IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHER JUDGES: YES/NO (3) REVISED:	
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DATE	SIGNATURE

CASE NO: 16198/2021

In the matter between:

SOUTH AFRICAN MARINE FUELS Applicant

and

JUDGMENT

THE SOUTH AFRICAN MARITIME SAFETY AUTHORITY Respondent

TOLMAY J

1. This is an application in which the applicant (SAMF) at this stage only seeks certain declaratory relief against the respondent (SAMSA). SAMF is a provider of offshore bunker delivery services by barge to vessels within the limits of the ports of Ngqura (Coega) and Gqeberha and outside those limits in Algoa Bay generally. The Transnet National Ports Authority of South Africa (TNPA) licensed SAMF to operate these ports until 23 May 2027 and 29 November 2023 respectively. SAMSA is a statutory body created in terms of the South African Maritime Safety Authority Act 5 of 1998 (the SAMSA Act). SAMSA is inter alia responsible for the administration of the Marine Pollution (Control and Civil Liability) Act 6 of 1981(the Act).

2. On 25 January 2018 SAMSA granted SAMF permission in principle in terms of section 21(b) of the Act to perform offshore bunkering operations. The permission was subject to the following seven conditions:

2.1 The final appointment of a service provider to combat pollution and the completion of a spill response drill.

2.2 SAMSA's inspection of SAMF's bunker barge on her arrival.

2.3 The approval being for daylight operations only, with further applications to be made for permission to conduct nighttime operations.

2.4 The employment of a suitably qualified or experienced operations manager.

2.5 This person to conduct an operation with SAMSA to ensure an understanding of various stated aspects.

2.6 Confirmation from TNPA that its conditions had been met.

2.7 That “The concerns raised by the Chief Operations Officer, in his email 22/1/18 have been met”.

The correspondence from SAMSA concluded with the following sentence: “All other statutory requirements of the Republic are adhered to”. This was, however, not listed as one of the conditions.

3. The email of 22 January 2018 was from Mr. Tilayi, who was the Chief Operations Officer at the time, and advised SAMF that final approval would not be given by SAMSA unless a certain Mr. Gcaba was SAMF’s BEE shareholder. A subsequent investigation concluded that Mr. Tilayi sought to dictate irregularly to SAMF who its BEE shareholder should be. On 15 February 2018 SAMSA issued further permission in principle in terms of section 21 of the Act stating the first five conditions and leaving out the last two. This permission in principle concluded with the same reference to adherence to all other South African statutory requirements and is yet again not numbered as a further condition.

4. Preceding the permissions in principle under section 21 of the Act by SAMSA and during February 2017, SAMF was granted a license in terms of the National Ports Act 12 of 2005(the National Ports Act) from the TNPA to conduct offshore bunkering operations within the port of Ngqura for a period commencing on 17

February 2017 until 16 February 2022. The license was subsequently extended until 2027 and SAMF also obtained a license for the port of Gqerberha.

5. On 17 August 2018, SAMSA granted the final approval in principle in terms of section 21(1) (b) of the Act to conduct ship to ship bunker fuel transfers in Algoa Bay. Approximately two years after granting the approval, on 21 November 2020 SAMF and other bunkering operators were advised by an e-mail from SAMSA's Acting Chief Executive Officer (CEO), who now was Mr. Tilayi, that SAMSA intended to conduct a compliance audit on the bunkering activities of bunkering operators. The crux of the e-mail was that SAMSA was of the view that it had an obligation to advance transformation and comply with the laws of the country in so far as it relates to taxation, BBBEE and immigration.

6. On 25 January 2021, Mr. Tilayi sent a further e-mail restating what was said in the previous mail and advising the operators that SAMSA would be conducting a compliance audit during February 2021. The scope of the compliance audit being inter alia compliance by operators with South African legislation not administrated by SAMSA. SAMF was of the view that SAMSA was acting ultra vires its mandate by conducting an audit on matters that do not fall within its jurisdiction in terms of section21 of the Act. After the exchange of correspondence between SAMF and SAMSA's attorneys, SAMF launched this application seeking declaratory relief.

7. After the launching of the application, SAMSA proceeded to suspend SAMF's approval to conduct bunker transfers in Algoa Bay with immediate effect. This led to SAMF bringing an urgent application for interim relief pending a review application and the application for declaratory relief. On 6 April 2021 the urgent application was postponed sine die. The court issued directions in respect of the further conduct of the application for declaratory relief, and inter alia directed SAMF to deliver an amended notice of motion and supplementary founding affidavit to include relief reviewing and setting aside the decision by SAMSA to suspend SAMF'S permission to conduct ship to ship bunkering operations. SAMSA was also ordered to deliver a record in terms of Rule 53 of the Uniform Rules of Court. Further disputes regarding the sufficiency of the record provided ensued, which led to SAMF issuing a notice in terms of Rule 30A dated 27 July 2021 in which it was alleged that SAMSA failed to comply with Rule 53 of the Uniform Rules of Court. Finally, SAMSA conceded the review and by agreement an order was granted setting aside the suspension.

8. The primary question that remains for determination is whether the declaratory relief is appropriate, or whether the dispute is moot, seeing that the review was conceded. The costs must also be decided, not only of the application, but also the costs of the urgent application for an interim interdict and the review and setting aside of the decision of 31 March 2021, as set out in the amended notice of motion, and the costs of the Rule 30A application to compel SAMSA to deliver a complete record of the relevant decision.

9. SAMF argued that SAMSA is only entitled to impose conditions in terms of section 21 of the Act as envisaged at achieving the purpose of the Act, as described in the long title. These conditions are aimed at the prevention and combatting of pollution of the marine environment. SAMF is of the view that SAMSA is not entitled to impose the recordal of BBBEE related conditions in exercising its power under section 21(1) (b) of the Act. SAMF argued that the recordal does not constitute a stand-alone condition in terms of section 21(1) (b) of the Act, and if it does, SAMSA was not entitled to impose it. SAMSA, it was argued, is not entitled to assume investigative, policing and other powers in relation to matters falling outside its statutory purview, and within the jurisdiction of other governmental agencies in order to determine whether SAMF is complying with all South African law. According to SAMF section 10(1) of the BBBEE Act does not enjoin SAMSA to determine and impose BBBEE qualification criteria for permission granted in terms of section 21(1) of the Act, as it does not constitute permission in respect of economic activity in terms of any law and is purely an environmental permission.

10. SAMSA contended that the declaratory relief sought is incompetent and rendered moot. This argument is premised on account of the setting aside of the suspension of the approval granted to SAMF. The declaratory relief, it was argued, would have no practical effect, given the prevailing circumstances. Furthermore, according to SAMSA, there is no apparent legal uncertainty to the

powers and mandate of SAMSA in the interpretation of section 21 of the Act, read with its mandate as envisaged in the SAMSA Act and this is not an instance where the court can exercise its discretion to grant declaratory relief in favour of SAMF.

11. The Constitutional Court in *Police and Prisons Civil Rights Union v South African Correctional Service Workers' Union and Others*[1] confirmed the jurisprudence regarding mootness. The starting point is that a court "…*will not adjudicate an appeal if it no longer presents an existing or live controversy*". It was emphasized that courts exist to determine concrete live disputes[2]. It was however also said that mootness "*is not an absolute bar to justiciability… When justice so require, even if a dispute is moot a court exercises a judicial discretion taking into account a number of factors*. *These include, but are not limited to, considering whether any order may have some practical effect, and if so its nature or importance to the parties or to others*".[3]

12. SAMSA's position was that as a result of the suspension being set aside, declaratory relief has become incompetent as there exists no live controversy between the parties. SAMSA has already embarked on establishing policy directives and stakeholder consultations in bunkering and thus the process of issuing and granting approvals will follow a completely new process. SAMSA also

[1] [2018] JOL 40249 (CC).
[2] Ibid at para 43. See also Minister of Tourism and Others v AfriForum NCP and Another [2023] ZACC 7 at para 23, See also National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others 2000 (2) SA 1 (CC).
[3] Ibid at para 44.

brought it under the attention of the court that the issuing of the licence and approvals did not follow an open competitive process. The main intention, according to SAMSA, was to first do a pilot project with SAMF and other operators who were licenced to operate for a period of five years. The pilot phase was used to introduce bunkering in the Republic of South Africa and the next licensees will have to undergo a transparent competitive process with pre-set conditions.

13. SAMF however argued that there is manifestly still a live dispute and is of the view that it is imperative that the court rules on the nature and powers under section 21 of the Act and on the issue arising in relation to section 10(1) of the BBBEE Act as these are legal issues and it is of critical importance in achieving legal certainty in relation to SAMSA's on going and future regulation of the offshore bunkering industry in terms of section 21 of the Act. *Minister of Finance v Oakbay Investments (Pty) Ltd and others*[4] (Oakbay) dealt with the question of a live dispute in relation to declaratory relief as follows:

"*Ex parte Nell settled the law regarding the existence of a live dispute as a requirement for the granting of a declaratory order by abrogating this requirement. However, Ex parte Nell did not render declaratory orders justified in all cases where there is no live dispute. The dictum on this requirement in Ex parte Nell is not without qualification. There the Court went further and stated that '. . . though the absence of a dispute may, depending on the circumstances cause the Court*

[4] 2018 (3) SA 515 (GP).

to refuse to exercise its jurisdiction in a particular case'. The following extract from that judgment reflects the reason why the Court granted the declaratory relief even though there was no live dispute between the parties:

'The need for such an order can pre-eminently arise where the person concerned wished to arrange his affairs in a manner which could affect other interested parties and where an uncertain legal position could be contested by all or one of them. It is more practical, and the interests of all are better served, if the legal question can be laid before a Court even without there being an already existing dispute'. [5]"

14. The existence of a live dispute is accordingly not a prerequisite for the granting of declaratory relief but it's absence or presence may inform the court in the exercise of its discretion on whether to grant the declaratory relief requested[6].The powers that SAMSA may exercise in terms of section 21(1)(b) of the Act will remain relevant and I agree that legal certainty is required, irrespective of new policies and new procedures in relation to the granting of bunkering approvals in terms of section 21 of the Act. In the interest of legal certainty, the powers of SAMSA in terms of section 21 of the Act should be clarified.

[5] Ibid at para 61.

[6] Ex Parte Nel 1963 (1) SA 754 (A), See also Competition Commission v Hosken Consolidated Investments Ltd 2019 (3) SA 1 (CC) at para 82, See also Khosa and Others v Minister of Defence and Military Veterans and Others 2020 (5) SA 490 (GP).

15. It was argued on behalf of SAMF that section 10(1) of the BBBEE Act has no application in the context of SAMSA granting approval in term of section 21(1) of the Act as the permission granted is a purely environmental approval and is not an "*authorisation in respect of economic activity in terms of any law*" as described in section 10(1)(a).

16. SAMSA was established in terms of the SAMSA Act. The objectives of SAMSA are set out in section 3 of the SAMSA Act and these objectives are to ensure safety of life and property at sea, to prevent and combat pollution of the marine environment by ships, and to promote South Africa's maritime interests. SAMSA is responsible for the administration of legislation as set out in section 2(2) of the SAMSA Act, including the administration of the Act. The purpose of the Act is set out in the long title thereof as follows:

"*To provide for the protection of the marine environment from pollution by oil and other harmful substances, and for that purpose to provide for the prevention and combating of pollution of the sea by oil and other harmful substances; to determine liability in certain respects for loss or damage caused by the discharge of oil from ships, tankers and off-shore installations; and to provide for matters connected therewith*."

17. Sections 21(1) and 21(2) of the Act provide as follows:

Authority's permission required for transfer of certain harmful substances or for certain other acts in respect of ships or tankers;

(1) No person shall-

(a) outside any harbour of which Transnet Limited has become the owner in terms of section 3 of the Legal Succession to the South African Transport Services Act, 1989 (Act 9 of 1989), or a fishing harbour as defined in section 1 of the Sea Fishery Act, 1988 (Act 12 of 1988), and within the prohibited area, render any ship having oil or any other prescribed harmful substance on board (whether as cargo or otherwise), or any tanker, incapable of sailing or manoeuvring under its own power;

(b) within the prohibited area transfer any oil or other prescribed harmful substance from any ship or tanker to any other ship or tanker or to an offshore installation or from such offshore installation to any ship or tanker, except with the permission of the Authority and in accordance with the provisions of this Act.

(2) In giving its permission for the performance of any act referred to in subsection (1), the Authority may impose any conditions subject to which such act shall be performed, and such conditions may include the obligation to obtain the services of one or more tugs, spray boats or other vessels to stand by during a period determined by the Authority.

18. Section 10 of the BBBEE Act reads as follows:

(1) Every organ of state and public entity must apply any relevant code of good practice issued in terms of this Act in-

(a) determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law;

(b) developing and implementing a preferential procurement policy;

(c) determining qualification criteria for the sale of state-owned enterprises;

(d) developing criteria for entering into partnerships with the private sector; and (e) determining criteria for the awarding of incentives, grants and investment schemes in support of broad-based black economic empowerment.

19. The purpose and functions of the Act must be interpreted and applied within the broader context of the legislative framework within which the maritime environment is regulated. This requires one to take into consideration other relevant legislation. The National Ports Act[7] in its long title states that its aim is to provide for the establishment of the National Ports Authority, for the Ports Regulator to provide for the administration of certain ports and to provide for certain matters connected therewith. Section 10 of the National Ports Act provides that all ports fall under the jurisdiction of the TNPA. The functions of the TNPA is as set out in section 11 of the National Ports Act and inter alia include

[7] 12 of 2005.

exercising licencing and control functions in respect of port services and port facilities, ensuring that any person who is required to render any port services and port facilities is able to provide those services and facilities efficiently, promote efficiency, reliability and economy on the part of the licence operators in accordance with recognised international standards and public demand. Importantly section 11 (1)(l), provides for the promotion of the achievement of equality by measures designed to advance persons or categories of persons historically disadvantaged by unfair discrimination in the operation of facilities in the ports' environment.

20. The TNPA is in terms of section 80 of the National Ports Act empowered to impose conditions relating to BEE and regulations 2, 3 and 4 deals with this aspect. Regulation 2 deals with the authority to incorporate BEE into decision making. Regulation 3 sets the specific BEE targets. Regulation 4 deals with the monitoring by the regulator of the measures taken pursuant to Regulations 2 and 3.

21. The licence originally issued during February 2017, by the TNPA for the port of Ngqura was subject to the condition that SAMF reach level four BBBEE status within eighteen months of the licence being issued and SAMF was obliged to provide the TNPA with annual confirmation of its BEE status. SAMF complied with these provisions. In this context, the requirement for BEE compliance is

provided for in this legislation in the marine environment. The Act on the other hand deals specifically with the protection of the environment.

22. The decision taken by SAMSA in terms of section 21 of the Act constitutes an administrative action in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and there does not seem to be any dispute about that as the review was conceded. Even if there was, it is clear that SAMSA exercised a public power as contemplated in section 1(a) (ii) of PAJA which would constitute an administrative action as interpreted by our courts[8]. Consequently, SAMSA's decision to grant permission and to impose conditions in terms of section 21 of the Act must be susceptible to the challenges under PAJA and the principle of legality.

23. The first question that needs answering is which conditions SAMSA is empowered to impose in terms of section 21 of the Act and whether those conditions are limited to those which are necessary to protect the marine environment. The second is whether the permission granted in terms of section 21(1) may trigger the application of section 10(1) of the BBBEE Act, and if so whether SAMSA is only entitled to impose such qualification criteria as referred to in section 10(1) of the BBBEE Act as have been determined by it. The third is whether the recordal constitutes a stand-alone condition and if so whether

[8] See Grey's Marine Hout Bay(Pty)Ltd v Minister of Public Works 2005 (6) SA 313 (SCA) at para 22-24.

SAMSA is entitled to impose it and was entitled to thereby assume jurisdiction and compliance, auditing and investigative powers under legislation which does not itself vest SAMSA with such jurisdiction.

24. It is trite that a statutory power may only be used for a valid statutory purpose[9]. Section 6(2) (e) (i) of PAJA states that an administrative action may be reviewed if it was not authorised by the empowering provision. Section 6(2) (e) (ii) provides that it may be reviewed if it was taken for an ulterior purpose. It is trite that "a power given for a specific purpose may not be misused in order to secure an ulterior purpose.[10]" In this specific instance it is important to note that the dispute is limited to what SAMSA is empowered to do in terms of the Act and more specifically section 21 thereof. In this regard the purpose of the Act as set out in the long title is to provide protection of the marine environment from pollution and other harmful substances. The permission required in section 21 is to provide for transfer of harmful substances. SAMSA is in terms of section 21 of the Act limited to impose conditions which are necessary to protect the marine environment.

25. Section 10 of the BBBEE Act has no application in the context of SAMSA granting approval in terms of section 21 of the Act, as the approval is only an environmental permission, as was correctly argued on behalf of SAMF. This must be seen in the context of the National Ports Act and Regulations which ensures

[9] Bernstein and Others v Bester and Others 1996 (2) SA 751 (CC) at para 46. See also Ex parte Speaker of the National Assembly: In Re Dispute Concerning the Constitutionality of certain Provisions of the National Education Policy Bill 83 of 1995 1996 (3) SA 289 at para33.

[10] Gauteng Gambling Board v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) at para 47.

compliance with BEE. The permission granted in terms of section21(1) does therefore not trigger the application of section10(1) of the BBBEE Act.

26. The recordal that requires compliance with all South African laws is not a stand-alone condition, it is at most a reminder that the rule of law finds application, and if SAMSA becomes aware of any contravention of South African law it is required to report it to the relevant authority that is empowered to investigate it and to give assistance in the investigation and ultimately resolution of the issue.

27. After considering the declaratory relief requested by SAMF it is apparent that the aim is to clarify which conditions SAMSA are entitled to impose in terms of section 21 of the Act and therefore the relief granted should be limited to what is necessary to attain that objective. SAMF is also entitled to costs, including the costs previously reserved, as SAMF was successful and SAMSA's actions necessitated the applications brought by SAMF.

The following order is made:

1. The only conditions which the respondent is empowered to impose in terms of sub-section 21(2) of the Marine Pollution Act, in relation to any act to be

performed pursuant to permission granted by the respondent in terms of sub-section 21(1)(b), are those which are necessary to protect the marine environment from pollution by oil and other harmful substances, and for that purpose, to prevent and combat pollution of the sea by such substances.

2. The recordal in the permission granted in terms of section21(1)(b) of the Marine Pollution Act on 17 August 2018, that “All other statutory requirements of the Republic, outside of the jurisdiction of SAMSA, are adhered to”, does not constitute a stand- alone condition imposed by the Respondent in terms of section 21(2) of the Marine Pollution Act.

3. The Respondent shall pay the costs of the Applicant, including those occasioned upon the employment of two counsel, where applicable, and will include:

3.1. The costs of this application.

3.2. The costs relating to the review and setting aside of the Respondent’s decision, made on 31 March 2021, to suspend the permission previously granted by the Respondent to the Applicant on 17 August 2018 in terms of section 21(1) of the Marine Pollution Act, as ordered by the Court and reflected in paragraph 2 of its Order of 3 March 2022.

3.3. The costs of the Applicant’s interlocutory application in terms of Uniform Rule 30, as described in paragraph 3 of the aforesaid Order of 3 March 2022.

3.4 The costs of the application for the interim interdictory relief obtained by the Applicant, as reflected in the Order of Court dated 6 April 2021.

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R G TOLMAY

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES:

For Applicant:	Adv I Jamie SC Adv J D Mackenzie Instructed by Primerio
For Respondent:	Adv M Maphanga SC Adv K Maleka Instructed by Nkosi Sabelo Incorporated
Date of Hearing:	5 September 2023
Date of Judgment:	