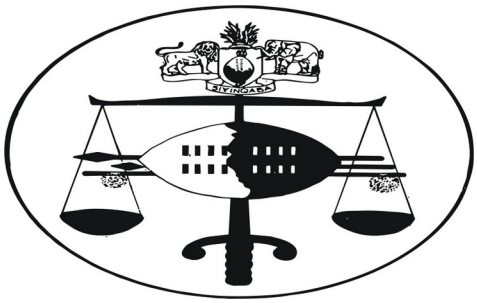

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Case No. 50/2011

In the matter between

SOUTHERN TRADING COMPANY (PTY) LIMITED	**Appellant**
and	
MINISTER FOR AGRICULTURE AND COOPERATIVES	**1st Respondent**
NATIONAL AGRICULTURAL MARKETING BOARD	**2nd Respondent**
ATTORNEY GENERAL	**3rd Respondent**
OVERSEAS INVESTMENTS (PTY) LIMITED t/a	
SWAZILAND OIL MILL INDUSTRIES (SOMI)	**4th Respondent**
MINISTER FOR COMMERCE, INDUSTRY & TRADE	**5th Respondent**

Neutral citation: Southern Trading Company (PTY) Limited *v Minister for Agriculture and Cooperatives, National Agricultural Marketing Board, Attorney General, Overseas Investments (Pty) Limited t/a Swaziland Oil Mill Industries (SOMI, Minister for Commerce, Industry & Trade* (50/2011) [2012] SZSC 17 (31 May 2012)

Coram: RAMODIBEDI CJ, DR TWUM JA, and AGIM JA

Heard: **18 MAY 2012**

Delivered: **31 MAY 2012**

Summary: **Review – Of the first respondent's decision to amend, by Legal Notice No.44 of 2011, the Scheduled Products Regulations promulgated in terms of s 15 of the National Agricultural Marketing Board Act 13 of 1985 by the addition thereto of the words "(h) all edible oil and crude oil from the following crops - Sunflower, groundnuts, cotton and soya beans"- Appellant contending that the impugned decision was *mala fide and* vitiated by illegality, procedural unfairness and irrationality – The appellant further seeking the Legal Notice in question to be declared null and void and of no force and effect – The High Court dismissing the application with costs – On appeal the appellant's appeal dismissed with costs.**

RAMODIBEDI CJ

[1] On 28 March 2011, and by Legal Notice No. 44 of 2011, the first respondent, acting in terms of s 15 of the National Agricultural Marketing Board Act No. 13 of 1985 ("The Act"), issued a regulation amending the Scheduled Products Regulations ("The Regulations") by adding in Regulation (h) a new product, namely, edible and crude oil from soya beans. The then existing list in terms of a previous amendment to the Regulations, namely Legal Notice No. 175 of 2010, was as follows: Sunflower, groundnuts and cotton.

[2] It is not disputed that the first respondent's decision referred to in the preceding paragraph enabled the second respondent to make a decision demanding that

all importers of edible oil must register and obtain permits from it. This decision was published by the second respondent in a notice in the Times of Swaziland on 28 April 2011.

[3] It is no doubt convenient to quote upfront s 15 of the Act which conferred the power on the Minister to issue the impugned Regulation. It reads as follows:-

> *"15. The Minister may make Regulations prescribing scheduled products and generally giving effect to the provisions of this Act."*

[4] As pointed out above, it is not disputed that the first respondent's decision referred to in paragraph [1] above enabled the second respondent to list edible oil as a scheduled product in the Regulations. Likewise, the decision enabled the second respondent itself to make a decision demanding that all importers of edible oil must register and obtain permits from it. Similarly, it enabled the second respondent to impose a 15% levy on the importation of edible oil. It is this latter decision which forms the bedrock of the present dispute.

[5] Against this background the appellant, a private registered company which conducts business as an importer and distributor of consumer goods including edible oils, launched review proceedings in the High Court against the respondents. It sought an order in the following terms:-

"1. The first respondent's decision to amend the Schedule Product Regulations promulgated in terms of section 15 of the National Agricultural Marketing Board Act 13 of 1985 by the addition thereto of the words '(h) All edible oil and crude oil from the following crops - sunflower, groundnuts, cotton and soya beans' is reviewed and set aside.

2. *Legal Notice 44 of 2011 published in Government Gazette No. 30 on 28th March 2011 is declared to be of no force and effect, and is set aside.*

3. *The second respondent's decision to impose an import levy of 15% on 'edible oil and products' is reviewed and set aside.*

4. *The notice of the second respondent's said decision published in The Times of Swaziland on 28 April 2011 is declared to be of no force and effect, and is set aside.*

5. *The first and second respondents are ordered to pay the costs of this application including costs of counsel as certified in terms of High Court Rules 68 (2) save in the event of opposition by the fourth and fifth respondents, in which the event the party opposing is to pay the costs occasioned by its opposition.*

6. *Further or alternative relief."*

[6] After hearing submissions, the High Court dismissed the appellant's application with costs including costs of counsel as certified in terms of the High Court Rules 68 (2).

[7] The appellant is aggrieved by the decision of the High Court. It relies on four grounds of appeal, namely:-

(1) That the amendment of the relevant Regulations is unlawful because it contravenes binding international law obligations of the Kingdom of Swaziland under Article 25 (3) of the Southern African Customs Union ("SACU") Agreement of 2002.

(2) That the decision was taken without complying with the requirement of procedural fairness including the requirement that the decision – maker must apply his/her mind properly to the matter. In elaboration, the appellant complained that the court *a quo* erred in finding that the first respondent had observed the rules of natural justice and in particular the *audi alteram partem rule.*

(3) That the decision was taken for an impermissible and ulterior purpose, namely, to benefit one supplier, namely the fourth

respondent at the expense of other suppliers such as the appellant.

(4) That the decision was not rationally justifiable, having regard to the purpose for which the Act was enacted.

[8] The facts were comprehensively summarised by the court *a quo*. It is not necessary to repeat the exercise in this judgment, save insofar as it is strictly necessary to do so. The parties filed long-winded affidavits. Thus, for example, the appellant, on the one hand, relied on the founding affidavit of its Managing Director, Brian Marsh, which comprised no fewer than 119 paragraphs. There were no fewer than 19 documents attached as annexures. For good measure, Brian Marsh deposed to a supplementary affidavit comprising a further 27 paragraphs. The first respondent, on the other hand, filed an answering affidavit comprising 40 paragraphs.

[9] The gravamen of the appellant's complaint giving rise to the application for review is contained in paragraph 18 of Brian Marsh's founding affidavit in these terms:-

"18.1 The amendment to the Regulations is unlawful because it causes the Kingdom of Swaziland to breach its obligations

under Article 25(3) of the Southern African Customs Union Agreement of 2002;

18.2 The promulgation of the amendment and the imposition of the 15% import levy was procedurally unfair because, prior to these actions being taken, the applicant was not given a hearing or at least was not given a genuine and fair hearing;

18.3 The decision-makers failed to apply their minds to the decisions because they did not have the applicant's representations before them when they made their decision, alternatively they failed to properly consider these representations;

18.4 In imposing the levy the second respondent exercised its power to impose a levy mala fide or for an ulterior purpose, that being to benefit a specific private competitor of the applicant and not in pursuit of a legitimate governmental objective;

18.5 The decisions are irrational because they are based on incorrect assumptions and a mistaken understanding of the facts and objectively viewed will not promote or tend to achieve their stated purpose, but will rather cause unjustifiable harm to the applicant and to ordinary citizens of the Kingdom of Swaziland."

As can be seen, these complaints form the crux of the appellant's grounds of appeal as fully highlighted in paragraph [7] above.

[10] In paragraph 7 of his answering affidavit the first respondent denied all the allegations made by the appellant in the preceding paragraph. I shall deal with his response in some detail later in the course of this judgment. It shall suffice at this stage to stress that he relies on s 15 of the Act fully reproduced in paragraph [3] above.

[11] It is instructive to stress that s 15 of the Act confers power on the first respondent as the responsible Minister to make regulations prescribing scheduled products, something which is plainly consistent with the objective of the Act, namely, to regulate the importation and exportation of scheduled agricultural products. There is no challenge to the first respondent's power on that score.

[12] It is convenient at this stage to consider the appellant's grounds of appeal as fully highlighted in paragraph [7] above. But, before doing so, it is necessary to observe that they are plainly premised on the common law principles for review as stated in Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL); [1984] 2 ALL ER 935 (HL). That case is authority for the proposition that judicial review may be exercised where decisions are found to be defective due to illegality, irrationality and procedural impropriety.

ILLEGALITY

[13] As will be recalled, the appellant's complaint on this ground is that the amendment of the Regulations in question is unlawful because it contravenes Article 25 (3) of the SACU Agreement. There is indeed a presumption that a statute will not be interpreted so as to violate a rule of international law. Indeed, s 61 (1) (C) of the Constitution expressly provides that in its dealings with other nations the Government shall *"promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means."* As correctly pointed out by G.M. Cockram: Interpretation of Statutes, third Edition at p 131, the courts will endeavour to adopt a construction that will avoid a conflict between municipal law and international law.

[14] In order to appreciate the full import of Article 25 (3) of the SACU Agreement on which the appellant relies for illegality, it is necessary to reproduce the whole Article:-

> *"(1) Member States recognize the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the Council.*

(2) Except in so far as may be agreed upon between the Member States from time to time, the provisions of this agreement shall not be deemed to suspend or supercede the provisions of any law within any part of the Common Customs Area which prohibits or restricts the importation or exportation of goods.

(3) The provisions of paragraphs 1 and 2 shall not be so construed as to permit the prohibition of restriction of the importation by any Member State into its area of goods grown, produced or manufactured in other areas of the Common Customs Area for the purpose of protecting its own industries producing such goods.

(4) A Member State shall upon request by any other Member State take such steps as may be agreed upon between the Member States concerned to prevent the exportation or unrestricted exportation from its area to the area of such other Member State of such prohibited or restricted goods from outside the Common Customs Area or grown, produced or manufactured in its area or to prevent the exportation or unrestricted exportation from its area to a state outside the Common Customs Area of such prohibited or restricted goods imported from the area of such other Member State. The expression 'prohibited or restricted goods' includes second hand goods imported from outside the Common Customs Area.

(5) Member States shall co-operative in the application of import restrictions with a view to ensuring that the economic objectives

of any import control legislation in any state in the Common Customs Area are attained."

[15] It is fundamentally important to note that Article 25 (1) itself contains an exception which unmistakably gives the Member States the superior right, as may be agreed between themselves, to pass municipal laws prohibiting or restricting the importation or exportation of goods for economic, social, cultural or other reasons as they deem fit for their respective countries.

[16] Accordingly, the respondents on the other hand rely on Article 26 of the SACU Agreement which permits a Member State, such as Swaziland, to impose a levy on imported goods in order to protect its own infant industries. The Article reads as follows:-

"Article 26
Protection of infant industries

1. *The government of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into its area to meet competition from other producers or manufactures in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another*

Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.

2. *Infant industry means an industry which has been established in the Area of a Member State for not more than eight (8) years.*

3. *Protection afforded to an infant industry in terms of paragraph 1 shall be for a period of eight (8) years unless otherwise determined by the Council.*

4. *The Council may impose such further terms and conditions as it may deem appropriate."*

[17] Article 26 must be read in conjunction with Article 18 (1) (2). The latter reads as follows:-

"1. *Goods grown, produced or manufactured in the Common Customs Area, on importation from the Area of one member state to the Area of another Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement.*

2. *Notwithstanding the provisions of paragraph 1 above, Member States shall have the right to impose restrictions on imports or exports in accordance with National Laws and regulations for-*

(a) health of humans, animals or plants;

(b) the environment;

(c) treasures of artistic, historic or archaelogical value;

(d) public morals;

(e) intellectual property rights;

(f) national security; and

(g) exhaustible natural resources."

[18] It will be seen that Article 18 (1) contains an important exception to the free movement of domestic products in the common customs areas insofar as customs duties and quantitative resolutions (1) (2) are concerned. More importantly, Article 18 (2) expressly empowers Member States to impose restrictions on imports or exports in accordance with national or municipal laws for, amongst others, the health of humans. It cannot seriously be disputed that edible oil qualifies for the health of humans.

[19] Properly construed, therefore, Articles 18 and 25 (2) and (3) have this attribute in common, in my view. They both seek to elevate the municipal law above the SACU Agreement. That, as it seems to me, is by design in order to safeguard national interests. The conclusion is thus inescapable, in my opinion, that the SACU Agreement does not supercede the relevant provisions of the Act. In reaching the same conclusion the court *a quo* also took into account the fact, as it put it, that the SACU Agreement had not yet been ratified in this country as contemplated by Article 46 of the Agreement.

The court erred in that regard. At the hearing of the appeal in this Court, Mr Kennedy SC, counsel who appeared for the appellant, moved an application to allow the introduction of additional evidence in the form of annexure "B." This is styled "INSTRUMENT OF RATIFICATION", dated 5 February 2004. Both Mr Flynn for the first, second, third and fifth respondents and Mr Hulley for the fourth respondent had no objection to the application. This Court accordingly admits the document in this appeal. It reads as follows:-

> "***WHEREAS*** *the Southern African Customs Union Agreement was done at Gaborane, 21st October, 2002.*
>
> ***AND WHEREAS*** *it is provided under Article 45 that the aforesaid Agreement shall be ratified by its signatory States.*
>
> ***THE GOVERNMENT OF THE KINGDOM OF SWAZILAND*** *having considered the aforesaid Agreement hereby* ***CONFRIMS*** *and* ***RATIF[IES]*** *the same and undertakes to abide by the stipulation therein.*
>
> *In* ***WITNESS WHEREOF, I, MABILI DAVID DLAMINI,*** *Minister of Foreign Affairs and Trade of the Kingdom of Swaziland have hereunto set my hand and affixed the seal of the Kingdom of Swaziland.*
>
> ***Done at MBABANE****, this 5th day of FEBRUARY 2004*

(signed)

MABILI DAVID DLAMINI

MINISTER OF FOREIGN AFFAIRS AND TRADE."

[20] It is plain, therefore, that Swaziland has ratified the SACU Agreement. The conclusion, however, that this Agreement does not supercede Articles 18 (1) (2) and 25 (2) and (3) of the Act renders the court *a quo's* error referred to in the preceding paragraph inconsequential in the circumstances.

[21] It is important to note that the crux of the appellant's case is premised on the supposition that the impugned amended Regulation contravenes binding international law obligation of this Kingdom under Article 25 (3) of the SACU Agreement. Hence, it is contended on the appellant's behalf that the Regulation is unlawful. I should point out at this stage that a greater part of the submissions in this Court was devoted to this aspect of the matter.

[22] In my judgment, there is one short answer to the appellant's case on the alleged violation of international law. It is this. Section 238 (4) of the Constitution expressly provides that unless it is self-executing, an international agreement, such as the one in issue here, becomes law in

Swaziland only when enacted into law by Parliament. It is common cause that there is no such law enacted by Parliament in this country. Mr Kennedy SC sought to overcome this hurdle by submitting that s 238 applies prospectively and not retrospectively. He relied on s 279 of the Constitution for the proposition that existing treaties shall not be affected prospectively after the coming into effect of the 2005 Constitution. This section provides as follows:-

> *"279. Where Swaziland or the Government was a party immediately before the commencement of this Constitution to any treaty, agreement or convention, such treaty, agreement or convention shall not be affected by the commencement of this Constitution, and Swaziland or the Government as the case may be, shall continue to be party to it."*

[23] Section 279, however, does not detract from the provisions of s 238 (4) of the Constitution to the effect that in this country an international agreement becomes law only when enacted as such by an Act of Parliament. What s 279 does is simply to recognise the existing international agreements without seeking in any way to convert them into law. Such a process is governed by s 238 (4). It follows from these considerations that Mr Kennedy's argument on this point is untenable.

[24] The logical effect of the conclusion that the SACU Agreement has not been enacted into law as envisaged by s 238 (4) of the Constitution is that the appellant has, in my view, failed to establish any contravention or violation of international law in the matter.

[25] It is convenient to pause there and mention another twist to this matter. The appellant's next contention was that the respondents failed to show that an infant industry had been established in this country in term of s 26 of the SACU Agreement. Quite clearly, this is a question of fact to be determined from the affidavits and annexures filed of record. In this regard the paragraphs reproduced hereunder will suffice.

[26] In paragraph 35 of his founding affidavit Brian Marsh averred as follows:-

> *"35. The fourth respondent is an entity that conducted business until February 2010 in the edible oil industry. It is commonly referred [to] by the acronym SOMI. I do no know or have more detailed information concerning the legal nature of this entity, except that it is owned partly or wholly by foreign investors including a certain Mr Dauds."*

It is plain from this paragraph that Brian Marsh concedes that the fourth respondent conducts edible oil industry. In my view, it can only be able to do so if the industry has been established.

[27] In paragraphs 4.1 and 4.2 of her supplementary answering affidavit, the fourth respondent's Director, Phumelele Dlamini, made the following uncontroverted averments:-

> *"4.1 The edible oil in Swaziland is relatively still at infancy level with only one producer that imports crude oil and processes it into the finished product. Prior to the single producer, all edible oil consumed in the country was imported mainly from South Africa by local distributors.*
>
> *4.2 The single producer [was] established in the country in August 2007. The total investment in the project is estimated at E60 million with 70 percent of the capital financed from local institutions. The factory consists of a 50 ton per day sunflower seed crushing plant, an oil mill at 30 tons per day oil refinery and an automated bottle filling plant."*

These averments were not met issuably at all and must, therefore, be accepted as correct.

[28] Furthermore, it is important to note that in paragraph 35 of his replying affidavit Brian Marsh made the following damaging averment which can only mean that edible oil industry has been established in this country:-

> *"35. What the respondents cannot deny is that the only producer claiming to be a manufacturer of edible oil in Swaziland is the fourth respondent (SOMI). It is the only participant in the edible oil industry that will benefit from the import levy's imposition."*

[29] In fairness to him, the appellant's counsel conceded in argument before this Court that edible oil industry had been established in this country. He submitted, however, that the industry stopped at some stage in the past. It requires to be stated, however, that it is the respondents' case that the industry experienced unbearable competition caused by the influx of oil imported from South Africa. It is their case that it was precisely for that reason that resort was made under Article 26 of the SACU Agreement to protect the infant oil industry in the country.

[30] It follows from the foregoing considerations that the respondents' version that edible oil industry has been established in this country must be accepted as correct on the authority of Plascon Evans Paints v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623(A) at 634 H – 635C. That case is authority for the proposition that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order may only be granted if the facts averred in the applicant's affidavits which have been admitted by the

respondent, together with the facts alleged by the respondent, justify such an order.

PROCEDURAL IMPROPRIETY AND IRRITIONALITY

[31] It will be convenient to consolidate together the appellant's complaint relating to procedural impropriety and the complaint relating to irrationality on the part of the first and second respondents in promulgating the impugned Regulations. It will be recalled from paragraph 18 of Brian Marsh's founding affidavit that the appellant complains that the first respondent, as the repository of power, failed to apply his mind to the decision promulgating the Regulations in question because he failed to have, alternatively consider, the appellant's representations. The appellant also complains that in imposing the 15% levy on soya beans, the second respondent acted *mala fide* or for an ulterior purpose to benefit a specific private competitor, namely, the fourth respondent and not in pursuit of a legitimate governmental objective. Furthermore, the appellant complains that the decisions of the first and second respondents respectively are irrational.

[32] In order to properly address these complaints, it is necessary to have regard to the background leading up to the promulgation of the impugned

Regulations. It is not disputed that before promulgating these Regulations, the first respondent engaged a consultant to conduct a study on the need for the protection of edible oil industry in this country in accordance with Article 26 of the SACU Agreement. Furthermore, it is not disputed that the purpose of the study was, in the words of the first respondent in paragraph 34.5 of his answering affidavit, also to *"identify interventions that government could adopt to nurture the edible oil industry during its infancy stage to improve its competitiveness."* Hence, the first respondent is unchallenged in paragraph 38 of his answering affidavit in which he stated the following:-

> *"The imposition of the import levy on edible oil is based on a study that objectively examined the volume of the competing imports and the effect of the competing imports on prices in the domestic industry for like products; and the consequent impact of these competing imports on domestic producers of such products. The study concluded that the imports were suppressing the development of the domestic industry hence the imposition of the levy."*

[33] Similarly, Phumelele Dlamini is unchallenged in her crucial averment in paragraph 7 of her supplementary answering affidavit in these terms:-

> *"The decision to amend the Regulations to include sunflower, groundnuts, cotton and soya beans is in line with the Swaziland Government's development and industrialization policies."*

[34] It must be stressed that the impugned Regulations were informed by Government's policy to promote diversification and industrialisation in the national interest. In this regard, this Court accepts the following uncontroverted averments of the first respondent in paragraph 36 of his answering affidavit:-

> *"I deny that the imposition of the levy is designed to serve the commercial interest of a particular commercial party. The purpose if the imposition of the levy is to assist the infant edible oil industry to meet competition from similar products from the Common Customs Area; and to enhance the process of economic development, diversification, industrialization and competitiveness of the edible industry."*

Similarly, the Court accepted the uncontroverted averments of Phumelele Dlamini in paragraph 3.2.1 and 3.2.2. of her supplementary answering affidavit:-

> *"3.2.1 Government's interest to promote industrialization are enshrined in the National Development Strategy. Government recognizes the need to diversify from agriculture into industry and services, as well as from the narrow range of non-agricultural activities into a broader spectrum of economic activities. Hence it is important for Swaziland to identify feasible areas for industrial development. Maximizing value addition on agricultural output and promoting sectors with strong backward and forward linkages is important for*

Government and is one of the important elements for industrialization. The edible oil industries has been identified as one sector that has huge industrial potential with strong backward and forward linkages.

3.2.2 It is Government's interests to diversify her exports and increase export earnings through the promotion of export oriented industries. Since the edible oil industry has great export potential, it presents an opportunity to increase export (sales) earnings and improve the country's balance of payment position."

[35] Reverting now to the appellant's complaint as fully summarized in paragraph [31] above, consider that it is not seriously disputed that the appellant was afforded adequate hearing in the circumstances. The first respondent is unchallenged in his averments in paragraph 34 of his answering affidavit to the effect that the appellant and other stakeholders were invited to a workshop on 21 October 2010 to discuss and make comments on the draft report on the study by the consultant. Nor is it disputed that "comments by stakeholders were taken and were considered when the final report was prepared." Indeed, in paragraph 26 of his answering affidavit Brian Marsh does not contest these allegations. He merely says the following:-

"*26.1 The issue is not whether the Minister is bound by the views and recommendations of the consultants. The issue in relation to*

procedural fairness is whether the representations of the applicant were properly considered not by the consultants, but by the Minister, for it was he who took the decision.

26.2 There is no evidence to show that the Minister did in fact consider our detailed representations submitted to the consultants – including those which were not even passed on by the consultants to the Minister, as appears from the record filed in terms of Rule 53.

26.3 Nor is there any reference in the report by the consultants to the Minister which adequately conveyed the content and import of our representations."

[36] Perhaps more importantly, by letter annexure "NC51" dated 25 August 2010, the appellant's attorneys made written lengthy submissions" in which they registered their concerns regarding the proposed regulation. It is simply not correct in these circumstances that the appellant was not given an opportunity to be heard.

[37] In effect, it was submitted on the appellant's behalf in this Court, that when government wants to make policy or even regulations, as in this case, it is legally obliged to consult or give a hearing to interested persons. This submission was made on the basis that such a decision amounts to an administrative action. I do not agree. Such a proposition is ominous. It

would inhibit government from effectively discharging its functions. Certainly, the Act itself does not contain such a sweeping statements. As was pointed out to counsel during argument, this would mean that if, for example, the Minister wants to increase petrol price by regulation in the natural interests he must first consult all the combi owners. While it may be advisable to do so, it is certainly not obligatory. The appellant's relied, amongst on the case of Minister of Health and Another No xx v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae 2006 (2) SA 311 (SCA). As counsel himself correctly conceded, however, that case was decided on the basis of a unique legislation, namely, the promotion of Administrative Justice Act 3 of 2000 Swaziland does not have a similar legislative or constitutional provision. In fact, there is no reference to the words "administrative action" in our Constitution. ?as well as s 33 of the Constitution of South Africa which expressly permits review of administrative action. The case is thus distinguishable.

[38] The appellant's allegation that in importing the 15% levy on soya beans the second respondent acted *mala fide or* for an ulterior purpose, being to benefit the fourth respondent was unsubstantiated. Not only was this allegation refused by the respondents but the Consultant did not find any evidence of

the sort. In paragraph 10.6 of the report the following crucial findings were recorded:-

> "*There is no evidence to suggest that the domestic producer entered the market or invested in Swaziland with the intention of creating a monopoly in this industry. It is proven and a fact as well that there have been a lot of players in this industry both local and foreign based but none have attempted to annex the opportunity of being a producer given the fact that Government has always been prepared to support any other new market entrant under the auspices of producer. It is clear therefore that Government has continued to exercise fair play in terms of supporting where possible the development of any industry and such commitment remains even if a second edible oil producer can setup base in the country.*"

[39] It follows from the foregoing that the court *a quo* was correct in finding that there was no illegality nor irrationality nor procedural improperly committed by the first and second respondents respectively in the promulgation of the impugned Regulations.

[40] In the result, the appeal is dismissed with costs including the costs of senior counsel certified in accordance with Rule 68 (2) of the High Court Rules.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

DR S. TWUM
JUSTICE OF APPEAL

I agree

E.A. AGIM
JUSTICE OF APPEAL

For Appellant : Adv Paul Kennedy S.C.

For 1st, 2nd, 3rd and 5th Respondents : Adv P.E. Flynn

For 4th Respondent : Adv G.L. Hulley