terms of Section 3(1A)(a)(ii) of the APS Act on 11 March 2022 in GN 877 of 11 March 2022 in Government Gazette 46032. A copy of Prokon's Inspection Fees is attached as Annexure FA19 (hereinafter ‘Prokon's Fee Determination').

[33] The applicants’ eventual response was to launch this review application. Before I set out the formal grounds for the review as laid out in the application, I propose to deal with the 2 points *in limine* that were raised by the Prokon.

F. The points in limine

[34] Prokon alleges that this review application is an abuse of process because:

34.1 the applicants have failed to exhaust internal remedies before resorting to the courts. And

34.2 the application was not brought within a reasonable time as envisaged by Section 7 of PAJA.

34.3 For these reasons, it was submitted on behalf of Prokon, the applicants are non-suited.

[35] This review application is a sequel to the earlier application which culminated in the Supreme Court of Appeal judgment reported as *Bertie Van Zyl (Pty) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries and Others* (549/2020) [2021] ZASCA 101 (14 July 2021). The main bone of contention here, as in the instant case was the first Fee Determination by Prokon. In that case, the failure to exhaust internal remedies as provided by section 10 of the Act, was dealt with and disposed of. UNTERHALTER JA writing for a unanimous bench, held that:

"…Given these uncertainties, in my view, the failure by the appellants to appeal under s 10(1), even if this was an available remedy, should not frustrate the appellants' review. Where the right to appeal is not made plain in the legislation, and, at best, it is cast as a right and not an obligation, the high court should have permitted the appellants, in the interests of justice, to proceed with their review. And I do so find."

[36] The second objection by Prokon is that the applicants "…waited just under six months before launching this second review application, again applying for Prokon's fee determination to be reviewed and set aside."[7] It was submitted on behalf of the applicant that the application was filed on 2 September 2022, which

[7] Para 8 First Respondent's Heads of Argument.

is 5 months and 20 days after the date of the fee determination, which is before the lapse of 180 days provided for in PAJA.

[37] In *Valor IT v Premier, North West Province and Others*[8], it was held that

"Whether a delay is unreasonable is a factual issue that involves the making of a value judgment. Whether, in the event of the delay being found to be unreasonable, condonation should be granted involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors – the length of the delay, the reasons for it, the prejudice to the parties that it may cause, the fullness of the explanation, the prospects of success on the merits – are all considered and weighed before a discretion is exercised one way or the other".

[38] With these views being pondered, it follows that the points in limine cannot prevail.

[39] I proceed to deal with the merits of the applicants' review application.

G. THE GROUNDS FOR REVIEW OF PROKON'S FEE DETERMINATION

Prokon's Fee determination was *ultra vires* the Act

[40] Section 3(1A)(a) of the Act provides that fees may be charged in respect of the powers exercised and duties performed by the executive officer of the assignee (as the case may be), "to ensure compliance with this Section".

[41] Section 3(1A)(b) further particularises that, in the case of powers exercised and duties performed by the executive officer, the prescribed fee shall be payable.

[8] [2020] ZASCA 62; [2020] 3 All SA 397 (SCA); 2021 (1) SA 42 (SCA) at para 30.

Where the assignee has exercised the powers and performed the duties, the fee determined by such assignee shall be payable.

[42] The Applicants argue that as a result, Section 3(1A)(a) should be read with and is qualified by what is set out in Section 3(1A)(4): fees may be charged in respect of the powers exercised and duties performed by the executive officer of the assignee to ensure compliance with Section 3 of the Act but the owner shall be liable to pay such fee only if the executive officer or an assignee performed an action contemplated in Section 3A(1)(b), (c), (d) or (e). Only then '...the owner of the product in question shall pay the prescribed fees or the amount determined by the assignee, as the case may be, for such action.'

[43] The purpose of the Act is to compensate the executive officer or an assignee for services rendered that will have some value to the owner. In *Bertie Van Zyl (Pty) Ltd t/a ZZ2 v Minister of Agriculture, Forestry and Fisheries*[9] the SCA stated as follows:

"[9] …The Act permits fees to be charged in respect of the powers exercised and the duties performed by executive officers and assignees. The fees are charged for the service rendered by executive officers and assignees. Owners thus receive consideration for the payment of fees – the inspection of their products to ensure that they may be sold in compliance with the Act…"

[44] The applicants submitted that, on a proper interpretation of Section 3(1A)(a)(ii) read with Sections 3A(1) and 3A(4) of the Act:

44.1 an assignee has the power, and the owner has the duty to pay the fee determined by the assignee to compensate the assignee

[9] [2021] 4 All SA 1 (SCA); [2021] ZASCA 101.

for the exercise of its powers and the performance of its duties set out in Section 3A(1)(b) — (e); and

44.2 an assignee has no power to charge a fee unless such fee is charged in respect of an action taken in respect of a quantity of a product as contemplated in Section 3A(1)(b) — (e),

[45] Prokon calculated its inspection fees on the basis that it would be entitled to charge the owner per consignment. In other words, Prokon's Fee Determination allows it to inspect a random number of products in a consignment and then require the owner of a product to pay for such inspection and in addition thereto, a fee on the uninspected products merely because these products were present at the place where Prokon conducted its inspection.

[46] As a result, Prokon's Fee Determination obliges an owner to pay an assignee not only for actions undertaken as contemplated in Section 3A(1)(b) – (e), but also an additional amount that would constitute a levy or a tariff imposed by Prokon on owners of products.

[47] Prokon is not entitled to charge a levy or to impose a tariff on owners. It cannot charge a fee for services not actually rendered: in terms of Section 3(1A) read with Section 3A(1)(c), Prokon may only charge a fee in respect of an action it in fact did perform.

[48] Prokon's Fee Determination is clearly *ultra vires* the provisions of Section 3(1A)(a)(ii) read with Sections 3A(1) and 3A(4) of the Act. Its Fee Determination falls to be reviewed and set aside on this ground alone.

[49] In *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa and others*[10] decision of the Constitutional Court,

[10] 2000 (2) SA 674 (CC).

Chaskalson P explained the principle of legality in the constitutional era as follows:

"[50] What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution, according to the doctrine of legality."

Prokon's Fee Determination was procedurally unfair

[50] Prokon decided to follow a notice and comment procedure and in terms of Section 4(3)(a) of PAJA, Prokon had to take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them.

[51] The applicants contend that Prokon fell short of what it was obliged to do in that it failed to provide interested parties with sufficient information concerning material aspects of its proposed administrative action to enable them to submit meaningful comments.[11]

[52] Prokon did not comply with these statutory obligations and thus deprived interested parties of the opportunity to comment meaningfully on material issues concerning its proposed inspection fees. These were the frequency of inspections they decided upon, the method of categorization of products and their pricing as well as Prokon's failure to make material documentation which it relied upon available. These were guidelines by the Organisation for Economic Cooperation and Development ('OECD').

[11] Regulation 18(3)(a) of the Regulations on Fair Administrative Procedures, 2002 (GN R1022 in GG 23874 of 31 July 2002) requires the notice containing proposed administrative action to contain 'sufficient information about the proposed administrative action to enable members of the public to submit meaningful comments'.

[53] This deprivation of material documentation appears to be a repeat of an earlier oversight which caused the SCA in the earlier appeal matter of *Bertie van Zyl* to comment as follows:

"…What was required of Procon in the notices calling for comment was information as to the basis of a fee based on weight, the rationale for the fee structure, the logic underpinning the categories, rate differentials and their relation to cost recovery.

[32] Absent this information, those affected by the proposed fee determination, including the appellants, were not placed in a position to make meaningful and informed comments. As a result, the consultative process did not meet the requirements of procedural fairness. The fee determination made by Procon cannot stand, since it is the outcome of an unfair process. It must be reviewed and set aside."[12]

[54] The applicants alleged that Prokon again fell short of what Regulation 18(3) requires. It failed to provide the general public with sufficient information relating to the rationale and logic underpinning the frequency of inspections, the categorisation of products into the applicable two categories, the rate differentials and their relation to cost recovery.

[55] In the circumstances, Prokon's Fee Determination was procedurally unfair. It falls to be reviewed and set aside as being procedurally unfair as well.[13]

[12] *Bertie van Zyl* para 36 *Supra.*

[13] Also see: *South African Fruit and Vegetable Canners Association v Impumelelo Agri Business Solutions (Pty) Ltd* [2021] ZAGPPHC 227, 2021 3 All SA 242 (GP) paras [18] & [38].

Irrationality and/or arbitrariness:

[56] Prokon determined the fees in a manner that is irrational and/or arbitrary and/or capricious and/or Prokon's decision was not rationally connected to the purpose for which it was taken.

[57] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa*[14] the Constitutional Court held that for the exercise of public power to be valid, a decision taken must be rationally connected to the purpose for which the power was conferred.

[58] Quite recently, in *Minister of Water and Sanitation v Sembcorp Siza Water (Pty) Ltd,*[15] the Court re-affirmed that an irrational decision will be set aside, stating:

> *"[47] But it bears emphasis that there is a distinction between irrationality relating to the decision itself and irrationality relating to the procedure leading up to that decision. The presence of each of them is fatal to the exercise of power. If the procedure followed is such that it could not result in achieving the purpose for which the power was conferred, the purported action must be set aside. The same result must follow if the decision taken would equally not lead to the attainment of that purpose."*

[59] The Constitutional Court emphasised the caution that rationality in so far as the exercise of public power revolves on whether there was a rational connection between the decision taken or procedure followed, and the purpose for which the power was granted. If there is such a connection, the review challenge based on this ground must fail.[16]

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[14] 2000 (2) SA 674 (CC) at *para* [85].

[15] 2021 (10) BCLR 1152 (CC).

[16] *Supra at para* [60].

[60] The thrust of the applicants' objection against Prokon's fee determination as being not rationally connected to the purpose for which it was taken comes from two angles, namely, Prokon's basing of inspection fees on the **weight of produce inspected** per kilogram and the **categorisation of inspection fees into shared regulations and own regulations.** [emphasis added].

60.1 The applicants submit that the agricultural products that fall in each of the two categories (shared regulations and own regulations) differ greatly in respect of weight and size and it behoves no argument that the fees payable following an inspection of a consignment of water melons (1c per kg), would be considerably more than an inspection of a consignment of garlic (1.5c per kg), chillies (1c per kg) or parsnip (1c per kg), for example.

60.2 The outcome of charging per weight of the product in this is a higher fee being payable by owners of products that weigh more and a lesser fee payable by owners of products that weigh less. This is despite the fact that Prokon would perform exactly the same services in respect of both categories of owners.

[61] Realising that Prokon's fee determination was riddled with the same difficulties as was the case with its earlier determination of 6 January 2017, which was reviewed and set aside in the SCA decision *Bertie van Zyl*, the applicant brought this to the attention of the respondent.[17]

[62] Prokon again based its Fee Determination on the weight of the product. Prokon has thus brazenly ignored the SCA's clear finding and did so despite the first applicant's objections.

[17] Annexure "FA16" to founding affidavit, being a letter from Van den Hoven Attorneys dated 3 December 2021.

[63] The SCA had made it clear, that the determination of a fee per consignment based on the weight thereof per kilogram, would be arbitrary and cannot rationally be linked to the costs incurred by Prokon in exercising its powers and performing its duties contemplated in Section 3(1) read with 3A(1)(b) to (e) of the APS Act.

The categorisation of inspection fees into shared regulations and own regulations:

[64] In its Fee Determination, Prokon motivated the inclusion of products into the two categories (own regulation inspections and shared regulation inspections) on the basis of *'the extent of the resources (labour finances etc) allocated for conducting the inspections'.*

[65] In its answering affidavit, Prokon elaborately explains the categorisation of products into these categories and the imposition of a higher inspection fee in respect of one of these, on the basis that own regulation products have specific regulations that must be complied with which results in own regulation products requiring more time, labour and resources.[18]

[66] It is the applicant's contention that Prokon has not complied with its fee determination but broadened the categories in its answering affidavit by: Including cactus pears, figs, granadillas, kiwi fruits, mangoes, persimmons, pomegranates, watermelons and melons in the category "shared regulation products". This is problematic because the aforementioned fruits and vegetables have each its own set of regulations containing restrictive and prescriptive provisions specifically with regard to each.

[18] Answering affidavit paras 156 to 164.

[67] The specificity of the provisions variously lays down methods of inspection based on ripeness standards, maturity requirements and quality.[19] As a result, and applying Prokon's criterion to use the labour and resources and time spent on an inspection, the above listed produce ought to be in their own regulation category. Instead, and strangely, Prokon included these fruits and vegetables on the shared regulation category.

[68] In practice, the inspection time required for cactus pears, figs, granadillas, kiwi fruits, mangoes, persimmons and pomegranates would be considerably more than what would be required for carrots, for example. Yet, Prokon imposed an inspection fee of 1c/kg in respect of carrots and the same fee for cactus pears, figs, granadillas, kiwi fruits, mangoes, persimmons, pomegranates, watermelons and melons.

[69] Prokon cannot explain this anomaly in the time and resources expended on the inspection of the produce in the foregoing example.

[70] Prokon has also sought to rely on a purported survey it belatedly conducted during January and February 2022 to justify an increase in inspection fees in respect of own regulation products. That survey is manifestly inaccurate however, as appears from random examples[20] that were extracted and referred to by the applicant from said survey. The discrepancies in the time it took inspectors to inspect produce is astonishing, for example, On 3 February 2022 Mr Martin Setswane required 135 minutes to inspect 29 carrots. On 13 January 2022, it took him only 12 minutes to inspect 28 carrots. There is no explanation for the difference.

[19] Part II Government Gazette No. 41723 of 22 June 2018.

[20] Supplementary founding affidavit para 5.12 read with answering affidavit para 165, referred to in applicant's heads of argument.

[71] The unavoidable conclusion is that Prokon's categorisation of products into own regulation inspections and shared regulations inspections and the fee differential in respect of produce falling into each category, is arbitrary and irrational.

Frequency of the inspections:

[72] Prokon stated that a twice a week inspection of products optimises the cost/inspection ratio, minimises cost and is sufficient to ensure that non-conforming produce do not reach the consumer.[21]

[73] Prokon stated that it based its decision that a frequency of two inspections per product per week would be required, on its experience *"based on quality assurance inspections conducted during the past 18 months".* It also added that the suggested frequency of twice a week inspection has also been tested and accepted in the retail environment during the past three years.

[74] The applicants' gripe with Prokon's decision on frequency of inspection and the categorisation of products into the two categories and the fees it determined in respect of each such category is that Prokon cannot rationally explain the reasons thereof by for example, providing particulars of the 18 months experience and whether standard operating procedures existed. This, according to the applicants, meant that Prokon's inspectors were left to their own devices when it came to determining frequency and the categorisation.

[75] The applicants accordingly submitted that Prokon's decision to calculate its fees based on historical product volumes, cannot be rationally related to the purpose for which it exercised its power, namely, to determine its fees.

[21] In para 2.10 of the Memorandum and in its Fee Determination para 1.10.

H. CONCLUSION

[76] The applicant's rationality review has been established as shown above. The application to review and set aside Prokon's Fee Determination in terms of Section 3(1A)(a)(ii) of the APS Act published in the Government Gazette No. 46032 of 11 March 2022, succeeds.

[77] The respondents made a submission regarding a conditional counter-application that in the event that this court should find for the applicant, then the court should invoke the provisions of section 172 of the Constitution and suspend the operation of such finding. I am not persuaded that this section is applicable in this instance and will leave the matter at that.

[78] In so far as costs are concerned, there was no case made for any departure from the normal rule that costs follow the costs. Accordingly, the first respondent shall cover the applicant's costs including the costs of two counsel, to be taxed on scale B.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 29/07/2024
Date of Judgment: 17 March 2025

On behalf of the Applicant: Adv. M.C. Maritz SC
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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 17 March 2025.