153/88

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE DAIRY BOARD Appellant

and

ANNANDALE DAIRY FARMS (PTY) LIMITED Respondent

CORAM: CORBETT, HOEXTER, BOTHA, GROSSKOPF et MILNE JJA

HEARD: 1 November 1988

DELIVERED: 29 November 1988

J U D G M E N T

GROSSKOPF, JA

This case concerns the powers of the appellant, the Dairy Board, which is a control board established by a scheme for regulating the marketing of dairy products in terms of the Marketing Act, no. 59 of 1968. In the Cape of Good Hope Provincial Division the respondent,a milk producer, applied for an order declaring that the appellant had acted unlawfully and

ultra vires in withholding from the respondent the repayment of certain premiums, and ordering the appellant to pay the amounts thereof to the respondent. The court (TEBBUTT J) granted this order, and gave leave to appeal to this Court - hence the present appeal. The judgment of the Court a quo has been reported as Annandale Dairy Farms (Pty) Ltd v. Dairy Board 1987 (2) SA 727 (C). Before passing to the merits of the appeal I should record that, at the outset of the argument on appeal, condonation was granted for the late filing of the appellant's notice of appeal.

It is convenient to commence with the legislative background to the present dispute. Since 1962 there have been several schemes for the marketing of milk and other dairy products pursuant to successive Marketing Acts. For present purposes we are concerned mainly with the current scheme and the current Act, although I shall later have to make brief reference to the earlier ones.

The Marketing Act no. 59 of 1968 (hereafter called simply "the Act") defines a scheme as

> "a set of rules complying with the requirements of this Act in relation to any one or more of the following, namely -
> (a) the regulation of the marketing of any product in the Republic;
> .....
> (c) the promotion of the demand for any product whether within or outside the Republic;
> .....
> and matters incidental thereto ..." (sec. 1)

The manner in which schemes are to be established is laid down in Part 2 of the Act. Acting pursuant to these provisions (before their amendment by Act 66 of 1984) the State President by proclamation R 290 of 1978 published a "Scheme for Regulating the Marketing of Dairy Products in terms of the Marketing Act, 1968, and Matters Incidental Thereto" (hereinafter referred to as "the Scheme") to take effect on 1 March 1979. From this date the Scheme was, pursuant to section 14(2) of the Act, "binding on the persons to whom and in the area in which those provisions apply." It was common cause that the Scheme was binding on the respondent as a registered producer of milk in the Cape Peninsula area. For convenience I shall henceforth refer to the

respondent as the Producer. The appellant was established by section 6 of the Scheme as a control board to administer the Scheme. For convenience I shall refer to it as the Board. In terms of section 6(2) of the Scheme and sec 25(2) of the Act the Board is a body corporate capable of suing and being sued in its own name, and of performing all such acts as are necessary for or incidental to the carrying out of its objects and powers under the Scheme .

The Board derives its income solely from levies on dairy products. Provisions are contained in the Scheme and the Act authorising the Board to impose, with the consent of the Minister of Agriculture,general levies (section 21 of the Scheme and section 41 of the Act) and special levies (section 22 of the Scheme and section 44 of the Act). In fact the Board imposed both a general levy and a special levy. The general levy is used to finance the Board's administrative expenses and may be devoted to other authorized purposes. It is not in issue in this appeal. We are concerned only with the special levy, and

the use to which it has been put.

The levies are collected from the purchase price of milk in the following manner. In terms of the Scheme registered producers of fresh milk sell and deliver their milk to distributors at controlled prices. The distributors in turn sell it to the public. The distributors do not pay the producers direct, but pay the purchase price over to the Board for the credit of a Milk Purchases Fund. If more milk is produced than is required for immediate public consumption the surplus is delivered to the Board, which sells it to persons such as producers of cheese or milk powder. The proceeds of such sales are also paid into the Milk Purchases Fund. Every month the Board deducts the general and special levies from this fund and distributes the balance among producers pro rata to the volume of milk with a defined butterfat and protein content supplied by each producer. A part of the special levy is transferred to a Quality Purchases Fund which is used to pay quality premiums to producers whose milk complies with certain

quality standards laid down by the Board. Since these quality premiums form the nub of the present case it is worthwhile considering their origin in some detail.

In 1964 the Board's predecessor under an earlier scheme sent a study group overseas to investigate, inter alia, methods employed in the purchase of milk on the basis of quality and its cooling in bulk. In its report the study group emphasized that milk could not be effectively marketed unless it was of high quality and was kept fresh by proper refrigeration. Up to that time milk had been conveyed from the producer in metal cans. In 1965 the Board's predecessor decided to establish two experimental routes on which bulk cooling tanks would be installed on farms. Immediately after milking the milk would be pumped into these tanks and refrigerated. The refrigerated milk would then be conveyed in insulated carriers to the distributors. In order to encourage producers to participate in the experiment, the Board's predecessor paid, with the consent of the Minister, a premium of half a cent per gallon from its

special levy fund to producers to assist them in acquiring bulk tanks. The experiment was a great success. On 4 October 1965 the Board's predecessor wrote to the Minister asking his approval for the payment of a premium of half a cent per gallon on all milk refrigerated and transported in bulk in the Cape Peninsula. On 23 November 1965 the following reply was sent on behalf of the Minister:

> "Die Minister het ... goedgekeur dat vanaf 1 Oktober 1965 'n premie van 0.5c per gelling op melk in massa verkoel en vervoer in die Kaapse Skiereilandgebied betaal word, op die uitdruklike voorwaarde dat u Raad binne afsienbare tyd - in samewerking met die Departement van Landbou-tegniese Dienste, kwaliteits- en higiëniese standaarde ten opsigte van massamelk opstel en dat die premie slegs betaal word op massamelk wat aan dié standaarde voldoen."

On 2 July 1970 (the reason for the delay is not apparent) the Board's predecessor again wrote, attaching the proposed requirements for the payment of the quality premiums, and requesting the Minister's approval thereof. The proposed requirements were numbered (i) to (vii) and related to matters

such as the temperature at which milk was to be stored, its chemical, physical and hygienic qualities, the frequency with which it was to be conveyed from the producer's tanks, the specifications of the bulk tanks, equipment and road carriers, etc.

Under the heading "Chemiese, Fisiese en Higiëniese Kwaliteit" there appeared inter alia the following:

> "dit (i.e., the milk) mag nie afkomstig wees van koeie wat aan mastitis ly nie."

Mastitis is an inflammation of the udder of a cow, usually caused by bacteria which infect the udder. When the udder is infected, the number of somatic cells (being mainly the white blood cells fighting the infection) increases. This may also result from other diseases, and a high count of somatic cells in the milk is a reliable indication of udder disease in the cow. Mastitis affects not only the quantity of milk produced but also the quality. Thus the nutritional value of affected milk is reduced. Moreover, such milk always contains

a certain amount of pus, which is repugnant to the consumer. And, finally, if raw milk is seriously contaminated by mastitis, the normal process of pasteurization may become deficient in that some of the bacteria in the milk may not be destroyed thereby, with the result that they may be transferred to the consumer.

The request for Ministerial approval of the proposed quality standards received the following response, dated 31 August 1970:

> "Met verwysing na u brief ... van 2 Julie 1970 ... wens ek u mee te deel dat die Minister slegs kennis geneem het van die voorwaardes (i) tot (vii) ... wat by u brief onder verwysing aangeheg is, aangesien die voorwaardes geen beginselvoorstelle bevat wat die Minister se goedkeuring verg nie, maar slegs huishoudelike reëlings is waaraan produsente moet voldoen om te kwalifiseer vir betaling van die kwaliteitspremie."

After receipt of this letter, the proposed system of paying quality premiums from the proceeds of a special levy was introduced and it continued in operation after the inception of the present Scheme in 1979. In 1978 the quality premium had been fixed at 1,25 cent per litre. The Board considered this

too low, and resolved as follows in May 1982:

> "that the quality premium on fresh milk be increased to 10% of the gazetted purchase price of fresh milk, with the necessary adjustment in the special levy for this purpose, and that such premium/levy then be adjusted accordingly with every future price adjustment".

This resolution was approved by the Minister in August 1982 as follows:

> "U Raad se besluit met betrekking tot die aanpassing van die premie op grootmaatmelk, met elke verhoging in die prys van varsmelk, sodat dit 10% van die vasgestelde volprys van varsmelk met h minimum bottervetinhoud van 3,3% verteenwoordig, is ... deur die Minister goedgekeur as deel van die prysreëlings vir 1982/83 wat op 1 Julie 1982 in werking getree het".

Although this approval was initially only in respect of the price arrangements for 1982/83, the premium has been maintained at that level at all times relevant to the present appeal. There is no suggestion on the papers that this does not carry the Minister's approval.

In 1983 the Board amended the requirements for the payment of a quality premium, and informed all producers

accordingly by way of a circular dated 27 April 1983. The broad pattern remained the same, but the Board now defined with greater precision what the consequences would be if a producer, while complying generally with the Board's requirements, nevertheless was in breach of one or more of them. This was done negatively: such a producer was said to be subject to "penalisation" by way of a "forfeiture" of the premium for a specified period. Thus, for instance, if the milk was not stored at the right temperature, the producer would "forfeit" the premium on the specific day's milk deliveries from the tank concerned. If the milk contained added water, the premium would be forfeited on a full month's deliveries if added water was found to be present in any day's deliveries during the course of the month, and so on. In respect of mastitis the circular provided:

> "The milk may not have been derived from cows infected with mastitis;
> Penalisation: Premium for particular day's deliveries is forfeited."

On 26 March 1984 the Board sent a further circular to

all fresh milk producers in the Cape Peninsula area informing them of a Board resolution to the effect that milk containing more than 750 000 somatic cells per ml would be regarded as coming from cows infected with mastitis. Such milk would accordingly not qualify for the payment of a quality premium. The Board also indicated how and by whom the milk would be tested.

The Producer at first regularly received its quality premiums. However, on 2 November 1984 the Board wrote to the Producer informing it that a somatic cell count in excess of 750 000 per ml had been found in deliveries by the Producer during September and October, and that, should the prescribed standard not be attained during November 1984, the premium payment on the total volume of milk delivered during that month would be withheld. During November 1984 the Board in fact withheld the November premium, which amounted to R12 535-00, but after representations by the Producer, reconsidered its decision and paid the premium. In the course of the exchanges between the

parties it appeared that there was a dispute between them in regard to the procedures used in testing the milk. Analyses obtained by the Producer, differing from those obtained by the Board, indicated that the somatic cell count was within permissible limits. The Producer has, however, expressly indicated that it does not wish the court to decide this dispute, which is in any event incapable of resolution on the papers. We must therefore assume that the Board is correct in stating that the Producer's milk did not satisfy the Board's requirements.

The premiums for December 1984 and January 1985 (amounting respectively to R10 967-76 and R11 143-96) were later also withheld by reason of an excessive somatic cell count. Although representations were again made, the Board remained unconvinced and refused to pay the premiums to the Producer. On 21 October 1985 the Producer issued the Notice of Motion in the present case. In it the Producer asks for orders:

a) declaring that the Board acted unlawfully and ultra

vires "in withholding from the (Producer) the repayment of premiums" for December 1984 and January 1985;

b) declaring that the Board "has no right or power to penalize" the Producer by "withholding, declaring forfeit or confiscating any such premium on the ground that the fresh milk delivered by the (Producer) ... does not comply with the (Board's) requirements as to quality of the said milk, or on any other ground";

c) ordering the Board to pay the said sums of R10 967-76 and R11 143-96 with interest;

d) ordering the Board to pay the costs of suit.

These prayers, it will have been noted, proceed on the basis that the Board has been "withholding", "declaring forfeit" or "confiscating" the premiums, and the application questions the legality of such conduct on the part of the Board. This approach was adopted also by the court a quo. At the very outset of its judgment (supra, at p. 728 F-G) it defined the issues for decision in the case as whether the withholding of the

premiums constituted a penalty, and whether, if it did, it was ultra vires the Board. These questions were then answered in the affirmative. However, the use of the word "withhold" in this context tends to be misleading. It suggests that the Producer's right to the premiums was not in issue, and focuses attention on the Board's denial of the right which is thus assumed to exist. So understood the word "withhold" begs the question. The true question in this appeal is not whether the Board may "withhold" the premiums but whether the Producer has any right to claim the premiums, and to this question I now turn.

The rights of the Producer as against the Board in the present matter depend on the legality and effect of the special levy and the system of quality premiums introduced by the Board. In this regard it was not contended that the Board, in introducing this system, acted otherwise than in good faith and for the attainment of authorized purposes. Indeed, the essence of a scheme in terms of the Act, as appears from the definition

quoted above, is that it serves inter alia to regulate the marketing of products and the promotion of the demand for them. And section 19 of the Scheme specifically authorizes the Board to take such steps as may be approved by the Minister for fostering or stimulating the demand for dairy products. In the present case the Board admittedly intended in good faith to promote the objects for which it was established. In particular its purpose was to foster or stimulate the demand for milk by trying to ensure that milk of a high quality was produced. The Producer's only argument was that, although the Board's purpose may have been commendable, the means which it employed were not authorized by the Scheme and the Act. This argument requires a closer analysis of the provisions relating to the imposition of special levies and the manner in which the money raised thereby is to be used.

As adumbrated earlier in this judgment, section 22 of the Scheme (following section 44 of the Act) empowers the Board, with the approval of the Minister and on such basis as the Board

may determine, to impose a special levy on dairy products, including milk. I have set out the facts pertaining to the special levy in the present case. The imposition of the special levy clearly complies with the provisions of the Scheme, and the Producer has not contended to the contrary.

In terms of section 26(1) of the Scheme and section 46(3) of the Act money derived from a special levy is to be paid into one or more special funds. In the present case this has been done. In particular, some of the money was paid into the Quality Purchases Fund. The money thus raised by special levies and paid into special funds became, in my view, the property of the Board to be administered according to law. This proposition was not disputed by the Producer's counsel. The view expressed in the judgment of the court a quo (supra at p. 734 B and p. 737 G) that the money collected by the special levy belongs, not to the Board, but to the producers, is consequently incorrect. Nor do I agree with the learned Judge a quo (loc. cit) that the Board itself saw matters in that light. The attitude of the Board,

as I understand the passage quoted in the judgment a quo at p. 734 A-B, was that all the money raised by the special levy was to be paid to producers of milk who qualified to receive the quality premiums. No doubt this recognizes the moral right of the body of producers to receive the proceeds of the special levy. It does not, however, imply that the money "belongs" to such body, nor, a fortiori, that any part of it "belongs" to any individual producer. However, be that as it may, the views of the Board are of little importance. What matters are the objective facts and their legal consequences. As I have stated the true position in my view is that the money became the property of the Board to be dealt with as prescribed by law. And in this regard section 26(2) of the Scheme provides:

> "The Board may deal with money in any such special fund in such manner as may be approved by the Minister."

The effect of this sub-section is that the Board may pay the money to the Producer if, and only if, such payment accords with the manner of dealing with the fund which has been

approved by the Minister. On the papers it was common cause that the Minister had approved the manner in which quality premiums were to be paid. However, during argument there was some suggestion on behalf of the Producer - I deal with it in greater detail later - that the Minister did not in fact give such approval. If this suggestion were correct the result would not be that the Board was obliged or even entitled to pay the premiums to the Producer. The very converse would be the case. It is clear that the Minister has not approved any manner of dealing with the money other than by the payment of quality premiums. Consequently, if it were to be correct that the payment of quality premiums also did not receive his approval, the result would be that the Minister has not approved any manner whatever of dealing with the money in the special fund. The Board would then be compelled to leave the money in the fund until the Minister has given approval for it to be dealt with in some manner.

Realizing what the effect would be if the Minister had

given no approval whatsoever, Mr. Dison, who appeared for the Producer, argued that the Minister had given only a partial approval. The Minister had, he contended, approved the payment of quality premiums in principle, but had not approved the specific requirements laid down by the Board. Therefore, he contended, the premium should be paid to producers whether or not they complied with the detailed quality standards.

In view of the Minister's attitude as expressed in the above-quoted passage from the letter dated 31 August 1970, viz., that the specific requirements were domestic arrangements which did not need his approval, there is something to be said for the factual basis upon which this argument rests, and I return to it later. However, if it were to be correct that the specific requirements were invalid because they lacked the Minister's approval, the result would not be that contended for by Mr. Dison. What is clear beyond doubt is that the Minister has not approved the payment of premiums for milk which falls short of the prescribed quality standards. As early as 25 November 1965

the Minister insisted (in the passage quoted above) that payment of quality premiums should be made only in respect of bulk milk complying with standards of quality and hygiene approved by the Board in co-operation with the Department of Agricultural Technical Services. There is no suggestion on the papers that the Minister's attitude in this respect has ever changed. Counsel's submission that the Minister must be taken to have approved the payment of a quality premium in a case like the present where the producer has, on the facts assumed for the purposes of this judgment, supplied milk which did not comply with the prescribed standards,cannot be sustained.

It follows from what I have said that it does not really matter for present purposes whether the Minister has sufficiently and effectively approved the requirements for the payment of quality premiums. If he has given an effective approval the Producer cannot claim the premiums because its milk did not comply with the Board's requirements. If no effective approval has been given, the Producer still cannot claim the

premiums because payment to it would not be in accordance with any approval given by the Minister. I would nevertheless like to add, even if it is obiter, that, in my view, the Minister has effectively approved the payment of quality premiums. In terms of section 26(2) of the Scheme he must approve the "manner" in which the Board is to deal with money in the special fund. In the present case he approved, on 4 October 1965, the payment of a premium in a specified amount (which was later, with his approval, increased) in respect of milk refrigerated and conveyed in bulk, provided that such premium was to be paid only for milk which complied with standards to be laid down in co-operation between the Board and the Department, as set out above. In my view this constituted a sufficient description of the "manner" in which the Board was to deal with the money for the purposes of section 26(2) of the Scheme, and the Minister was entitled to adopt the attitude reflected in the above-quoted letter of 31 August 1970 that the detailed standards laid down by the Board were a domestic matter which did not require his specific

approval. I assume, of course, that the standards were in fact laid down in co-operation between the two bodies as required by the Minister - a matter that was not canvassed on the papers, since the Producer did not then dispute that the Minister's approval had been given.

No point was made in argument - and, in my view, rightly so - of the fact that the Minister's approval of the payment of quality premiums was given in 1964, before the commencement of the Scheme. There are various bases upon which it may be held that such approval is still in force, but the simplest derives from the succession of control boards established by schemes for the marketing of milk and cream. The first such scheme was promulgated under proclamation R 8 of 1962 issued pursuant to the Marketing Act, no. 26 of 1937. Sections 19 and 20(2) of the 1962 scheme dealt with the imposition of special levies, their payment into special funds, and the manner of dealing with the money in special funds. These provisions do not differ in any material respect from the corresponding

provisions of the present Scheme.

The 1962 scheme was repealed and replaced by a new scheme promulgated under proclamation R 225 of 1966. Despite the repeal and the replacement, sections 19 and 22(2) of the scheme remained substantially unaltered. Section 31 of the 1966 scheme further provided, inter alia, that any authorization given under the 1962 scheme would be deemed to have been given under a corresponding provision of the 1966 scheme.

The 1966 scheme was in turn repealed and replaced by the present scheme, which contains a similar saving provision in section 50. And section 100(2) of the Act contains a saving provision for steps taken or things done under its predecessor, the 1937 Marketing Act. Pursuant to these various saving provisions approval given by the Minister of the manner in which the control board of an earlier scheme could deal with money in a special fund would have been carried forward to the present Scheme.

To sum up: my view is that the Producer has not shown

that it was entitled to payment of the disputed amounts from the Quality Purchases Fund, whether by way of quality premiums or otherwise. There can accordingly be no question of the Board having been guilty of "unlawfully ... withholding the repayment of premiums" as contemplated by prayer a) of the notice of motion, nor of the Board having claimed a right to "penalize" the Producer by "withholding, declaring forfeit or confiscating any such premium" as contemplated by prayer b).

In the court a quo the non-payment of the premium was regarded as a penalty, and, as stated above, the question was discussed whether the Board was entitled to impose such a penalty. Now, of course, a producer who does not obtain a quality premium is worse off than one who does and to that extent he suffers a disadvantage. However, the Board's actions which gave rise to this disadvantage were in my view, for the reasons which I have stated, authorized by the Scheme and the Act, and it therefore, with respect, serves little purpose to consider whether or not this disadvantage can be considered a penalty in

any sense of the word.

It follows from the aforegoing that in my view the application should not have been granted and that the appeal must succeed.

Finally I turn to the matter of costs. At the hearing before the court a quo the Producer applied for the striking-out of large parts of the Board's opposing affidavits and annexures thereto on the grounds that they were irrelevant or contained hearsay matter. In the result the trial court did not make any order on the application to strike out since it granted an order of costs in favour of the Producer(cf. the judgment (supra) at p. 738 C). For the purposes of the preparation of the appeal record the Producer agreed that the matter to which it had objected in its notice to strike out could be deleted from the record. The Board made substantial use of this consent, but still decided to include some passages to which objection had been taken. The Producer contended that the Board should be deprived of the costs of that part of the record. This

contention was made in general terms, and no attempt was made by the Producer's counsel to substantiate it with reference to specific passages. It will suffice therefore if I also deal with this matter in general terms and state that the record as presented to this court does not seem to me to contain sufficient objectionable matter to warrant a special order as to costs. As far as the papers in the court a quo are concerned, the fact that certain parts of the record could, without harm to the Board's case, be deleted on appeal does suggest that such parts should probably not have appeared in the record at all. However, as emphasized on behalf of the Board, we do not have the full record before us as it was presented to the court a quo. It is therefore impossible to come to a firm conclusion that the matter now deleted was irrelevant to the issues as they would have appeared to the Board when drafting its opposing affidavits, or was in other ways objectionable. I also did not understand Mr. Dison to contend that we can or should now determine whether the motion to strike out should have succeeded in whole or part.

I accordingly do not think we would be justified in making a special order for costs either in this court or the court a quo.

In the result the appeal is upheld with costs, including the costs of two counsel. The order of the Cape of Good Hope Provincial Division is set aside and replaced by the following:

"The application is refused with costs, including the costs of two counsel".

E M GROSSKOPF, JA

CORBETT, JA
HOEXTER, JA
BOTHA, JA
MILNE, JA
} Concur