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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HARLINGTON INVESTMENTS (PTY) LTD ..... AF

and

THE DIRECTOR-GENERAL: NATIONAL HEALTH AND POPULATION DEVELOPMENT ..... 1ST RESPONDENT

SAINT INTERNATIONAL CC ..... 2ND RESPONDENT

CORAM : CORBETT, VAN HEERDEN, SMALBERGER, KUMLEBEN JJA et NICHOLAS AJA

HEARD : 13 SEPTEMBER 1988

DELIVERED : 29 SEPTEMBER 1988

J U D G M E N T

KUMLEBEN, JA

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Appellant initiated proceedings in the Transvaal Provincial Division of the Supreme Court for the review of a decision of first respondent. It applied on Notice of Motion, as a matter of urgency, for the issue of a rule nisi calling upon respondents to show cause the following day why:

> "2.1. The decision taken at Pretoria on 30 March 1987 in terms of which 16 containers of imported mechanically deboned poultry were released from detention and declared fit for sale and communicated to the Second Respondent in a telex purportedly from the First Respondent should not be corrected and set aside in terms of rule 53(1)(a)."

(The decision in question was that 16 containers of mechanically deboned poultry ("MDP"), which had been detained by first respondent, be released to second respondent.) In addition an order was sought that the relief set out in paragraph 2.1. above operate as an interim order pending the decision on the return day of the rule. A founding affidavit of appellant's managing director, Mr. Shefer, was lodged in

support of the application, together with a short affidavit of Professor Holzapfel, a microbiologist of the Faculty of Agriculture of the University of Pretoria.

First respondent learned of the pending application for the first time on the morning of the hearing. The papers were taken to the home of Mr Harvey, the sole member of second respondent, the previous night. In the absence of anyone to receive them, they were left at his home. Mr Harvey was away at the time. The next morning, that is, on 3 April 1987, the matter was called in court. Since there had been no opportunity to lodge answering affidavits, first respondent sought leave to lead viva voce evidence in rebuttal of the allegations in the founding affidavits in an attempt to prevent the grant of the order sought. Such leave was granted. First respondent called two witnesses, namely, Dr Stevens, the Director: Foodstuffs, Cosmetics and Disinfectants in the Department of National

Health and Population Development ("Department of Health") and Mr Lotter, the manager of second respondent. They had not had sufficient time to become fully conversant with the facts of the case with the result that they fared badly under cross-examination. At the conclusion of their evidence, and after argument, Smit J granted the relief sought and made the provisional order returnable on 2 June 1987.

Before that date respondents lodged answering affidavits in which the grounds alleged by appellant (Mr Shefer on its behalf) for claiming that the decision be set aside, and the facts relied upon, were canvassed in detail. After the answering affidavits with annexures had been served on appellant, three further affidavits sworn by Mr Shefer were lodged in connection with interlocutory matters, which arose before the application was argued on the merits. In the second of these affidavits, dated 25 May 1987, he said:

> "I am advised that at this stage it is inappropriate and improper in terms of Rule 53 for me to prepare and deliver affidavits replying to the affidavits filed on behalf of first and second respondents. I wish to place on record that my failure at this stage to respond on oath to such affidavits is not to be construed as an admission of the contents thereof."

He did in fact in that affidavit proceed to deal with and dispute the allegations of one deponent, Mr P R du Toit, but, despite what appears to have been foreshadowed in the quoted passage, no further replying affidavits were forthcoming from him, or from any one on behalf of appellant, on the merits (apart from one of Professor Holzapfel which did not deal with material allegations in the answering affidavits). The allegations in the answering affidavits therefore stand uncontradicted, except in so far as they are in conflict with averments in the founding affidavits.

The matter came before Kriegler J on the return day. On 9 June 1987 judgment was delivered: dismissing the application to review and set aside the decision; discharging the rule nisi; and ordering that appellant bear the costs

(excluding those stated in the order) on an attorney and client scale. Leave was, however, granted to appeal to this court on the merits and against the costs order.

As I have indicated, a number of subsidiary or interlocutory applications were made before the matter was argued on the return day. They included an application to anticipate the return day (with an in limine counter-application); one to dismiss the application with reliance upon the provisions of sec 35 of the General Law Amendment Act, 62 of 1955; and an application for an order compelling first respondent to deliver further documents in compliance with the provisions of Uniform Rule of Court 53(1)(b). These applications have no bearing on the issues now before this court on appeal and it is therefore unnecessary to consider any of them.

The following background facts are either common cause or are undisputed.

Appellant is an importer of food products including large quantities of MDP. Second respondent is one of its main trade competitors. MDP is a processed form of poultry meat and is used as a "filler paste" in certain meat products. In common with other foodstuffs it is susceptible to bacterial contamination. Hygienic conditions in the slaughtering, preparing and storage of MDP are necessary to restrict the bacterial content within safe margins.

The duty of ensuring that imported MDP and other meat products are within the prescribed bacterial limits, and do not present a health hazard, is entrusted to officials of the Department of Agricultural Economics and Marketing ("the Department of Agriculture") in terms of the Animal Slaughter, Meat and Animal Products Hygiene Act, 87 of 1967 ("the Meat Hygiene Act"). Dr Coetzee, the Deputy-Director of

the Directorate of Veterinary Services of the Department of Agriculture, in his affidavit explains in detail how these functions are carried out in terms of the relevant regulations. It is the responsibility of officials of his Department to be satisfied that the product in question is fit for human consumption. The procedure adopted in the case of an imported meat product is that it is released by the customs officials into the custody of officials of the Department of Agriculture. It is their duty to ensure that there has been compliance with the conditions of the import permit, that the importation is in accordance with the relevant regulations, and that the product is safe for human consumption. In this regard Dr Coetzee said:

> "Die mees logiese en praktiese wyse om die beheer uit te oefen is dat vereis word dat sertifikate deur 'n veearts wat deur die Regering van die land van herkoms daartoe gemagtig uitgereik word waarin

onder andere gesertifiseer word dat vleis die higiënese standaarde en ander vereistes kragtens die **Vleishigiënewet** gestel, nakom."

In addition certain other documents are to be examined to ensure that the imported product from the time of shipment has been conveyed and stored in accordance with the requirements of this Department. In certain circumstances independent tests are carried out before releasing the product to the importer.

The irradiation of MDP and other food products is a process whereby food is subjected to atomic ionization for a twofold purpose: firstly, to erradicate certain bacteria (salmonellae) that may be present; and secondly, to reduce the level of other bacteria and thus increase the shelf life of the product after it has been thawed. Once irradiation has taken place, it is no longer possible to determine what

the bacterial levels prior to irradiation were. Certain bacteria produce toxins. Irradiation has no effect on the level of toxins present in the product before irradiation takes place. Matters relating to irradiation of foodstuffs fall under the control and supervision of officials of the Department of Health. Paragraph 2 of Regulation 1600, published under Government Notice R1600 of 22 July 1983, and made in terms of sec 15(1) of the Foodstuffs, Cosmetics and Disinfectants Act, 54 of 1972, ("the Foodstuffs Act") provides that:

> "No foodstuff which has been irradiated shall be sold unless the Minister or the Director-General has, in writing, approved the sale of such irradiated foodstuff."

The detention and release of the 16 containers came about in this way. In October 1986 the Department of

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Agriculture became concerned about the bacterial levels of some MDP imported from Europe, because they were excessively high. This concern was conveyed to local importers. In January 1987 this Department evaluated the whole situation and decided to suspend the importation of MDP from two abbatoirs in France and one in West Germany. (It is to be noted that irradiation was not an issue.) This resulted in some 20 containers of MDP imported by appellant from one or other of the two French abbatoirs being impounded and rendered unavailable to appellant for sale in the Republic. In the circumstances, as Shefer put it:

> "...Applicant suspended the implementation of existing contracts with France and re-contracted with more reliable suppliers in the U.K. and Holland on less favourable terms. Inter alia the product was more expensive."

Shefer thereafter learned that appellant's competitors, including second respondent, had in the second half of January 1987 imported into South Africa between 500 and 800 tons of MDP from French suppliers and that these consignments had been subjected to irradiation prior to shipment. On 20 March 1987 Shefer reported this to Dr Stevens. As no permission had been granted to sell irradiated MDP in terms of paragraph 2 of Regulation 1600, it was decided to detain all available MDP imported from France since 1 January 1987. The order of detention, issued on 23 March 1987, had the effect of placing the contents of such containers under embargo wherever they were at the time. As at the date of the detention order 6 of the 16 containers had been cleared by the Department of Agriculture and were in transit to, or in the possession of, second respondent's customers. A further 6 were thus cleared before the issue of the rule nisi on 3 April 1987. I should mention that 2 of the 16 containers (numbered Peru 272017/2 and Peru 272100/6) were,

in fact, not imported by second respondent but by Eskort Natal and Ranch Intertrade respectively. (The question whether these two firms should not have been joined was raised in some correspondence, but not pursued further and need not be considered in this appeal.) The 14 containers in which second respondent was interested were ordered from one source in France, a manufacturing company called "SOCIETE DE PROTEINES INDUSTRIELLES" ("SPI").

Once the necessity to obtain a permit in terms of paragraph 2 of Regulation 1600 was brought to his attention, Mr Harvey promptly applied, on behalf of second respondent, to Dr Stevens for the necessary approval in terms of the Regulation. Dr Coetzee and Dr Stevens were also anxious to have the fate of these containers decided without delay. (The value of the MDP in the 14 containers of second respondent was approximately R500 000,00.) On 26 March 1987 they had a discussion with the commercial attaché of the French Embassy in Pretoria, one Monique Chapelle, as a result

of which she sent a telex message to the veterinary authorities in France. In it she asked them to furnish the necessary certification to satisfy the requirements of both Departments. In reply three telex messages - addressed to her as "Mrs Agriculture Attache"- were sent by Dr Adroit, the Controller General, Chief of Veterinary Service and Food Hygiene of the Minister of Agriculture in France. In them the 16 containers were identified and in regard to all of them Dr Adroit certified:

(i) That the MDP exported had been inspected by an official of the French Veterinary Department.

(ii) That the MDP was in accordance with the South African standards before ionization.

(iii) That the level of ionization was 3 kGy (an abbreviation for kiloGray, which is the unit of measurement of irradiation).

(iv) And that, in reference to the 14 containers ordered by second respondent, the SPI factory was visited on 19 March 1987 by a French veterinarian who was totally satisfied with the plant and the manner in which it was being run.

In South Africa, irradiation of foodstuffs up to a maximum of 10 kiloGrays is regarded as completely safe and as posing no danger to the consumer.

This information satisfied Dr Stevens that the requirements of both Departments had been met. He then gave second respondent the necessary approval in writing for the sale and distribution of its fourteen containers. This had the effect of releasing them from detention, which in turn gave rise to the application.

The argument in support of the application has been anything but consistent. Appellant, according to the founding affidavit of Shefer, based its case for setting aside the decision on grounds which may be thus summarised:

(a) That in taking the decision to release the containers for sale, Dr Stevens failed to exercise his discretion "in terms of the Act and Regulations", or to "apply the criteria in terms of the Act and the regulations", or to act "in the public interest" or to apply his mind to the matter.

(b) That first respondent's decision to release the containers "constitutes a declaration with retrospective effect."

(c) That Dr Stevens did not have the necessary delegated authority to take the decision.

The short judgment delivered by Smit J on 3 April 1987, when granting the provisional order, does not indicate the grounds upon which it was based. In argument before Kriegler J on the return day, Mr Mostert, who at that stage appeared on behalf of the appellant, argued ground (c) above but not grounds (a) and (b) and advanced two additional arguments. Firstly, to quote from the judgment of Kriegler J, that "the decision to release the containers was not a real one but merely a formality pursuant to a 'deal' negotiated between

SPI, the French Embassy in Pretoria and first respondent's Department." And secondly, that the telex message of 30 March 1987 sent to second respondent conveying the approval for the release of the containers was vague and did not constitute a valid approval in terms of paragraph 2 of Regulation 1600. These submissions were rejected by Kriegler J, who in addition gave his reasons for concluding that ground (a) was without substance. He accordingly discharged the rule. Leave to appeal on the merits was, as I have said, granted by Kriegler J, essentially on the question of the validity of the delegation, though such leave was not restricted to this ground. Leave was also granted to appeal against the award of costs on an attorney and client scale.

Mr Shaw, who appeared for the appellant on appeal, abandoned ground (c) above. He, however,submitted that the application ought to have succeeded, and the rule nisi confirmed, on grounds not at any previous stage raised or

argued. Firstly, he submitted, that Dr Stevens was not entitled to rely upon the assurances and certification of Dr Adroit, as contained in the telex messages, in reaching his decision to release the containers. Alternatively, inasmuch as documents originating from France (which came to hand after the decision was taken) showed, as regards some of the containers,that Dr Adroit's certification was in certain respects incorrect, this in itself constituted a ground for setting aside the decision.

In regard to both these contentions, Mr Visser, who appeared on behalf of first respondent, submitted that in deciding in any given case whether permission in terms of paragraph 2 of Regulation 1600 should be granted, the only relevant consideration - "jurisdictional fact" as he put it - to be taken into account is whether the degree of irradiation was within the South African prescribed limits and that therefore the MDP did not present a health hazard

due to irradiation. Having regard to this jurisdictional fact, the decision of Dr Stevens, so counsel submitted, cannot be faulted and the fact that other considerations were taken into account is therefore irrelevant. Mr Shaw did not contend that Dr Adroit's certification of the dosage of irradiation was incorrect. Thus, if Mr Visser's argument is sound, it provides a partial answer to Mr Shaw's first submission (in that only the reliance upon the certification as regards irradiation can be questioned) and a complete answer to his alternative argument (in that the correctness of the certification of the degree of irradiation is not challenged). Mr Shaw, however, argued that paragraph 2 of Regulation 1600 authorised Dr Stevens to call for evidence to satisfy himself that pre- irradiation levels of bacteria conformed to South African standards as laid down by the Department of Agriculture. And, so counsel submitted, in this particular case, he was obliged to do so because, when the containers were passed by officials of the Department of

Agriculture, they were unaware of the irradiation before shipment. Inasmuch as Dr Stevens, in conjunction with Dr Coetzee, did in fact call for such wider certification, I am prepared to assume in favour of appellant that the scope of paragraph 2 of Regulation 1600 is as wide as Mr Shaw contends.

The question is therefore whether in both respects Dr Stevens was entitled to rely on the assurances in the telex messages. I have no doubt that he was. In Builders Ltd. v Union Government 1928 A.D. 46 Wessels JA at page 60 stated with approval two propositions which manifestly apply to the present case, namely:

> "1. That where a statute appoints an official or other person to decide any question of fact or mixed law and fact, he must honestly address his mind to the subject.
>
> 2. He need not adopt the procedure of a court of law. He may obtain his facts as he thinks best."

(See too Zarkalis v Chief Immigration Officer 1976(2) S.A. 431 (R., A.D.) 433C.)

Dr Stevens did just that. The source to which he turned for certification was an impeccable one. Dr Adroit was the highest veterinary authority in France. Dr Coetzee confirms, in the passage quoted earlier in this judgment, that it is standard practice to obtain an assurance from responsible officials overseas that there has been compliance with South African standards when meat products are imported from abroad and that this is often the only practicable procedure to adopt. Dr Stevens had no reason to think that the certification of Dr Adroit would not be reliable and accurate. To require him to have called for the source material on which the certification was based - as was submitted in argument - is to my mind quite unwarranted.

Mr Charrier, the general manager of SPI, came out to South Africa at the request of second respondent for consultations in connection with this case. He also furnished one of the answering affidavits. He brought with him analyses, signed by Dr Helmer of the French Department of Veterinary Services, relating to 12 of the 16 containers. These certificates reflected tests carried out to ensure that the MDP conformed to the French standards as regards the presence of bacteria prior to irradiation. The results of such tests are recorded on these certificates. They were annexed to Mr Charrier's affidavit. At some stage after service of the answering affidavits legal representatives (though they were not relied upon in argument before Kriegler J). They revealed - and this was conceded on appeal before us - that certain bacterial levels were in fact not in accordance with South African requirements and that to that extent the certification and assurance in Dr

Adroit's telex message were incorrect. Since this was conceded by counsel for the respondents, it is unnecessary to go into further details in this regard.

Mr Shaw's alternative argument relied on this inaccuracy. He submitted, to quote from his written heads of argument, that:

> "Doctor Stevens acted on the fundamental assumption of receiving a proper certificate which he did not receive. His decision was, therefore, not a decision based on the information he required and which he thought he had;..."

and for this reason, so counsel argued, the decision to release the containers cannot stand and should be set aside. It was submitted, in short, that whenever an administrative decision is taken in good faith, based on facts which are subsequently shown to be incorrect, the decision is to be set aside. This argument is without merit and counsel was unable to cite authority in its support. It is hardly necessary to point out that such would not be a ground for

rescission of a civil judgment in a court of law (cf Estate Garlick v Commissioner for Inland Revenue 1934 A.D. 499 at 502) and in the field of criminal law the fact that a witness is shown to have committed perjury is in itself not a reason for setting aside the conviction (cf Mokoena v Minister of Justice and Another 1968 (4) S.A. 708 (A) and R v Maharaj 1958 (4) S.A. 246 (A) 248G.) Similarly, in the case of an administrative decision, the mere fact that it was based on incorrect evidence or information cannot vitiate it.

In Administrateur van Suidwes-Afrika en 'n Ander v Pieters 1973(1) S.A. 850(A), in reference to an administrative act involving the grant or refusal of a permit, this court held at page 857H to 858B:

> "Die verlening van 'n onbeperkte administratiewe diskresie aan 'n statutêr gemagtigde beteken egter nie op sigself dat 'n besluit van die gemagtigde onder geen omstandighede deur die Howe hersienbaar

is nie. (Johannesburg Consolidated Investment Co. v. Johannesburg Town Council, 1903 T.S. 111 op bl. 115). Waar die statutêr gemagtigde sy administratiewe diskresie nie uitoefen nie, of nie na behore uitoefen nie, of waar hy hom in die uitoefening van sy bevoegdhede aan 'n growwe onreëlmatigheid of 'n duidelike onwettigheid skuldig maak soos, bv., waar hy die uitdruklike of geïmpliseerde voorskrifte van die magtigende bepaling verontagsaam, of hom deur ongeoorloofde bybedoelings laat lei, kan die Howe sy besluit hersien. (Shidiack v. Union Government, 1912 A.D. 642 op bl. 651 - 2, en Judes v. District Registrar of Mining Rights, Krugersdorp, 1907 T.S. 1046 op bl. 1051). Met 'n behoorlike en opregte uitoefening van 'n diskresie, kan die Howe egter nie inmeng nie, selfs nie indien geoordeel sou word dat die besluit verkeerd of onbillik is nie. (Shidiack se saak, supra op bl. 652, en Jeewà v Dönges, N.O. and Others, 1950 (3) S.A. 414 (A.A.) op bl. 423)."

Neither of the two arguments presented to us establish a right of review on any of the grounds set forth in the above passage.

At the start of argument on appeal the court raised the question whether the appellant had the necessary locus standi to bring the decision on review. In Director of Education, Transvaal v McCagie and Others 1918 A.D. 616 at 621 this court held that:

> "The principle of our law is that a private individual can only sue on his own behalf, not on behalf of the public. The right which he seeks to enforce, or the injury in respect of which he claims damages, or against which he desires protection, will depend upon the nature of the litigation. But the right must be available to him personally, and the injury must be sustained or apprehended by himself. Here we have to do with an application to set aside proceedings alleged to have been taken in contravention of a statute; and the question arises whether the respondents had such a personal interest in the matter as entitled them to invoke the assistance of the Court."

As appears from the passage quoted from Shefer's founding affidavit, this application was prompted by the fact that appellant's source of supply of MDP from France had been

curtailed and it was obliged to purchase from a more expensive and less convenient source. It was for this reason that it objected to second respondent importing from SPI without the necessary permission. It is open to some doubt whether this can be regarded as a sufficiently direct interest in the matter to entitle appellant to challenge the propriety of the permission granted (cf Roodepoort-Maraisburg Town Council v Eastern Properties (Prop.) Ltd., 1933 A.D. 87 at 101 and Cabinet of the Transitional Government for the Territory of South West Africa v Eins 1988(3) S.A. 369 (A) 388). However, in the light of the conclusion on the merits, and since the point was not fully argued before us, it is not necessary to decide it. Nor is it necessary to determine whether it was open to appellant to advance Mr Shaw's argument when it was not the basis on which the review was launched and was based on facts, and inferences from facts, set out in annexures to one of the replying affidavits of second respondent.

It remains to consider the correctness of the order as to costs. The punitive order was based on the fact that the material allegations on which appellant relied to obtain a rule nisi were without any foundation. They were convincingly refuted in the answering affidavits to the extent that, as has been mentioned, no replying affidavits on the merits were forthcoming. The inescapable inference is that they were irresponsibly and recklessly made. The more serious of such unfounded allegations were: that "the French veterinary certificates were false and completely unreliable"; that first respondent relied upon French certification "which in the past has proved to be totally unreliable"; that the second respondent and other competitors of applicant had since the second half of January 1986 "imported into South Africa between 500 and 800 tons of MDP from French suppliers, who had experienced similar levels of rejection during the last quarter of 1986"; that MDP imported by second respondent was on arrival in South Africa "found to

be quite sterile and in fact in some instances a nil bacteria level had been found"; and finally that the irradiation of MDP shipped to second respondent from France "had concealed the massive bacterial contamination levels previously infecting the product." These far-reaching allegations were clearly aimed at creating the impression that the MDP in the 16 containers constituted a health hazard. This too was refuted by the rebutting evidence. These unwarranted averments resulted in the 16 containers remaining in detention from the time the rule nisi was granted (on 3 April 1987) until the judgment in the court a quo (on 9 June 1987) inevitably causing prejudice and inconvenience to the second respondent and the customers involved. It is true that one of the allegations, viz. the inaccuracy of French certification, proved to be partially correct. However, since the evidence produced by Mr Charrier was not known to appellant at the time of his assertion that the French veterinary certificates were "completely unreliable", this

disclosure in his favour makes his conduct hardly less reprehensible.

In the circumstances I am satisfied that Kriegler J exercised a proper discretion in awarding costs on the attorney and client scale to respondents.

In the result the appeal is dismissed with costs, including, in the case of first respondent, the costs of two counsel.

M E KUMLEBEN

JUDGE OF APPEAL

CORBETT JA)
VAN HEERDEN JA)
SMALBERGER JA) concur
NICHOLAS AJA)