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.

11/11/2014

DATE SIGNATURE

CASE NO: 64056/2014

DATE: 2014 November ~~10~~ 11

IN THE MATTER BETWEEN:

QUICK DRINK CO (PTY) LTD	**FIRST APPLICANT**
MEGACOR INVESTMENTS (PTY) LTD	**SECOND APPLICANT**
AND	
MEDICINES CONTROL COUNCIL	**FIRST RESPONDENT**
REGISTRAR OF MEDICINES	**SECOND RESPONDENT**
MINISTER OF HEALTH	**THIRD RESPONDENT**
DIRECTOR-GENERAL OF THE DEPARTMENT OF HEALTH	**FOURTH RESPONDENT**
GAUTENG DEPARTMENT OF HEALTH	**FIFTH RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. This is an application in terms of which the applicant seeks the following relief in Part A of the Notice of Motion:
   a) An order condoning the applicants' non-compliance with the Uniform Rules of Court and directing that the matter be heard on an urgent basis in terms of Rule 6(12)(a);
   b) An order interdicting the respondents from applying the Medicines and Related Substances Act 101 of 1965 ('the Medicines Act') against the applicants and, in particular, from seizing or in any manner detaining Playboy electronic cigarettes and hookahs pending the final determination of the relief sought in Part B hereunder.
   c) Pending the final determination of the relief sought in Part B hereunder the decision of the first, fourth and fifth respondents, or any one or more of them, to seize or otherwise detain the first applicant's consignment of Playboy electronic cigarettes and hookahs on 20 February 2014 is set aside;
   d) Pending the final determination of the relief sought in Part B hereunder interdicting the respondents from enforcing or applying the provisions of the Medicines Act selectively against the applicants in relation to electronic cigarettes and hookahs in any manner that is discriminatory as against the applicants;
   e) Ordering the respondents who oppose the relief sought in Part A to pay the costs of Part A on a joint and several basis, the one paying the other to be absolved

The following relief is sought in Part B of the application:

   a) Reviewing and setting aside the decisions of the third respondent of 15 March 2012 and 11 February 2014 to amend Schedules 1, 2, and 3 of the Medicines Act to include nicotine as a scheduled substance;
   b) Insofar as this is an application for review under the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') if necessary, granting an

extension of time in terms of section 9(1) (b) of PAJA until the date of institution of this application.

BACKGROUND FACTS

2. This is an application involving the seizure by the first respondent of a consignment of e-cigarettes which were imported into South Africa by the first applicant under the name Playboy e-cigarettes.

3. An e-cigarette is described by the applicant as follows:

> '*An e-cigarette is a battery-powered device which simulates smoking by producing a vapour that resembles smoke. E-cigarettes use a heating element known as an atomizer to vaporize a liquid solution. Some solutions contain a mixture of nicotine and flavourings, while others release a flavoured vapour without nicotine*'.

4. It appears that e-cigarettes are widely sold and distributed in South Africa and the applicant alleges that a company Twisp distributes e-cigarettes nationwide, including through distribution agreements with Clicks and Engen. In addition it states that e-cigarettes are sold at kiosks, tobacconists and other retailers under the following brand names:

> 'Magic Label Electronic Cigarette Hookahs;
> Green Smoke Electronic Cigarettes;
> HATS Disposable Electronic Cigarettes;
> Greensmoke Tobacco Gold Cigarettes; and
> Twisp Cigarettes.'

5. It was not in dispute that despite e-cigarettes being widely available for sale to the public from a variety of outlets, the first respondent has not to date, other

than by the seizure of the consignment which is the subject of this application, taken any steps or measures against any other importer, distributor or retailer of e-cigarettes.

6. The seizure of the applicant's consignment of e-cigarettes took place on the 20th of February 2014 following an inspection by inspectors from the Gauteng Department of Health at the applicant's clearing agent's premises in Johannesburg.

7. There was an exchange of correspondence between the applicants and some of the respondents with a view to resolving the dispute that had arisen as to whether e-cigarettes are a medicine and / or a scheduled substance as defined in the Medicines and Related Substances Act 101 of 1965.

8. In correspondence the applicant's stance could be summarised as follows:
    - That the part of the consignment of e-cigarettes that contained no nicotine should be released immediately;
    - That the first to the fifth respondents should provide details of the grounds relied upon for Schedule 3 to be applied to e-cigarettes;
    - That confirmation was sought that the Medicines Act was being uniformly applied to all importers and distributors of e-cigarettes.

9. Section 22A(1) of the Medicines Act provides that, subject to the section, 'no person shall sell, have in his possession or manufacture any medicine or scheduled substance, except in accordance with the prescribed condition'.
In terms of section 1 of the Medicines Act:

> Medicine means 'any substance or mixture of substances used or purporting to be suitable for use or manufactured or sold for use in -
> (a) the diagnosis, treatment, mitigation, modification or prevention of disease, abnormal physical or mental state or the symptoms thereof in man; or

(b) restoring, correcting or modifying any somatic or psychic or organic function in man,

and includes any veterinary medicine.

'Scheduled substance' means 'any medicine or other substance prescribed by the Minister under Section 22A.

10. The first respondent took the following position in response to the request by the applicant with regard to the applicability of the Medicines Act:

'The remaining products as per your list supplied to us on 08/05/2014, contain nicotine which, based on the intended purpose, are regarded as medicines. You are therefore requested to apply for registration of the said products in terms of Section 14(2) of the Medicines Act before permission can be granted for the release of these products. Your attention is invited to the MCC website: www.mccza.com that lists the documents for medicines' registration.

Should you elect not to register your products in terms of the Medicine Act and you wish to re-export them, permission for such re-exportation of these unregistered products, is hereby granted.'

11. The applicant continued to engage the first respondent with regard to a possible resolution of the matter. In addition it also made enquiries with regard to how the Act was being applied and / or enforced against other e-cigarette importers, manufacturers and retailers.

By then it became evident that the applicant would have to embark on litigation and this application was launched in August 2014 on a semi-urgent basis on the basis that the consignment that has been seized has a shelf life and will expire in February 2015.

THE ISSUES IN DISPUTE:

- **URGENCY**

12. When one has regard to the time-line of events to which reference has already been made, then the applicant from the time the consignment was seized, acted reasonably and prudently in pursuing its rights and trying to resolve the matter. This included correspondence and meetings with the respondents as well as its own enquiries with regard to the manner in which the Act has been applied and enforced. I am accordingly satisfied that the matter is urgent, regard being had both to the nature of the relief claimed as well as the manner in which the applicant acted to assert and protect what it regarded as an infringement of its proprietary rights.

- **MERITS**

13. The two issues in dispute are:
    - The claim of selective enforcement of the Act against the applicant; and
    - The assertion that the seizure of the consignment was not in accordance with the Act, regard being had to the definitions of both 'medicine' and 'scheduled substance'.

➢ **The Case for selective enforcement**

14. The Applicants, relying on Section 6(2)(i) of PAJA which permits a Court to review and set aside an administrative decision if 'the action is otherwise unconstitutional or unlawful' contend that the seizure of the applicant's consignment was unlawful and unconstitutional in that it constituted the selective application of the Medicines Act *vis a vis* the applicant and to the exclusion of all other e-cigarette importers, manufacturers and retailers.

15. In this regard they point out that:
    a) E-cigarettes are readily available at kiosks, tobacconists and retailers;

b) Twisp, a South African company, is, to the knowledge of the first respondent, manufacturing e-cigarettes and distributing them throughout the country while there are also a number of other e-cigarette brands on the South African market, including Magic Label, Green Smoke and HATS;

c) That none of the e cigarettes manufacturers, distributors and / or retailers have been the subject of any enforcement action by the first respondent with regard to its business relating to e-cigarettes.

Indeed during argument it was accepted that the seizure of the applicant's consignment of e-cigarettes was the first and thus far the only instance of the enforcement of the Medicines Act relative to e-cigarettes.

16. The applicants on the basis of the above information and enquiries conducted, took the position in their founding affidavit that the Medicines Act was not being applied generally and equally to all cigarette consumers, retailers, wholesalers and manufacturers and called on the respondents to show evidence of:

- Investigations into those who manufacture, import, wholesale, distribute, and retail e-cigarettes;
- Searches and seizures of e-cigarettes;
- Interdicts against manufacturers, importers, distributors, and retailers prohibiting them from dealing with e-cigarettes; and
- Prosecutions against manufacturers, distributors, and retailers of e-cigarettes

17. In addition the applicant took the following position as a result of the inquiries it had made:

> *'Quick Drinks is unable to discern any permissible reason why it has been targeted for seizure of its e-cigarettes while the other retailers,*

wholesalers, and consumers of e-cigarettes are permitted to possess and otherwise deal with e-cigarettes.

Quick Drinks expressly calls on the respondents to provide the grounds on which it targeted Quick Drinks and its consignment for a search and subsequent seizure and did not target other manufacturers, importers, wholesalers, retailers and consumers.

If the respondents provide no such grounds the reasonable inference to draw is that there is no permissible, rational, and non-arbitrary reason for treating Quick Drinks and its e-cigarettes differently to other wholesalers, retailers, and consumers of e-cigarettes.

18. The response to these allegations of the selective enforcement of the Act by the first respondent was as follows:

> *'The fact that the council has not been able to successfully enforce its regulations throughout the whole country, does not detract the legal duty of enforcement but points to capacity constraints issues which the Council is currently working on'.*

As I understand it the respondents do not specifically deny knowledge of the existence and activities of other e-cigarette manufacturers, retailers, distributors, wholesalers and importers and do not deny that the seizure of the applicant's consignment has been the only instance of enforcement relating to e-cigarettes thus far. They simply contend that capacity constraints have prevented them from enforcing the Act throughout the country.

19. It is against the above factual scenario that one must then consider the applicant's arguments that the seizure, to the extent that it constituted a selective act of enforcement, falls to be set aside as being unlawful and unconstitutional.

20. Section 9(1) and Section 9(2) of the Constitution create the guarantee of equality and provides in a simple but powerful formulation that:

> *'Everyone is equal before the law and has the right to equal protection and benefit of the law;*
> *Equality includes the full and equal enjoyment of all rights and freedoms.'*

20. In ***HARKSEN v LANE NO AND OTHERS*** **1998(1) SA 300 (CC)** the Constitutional Court held as follows (at 320A):

> *'Where s 8 is invoked to attack a legislative provision or executive conduct that the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of s 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of s 8(1).'*

21. In ***PRINSLOO v VAN DER LINDE AND ANOTHER*** **1997 (3) SA 1012 (CC)**, the Court said:

> *'In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner.'*

22. The rationality requirement has indeed become a broader and more extensive requirement in the context of the rule of law. In the matter of ***PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SOUTH AFRICA:*** **IN RE EX PARTE** ***PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS*** **2000 (2) SA 674 (CC)**, the Court said (at 708D-E):

> *'It is a requirement of the rule of law that the exercise of power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.'*

23. In ***PRETORIA CITY COUNCIL v WALKER*** **1998 (2) SA 363 (CC)**, the Court took the view that the rationality criterion adopted in Prinsloo was equally applicable whether in dealing with 'equality before the law' or the 'equal protection of the law'. Clearly the requirement of rational differentiation applies even where the State is purporting to enforce a law, regulation or policy which it is otherwise entitled to enforce.

24. Finally in ***KALIL NO AND OTHERS v MANGAUNG METROPOLITAN MUNICIPALITY AND OTHERS*** **2014 (5) SA 123 (SCA)** the Court in the context of characterising the duty that rests upon public servants in dealing with a challenge to the legality of their action said the following:

> *'This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed*

upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance.'

25. In responding to the case for selective enforcement , the respondent seeks to rely on the decision in ***AK ENTERTAINMENT CC v MINISTER OF SAFETY AND SECURITY AND OTHERS* 1995 (1) SA 783 (ECD)** where the Court in dealing with an equality challenge with regard to the manner in which gambling laws were enforced, found that 'a transgression of section 8(1) or (2) will arise only if the organ of State intends to apply the law unequally or if the law is enforced according to a principle which has a discriminatory effect due to some characteristic of the discriminatee' (at page 789I).
Inconsistent application of the law does not *per se* transgress the rights contained in section 8 (Section 8 was the corresponding section in the Interim Constitution which dealt with the right to equality).

26. Accordingly there are two questions that arise in adjudicating the attack based on selective enforcement:
    a) Do the facts establish that the seizure of the applicant's consignment was an instance of selective enforcement?;
    b) If so, does this constitute a basis upon which the seizure may be set aside as being unlawful and / or unconstitutional in terms of Section 6(2)(i) of PAJA?

THE FACTUAL ASSESSMENT

27. When one has regard to the facts which are largely not in dispute, then what emerges is that despite the existence of a number of importers, manufacturers and retailers of e-cigarettes, some of whom have been selling e-cigarettes to the public at generally well-known outlets (such as Clicks and Engen), the seizure of the applicant's consignment was the first and thus far, the only act of enforcement of the Medicines Act relative to e-cigarettes.

28. While the first respondent has intimated that limited resources have prevented it from enforcing its regulations throughout the country, it provides no further information with regard to those resources and how, to date, they have been deployed. In this regard and accepting that the first respondent was limited by the resources at its disposal, one would have hoped and perhaps expected of it to take action against those already involved in the large-scale selling of e-cigarettes as opposed to seizing a consignment in a warehouse, which has not yet even reached the market. Of course one is not directing how the first respondent uses its resources, but its use of those resources in the manner in which it did, can hardly be said to represent a strategic and careful use of limited capacity when on the face of it, it would have simply been more effective and cheaper to have sought to enforce against at least some of those who were already involved in the retail market.

29. The first respondent was called upon in precise terms by the applicant to provide the grounds upon which it (the applicant) was targeted for enforcement and they were placed on terms that, in the absence of such grounds being furnished, the applicant would seek to draw the reasonable inference that there was no permissible, rational and non-arbitrary reason for treating it differently from other suppliers of e-cigarettes. In response to this invitation, the stance of

the first respondent was simply that it faced capacity constraints. One would have expected more of an organ of State in this regard when faced with both evidence of limited and / or possibly selective enforcement.

30. In this regard the Court accepts unequivocally that law enforcement in an ideal society should be even-handed and consistent. It is also so however that the State can never be expected to enforce the law against all possible violators at all times. Where resources are limited, it may be unreasonable to expect every potential defaulter to face the might of the law. Under such circumstances the law may then be enforced in an unequal and possibly haphazard manner and I cannot imagine that it would be open to someone to challenge such an act of enforcement on that basis alone.

31. Public policy considerations and the efficacy of public administration as well as the integrity of an effective law enforcement function, would all militate against the notion that an individual against whom a law is sought to be enforced, may purely on account of an assertion that the law being enforced against him / her is not being equally or uniformly applied to other wrongdoers, escape liability on account of that. It would however be a different matter when beyond being unequally enforced, the law is enforced in a selective manner and where no rational basis for the selectivity exists. Selectivity must be an option open to law enforcement agencies. There may be many viable reasons why a law is selectively enforced – the selection may enhance the efficacy of the system or the selection may be justified by the availability of resources. Accordingly even though the concept of selective enforcement may appear to be at odds with the values of equality, there may well be cogent justification for it and it would appear to me that given that rationality is a part of the rule of law, selective enforcement would pass constitutional muster when it is rational. If this were not the case it would be open to law enforcement agencies, who carry both enormous power as well as responsibility in applying and enforcing the law, to do so irrationally and to the prejudice of those affected.

32. In this case it would have been known to the first respondent that there were many importers, manufacturers, wholesalers and distributors of e-cigarettes in the South Africa market, most of whom were already doing business in the public retail space. If those businesses represent a group, then it is indeed inexplicable why enforcement was chosen in respect of only one business within that group. It is also inexplicable why enforcement was chosen against a business that had not yet begun retail operations. Clearly the selection made and the failure by the first respondent to offer any explanation in support of the selection made lends itself to the conclusion that not only was it selectively made, but that it was irrational and that it targeted the applicant for no objective reason.

33. There is, as has been pointed out, no explanation on the papers why the applicant was singled out from the rest of the e-cigarette entities. The first respondent having been invited to do so, declined to offer an explanation beyond 'capacity constraints' which in my view does not suffice when an organ of State, faced with the serious allegation of selective and unlawful enforcement, responds in such a cursory fashion.

34. During argument, counsel for the first respondent sought to suggest that the applicant was selected as this would provide an opportunity for a test case in respect of e-cigarettes. I am unable to agree with this submission. Firstly, it was not canvassed on the papers but was offered from the bar by counsel. Secondly, when one has regard to the papers then what was being suggested is not supported at any level by the stated stance of the first respondent. In its letter to the applicant of the 14th of May 2014, relevant to the consignment, it provides its consent to the re-exporting of the consignment. It is inconceivable that the seizure could have become a test case under those circumstances.

35. In addition and when I have regard to the ***AK Entertainment*** matter , then my view is that the equality jurisprudence that developed since then does not require a victim of discrimination to demonstrate that the discrimination that occurs does so on account of some characteristic associated with the 'discriminatee ' . It would be sufficient for the Applicant to show, as it in my view did, that as an individual importer of e-cigarettes it was being treated differently from all the other entities in that class of persons (other importers, distributors and retailers of e cigarettes), that the differentiation was unfair in that thee existed no rational connection between it and some legitimate governmental objective.

36. In conclusion I am satisfied for the reasons given that the seizure of the applicant's consignment was an act of a selective and targeted enforcement for which no rational basis existed.

SECOND LEG OF THE INQUIRY:

- Does the seizure fall to be set aside on this ground?

37. Having concluded that, as a matter of fact, there was a selective targeting of the applicant, my view is that this would constitute a differentiation of the kind contemplated in ***HARKSEN v LANE*** and in my view it cannot be said that there is a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to achieve, largely for the reasons I have already alluded to.

38. In the context of this matter and without having to make any conclusions on the question of whether e-cigarettes constitute a medicine or fall within the articles contemplated in Schedule 3 as scheduled substances, I am prepared to accept that the need to regulate e-cigarettes which contain nicotine may well constitute a legitimate governmental purpose.

39. What I have considerable difficulty with is how the selective enforcement of the Act against the applicant only is connected to that purpose. If anything the proposed enforcement militates against such a purpose as it conceivably leaves undisturbed and unchecked all the other entities in the market, including existing retailers, but instead targets an entity that has not even commenced selling. And then strangely also, leave was given to the applicant to re-export its seized consignment, should it wish to do so. This could hardly be said to be advancing any legitimate governmental purpose.

40. For these reasons I would find that the seizure of the consignment falls to be set aside in terms of Section 6 (2) (i) of PAJA in that it constitutes an unlawful and unconstitutional exercise of power.

THE BALANCE OF CONVENIENCE

41. While I am mindful of the general negative effects of nicotine as traversed in the papers, the reality is that tobacco products which also contain nicotine are sold generally on the open market, subject to appropriate health warnings.
I am not convinced that the balance of convenience in so far as it relates to the potential harm that e-cigarettes may constitute stand in the way of the grant of the relief sought. The first respondent seized the consignment in March 2014. It has had ample opportunity as well as the power and the authority to conduct tests on the samples of the consignment it has seized to determine its harmful effects, if any. To date it has not done so and it cannot now be open to the first respondent to simply contend that the harm to the public is a factor that should be considered in its favour.

42. On the contrary, if the first respondent was concerned about the harm to the public emanating from e-cigarettes then it should have used the limited capacity it had to enforce against existing retailers of e-cigarettes. Its failure to do so must raise questions about its own belief in the harmful effects of e-

cigarettes. At the end of the day proper studies and analysis may well throw more light on the matter and I would defer to those processes. For now however, it cannot be said that the balance of convenience favours the first respondent simply on account of the potential for harm for the reasons I have already given.

43. There is accordingly no need to make a determination on that part of the relief that relates to the interpretation of the Medicines Act.

ORDER

44. Accordingly I make the following order:

[1] Condonation is granted for the applicants' non-compliance with the Uniform Rules of Court and it is directed that the matter be heard on an urgent basis in terms of Rule 6(12)(a);

[2] Pending the final determination of the relief sought in Part B of the application, the decision of the first, fourth and fifth respondents, or any one or more of them, to seize or otherwise detain the first applicant's consignment of Playboy electronic cigarettes and hookahs on 20 February 2014 is set aside;

[3] Pending the final determination of the relief sought in Part B of the application, the respondents are interdicted from enforcing or applying the provisions of the Medicines and Related Substances Act 101 of 1965 selectively against the applicants in relation to electronic cigarettes and hookahs in any manner that is discriminatory as against the applicants;

[4] The respondents are ordered to pay the costs of Part A of the application which costs shall include the costs of two counsel, jointly and severally, the one paying the others to be absolved.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

64056/2014

HEARD ON:
FOR THE APPLICANTS: ADV. R BHANA SC (assisted by ADV. D WATSON)
INSTRUCTED BY: NORTON ROSE FULBRIGHT SOUTH AFRICA (ref: QUI66/A Strachan/R Forgan)
FOR THE RESPONDENTS: ADV. K MOROKA SC (assisted by ADV. H A MPSHE)
INSTRUCTED BY: THE STATE ATTORNEY (ref: 5898/2014/Z21/SN)