IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

2013.12.20
DATE

SIGNATURE

CASE NUMBER: 50309/12
DATE: 20 December 2013

MEDIRITE (PTY) LTD — APPLICANT

AND

SOUTH AFRICAN PHARMACY COUNCIL — FIRST RESPONDENT

THE MINISTER OF HEALTH — SECOND RESPONDENT

JUDGMENT

MABUSE J:

[1] PAJA, as it is conveniently referred to, otherwise known by its full appellation as The Promotion of Administrative Justice Act No. 3 of 2000, provides in section 6 for a mechanism in terms of which courts are empowered to review

any administrative action. Relying on the provisions of the said section the applicant seeks, by way of a notice of motion issued by the registrar of this Court on 29 August 2012, inter alia, against the first respondent an order in the following terms:

"Reviewing and setting aside the first respondent's amendment (as published in the Government Gazette No. 35095 on 2 March 2012 under Board Notice 35 of 2012) to section 1.2.2 of Annexure "A" to the Rules relating to good pharmacy practice in so far as that amendment inserted paragraphs (b), (c) and (d) to new Rule 1.2.2.1."

[2] The applicant contends that the said amendments are reviewable under the provisions of PAJA on several grounds including firstly, that the first respondent lacked necessary authorisation by the empowering legislation and on the further grounds of irrationality and unreasonableness. The first respondent holds a contrary view and opposes the application on the strength of its views. Accordingly, the question reserved for the Court in this matter is whether certain amendments made by the first respondent to the Rules relating to Good Pharmacy Practice and which are designed to give effect to the concerns raised by the first respondent are unlawful, irrational and unreasonable.

3. THE PARTIES

The applicant is a company registered in accordance with the laws of this country that govern companies. Its registered office is located in the province

of the Western Cape in particular at the corner of William Dabs and Old Paarl Roads, Brackenfel, Cape Town. It is represented in this application by a Mr. Allan Minto Howard ("Howard") its executive director who has been duly authorised by way of the applicant's resolution taken on 29 August 2012. The said Howard has to that end, provided the applicants founding affidavit. The first respondent is a juristic person established as such by the provisions of s. 2(1) of the Pharmacy Act 53 of 1974 ("the Act"). Its head office is located at SAPC Building, 59 Belvedere Street, Arcadia, in the city of Pretoria. In terms of the Act the first respondent is responsible for the regulation of pharmacy practice in the entire country. By virtue of powers conferred on it, the first respondent establishes rules relating to "good pharmacy practice". This application is directed specifically at the first respondent.

[4] The second respondent, against whom no relief is sought except costs in the event of his unsuccessfully opposing this application, is the Minister of the National Government of the Republic of South Africa of Civitas Building, Pretoria. This application is however not without opposition. It is opposed by the first respondent who, to that end, relies on the affidavit of one Olehile Maurice Bada Pharasi ("Pharasi"), the president of the South African Pharmacy Council ("SAPC") who himself was authorised by a resolution. The said resolution is not found attached to his affidavit or anywhere. This, however, is not an issue. This affidavit enjoys the support of other people.

[5] THE FACTS OF THE MATTER

In terms of the provisions of s. 35(A)(b)(ii) of the Act, the first respondent is vested with the muscle to make rules as to what constitutes good pharmacy practice. The first of these rules relating to what good pharmacy practice is were published on 17 December 2004 in the Government Gazette No. 27112. Since then these rules, which I shall call ("the GPP Rules"), for purposes of convenience, have undergone on divers occasions variations of an amending nature. These GPP Rules have a binding force on all the persons who have been licensed to render pharmacy services.

[6] In flexing its muscles in terms of the provisions of s. 35(A)(b)(ii) on 2 March 2012 the first respondent published in the Government Gazette 35095 under Board Notice 33 (not 35) of 2012, amendments to the then existing GPP Rules. Prior to the amendments, the rule had provided as follows:

"*The pharmacy premises must be clearly demarcated and identified from the premises of any other business or practice.*"

This newly amended GPP Rules, which were inserted into s.1.2.2 of Annexure "A" of the GPP Rules as paragraphs (b), (c) and (d) of the new Rule 1.2.2.2. The new Rules now provide as follows:

"*(b) The demarcation must be permanent, solid and closed at all times, which demarcation may be, inter alia, brick and mortar, aluminium, steel, glass, dry wall or wood partition.*

(c) The demarcation must be from the floor to the ceiling height and must enclose all areas attached to the pharmacy vis, the waiting area, the clinic, the semi-private area and the private areas.

(d) The pharmacy must have a single point of entry and a single point of exit in compliance with The Occupational Health and Safety Act 85 of 1993."

[7] Accordingly the target of the applicant's rip-roaring application is the amendment to s. 1.2.2.2 of Annexure "A" to the GPP Rules. By this application, the applicant seeks, by invoking the provisions of s. 61 of PAJA, to have the said amendments to the GPP Rules reviewed and set aside by this court. Later in the course of this judgment, I will deal firstly with the first Respondent's fundamental reasons why it deemed necessary to amend the GPP Rules and later with the applicant's reasons for objecting to the amended rule.

[8] REASONS FOR THE AMENDMENT OF RULE 1.2.2 AND FOR ITS SUBSTITUTION WITH GOOD PHARMACY PRACTICE RULE 1.2.2.2

It is in my view of utmost importance to set out fully the reasons why the First respondent deemed it necessary to amend the old Rule 1.2.2 and to replace it with the new GPP Rule 1.2.2.2 for the reasons constitute the pivot of the battlefield between the parties. The First respondent contends that it had identified a range of problems that emanated from the inadequate demarcation of pharmacies conducting business within other businesses such as supermarkets. Because it was under resourced to monitor and

inspect all such pharmacies which in terms of the law fell under its control, it had to adopt a uniform approach by amending the rules that dealt with such pharmacies. The purpose of the amendment is therefore to deal strictly with such pharmacies and to ordain the physical boundaries of such pharmacies and to do away with the white line demarcation of pharmacies.

[9] In its answering affidavit the first respondent set out a number of reasons and expanded on them why it was necessary for it to amend the GPP Rules. I will only mention a few of these reasons and not all of them for the purposes of this judgment. Firstly, the first respondent had to determine the goods and services that a pharmacy was permitted to render. This concern, as the first respondent put it, arose from a situation in which a certain pharmacy sold, among others, lawnmowers. It inevitably led to the council's decision to conduct a proper analysis of the goods and services that a pharmacy may offer. It accordingly prompted the first respondent to review the list of prohibited items in terms of its Rule 2.29. Secondly, the need to identify the boundaries of certain pharmacies in particular the pharmacies located within other businesses. Thirdly, a concern was raised about the model employed by companies that operated pharmacies within other businesses, which model involved the use of a white line model of demarcation. This method consisted in using a painted white line on the floor to demarcate the boundaries of the pharmacy premises. The concern raised about this method was that it did not satisfactorily set out the boundaries of the pharmacy. Under these circumstances the concern raised was that

members of the public would not be able to distinguish the pharmacy from the supermarket. With regard to the models adopted by the applicant, only a discrete area within the supermarket is regarded as a pharmacy whereas with regards to such stores such as Clicks and Dischem, for example, the whole store is registered as a pharmacy. Accordingly the purpose of the amendment of the GPP Rules was, among others, to determine the extent of the boundaries of the pharmacy for the purpose of enabling it to determine the extent of its control. It was therefore the purpose of the new GPP Rule to determine the part of the supermarket which would be under the control of the first respondent and the part that would be under the control of the supermarket. Fourthly, to discourage front shops, in other words, shelves near the dispensary in which items such as baby formula, Schedule 0 pills are sold. The first respondent finds it abominable for a pharmacy to offer goods and services which ordinarily constitute an integral part of the pharmacy business from outside the pharmacy premises. These are but a few of the reasons that the first respondent gave for the amendment of the GPP Rules.

[10] THE APPLICANT'S GROUNDS OF OBJECTION TO THE NEW GPP RULE

The applicant's case is moored on the following factors:

(1) it contends that the newly amended GPP Rule has imposed onerous new requirements for the physical construction of pharmacies located within other businesses;

(2) that the effect of the amendment constitutes a threat to the viability of the entire "business model" of the applicant and the continued provision of quality pharmacy services by the applicant to the public;

(3) that the new GPP Rule is irrational, unreasonable; and,

(4) that, in making the amendment, the first respondent exceeded its powers and consequently the amendment is unlawful.

[11] ENLARGEMENT OF THE APPLICANT'S GROUNDS OF OBJECTION

The Applicant enlarged its grounds of objection to the new GPP rule as follows. Section 3 of the Act sets out the objects which the first respondent, exercising such powers in terms of section 35(A), may achieve. Accordingly the exercise of such powers by the first respondent must be done only for the purposes set out in s.3 of the Act. While it appreciates the value of the GPP Rules as a tool for regulation and maintenance of high pharmacy standards, the applicant submits that there is a limit to the permissible extent of such rules. It is necessary to show that the content of the GPP Rules remains reasonable and consistent with the objects of the first respondent as set out in s. 3 of the Act. The Rules should not be unreasonable or irrational, or over regulate the pharmacy practice. The applicant contends advisably that any exercise by the first respondent of its powers to make rules in terms of the Act is confined. In other words the first respondent can only make rules in order to serve the objects set out in s. 3 of the Act. These are the checks and safeguards.

[12] The applicant was satisfied with the provisions of s. 1.2.2 of Annexure "A" as much as according to it the only applicable requirement was one of clear demarcation and identification of the precincts. The applicant contends that the aforegoing requirement was rational, reasonable and proportionate to the objects of the Act. It justifies its view on the basis that the first respondent has never refused to license new premises on the basis that they were not suitably demarcated from the supermarket business as required by the previous GPP Rules and furthermore that the Director General has never found all GPP Rules worrisome and that there has never been a complaint that the demarcation was not properly done. The first respondent does not contest the legitimacy of the amendment.

[13] THE FIRST RESPONDENT EXCEEDED ITS POWERS

It is the applicant's contention that in making the new GPP Rule, the first respondent exceeded its powers and that therefore the amendment is unlawful. The applicant furthermore contends that the exercise of the first respondent's powers in terms of s. 35(A) must only be done for the purpose set out in s. 3 of the Act; that the first respondent has not shown that by imposing new GPP Rule it will assist in promoting the health of the South African population or it will help to advance therapeutic outcomes for the health and quality of patients. Of more importance the applicant's argument is that the new GPP Rule does not promote the provision of pharmaceutical care which complies with universal norms and values; and

furthermore that it fails to establish or develop universally acceptable standards for pharmacy practice.

[14] According to the applicant, the first respondent should look at other countries, irrespective of the differences in the situations, and implement the models of demarcation employed by such countries. This, according to the applicant, will constitute the so-called universally acceptable standards. It contends that the first respondent should adopt and implement measures which are universally acceptable in the regulation of pharmacy practices.

[15] The first respondent is a creature of a statute. It derives its existence from the provisions of s. 2 of the Act and therefore it exercises its powers in terms of the Act. In the first place the purpose of the Act is set out as follows in the preamble of the Act:

"*Provide for the establishment of the South African Pharmacy Council and its objects and general powers; to extend the control of the Council to the public sector; and to provide for the pharmacy education and training requirements for regulation, the pharmacy practice, the ownership of pharmacies and ...*"

Secondly, s. 4 of the Act provides that:

"*The functions of the council shall be to endeavour to achieve the objects for which it was established, and for the purpose of achieving those*

objects the council shall, subject to the provisions of this Act, have power in addition to any other powers vested in it by this Act;

generally, to do all such things as the council deems necessary, or expedient to achieve the objects of this Act."

In my view s.4 confers, by implication, on the First respondent such powers as are necessary and reasonably ancillary to the full and effective achievement of the objects set out in s.3 of the Act. Thirdly, s. 35(A)(b), of the Act in particular has expressly conferred powers on the first respondent to make rules as to what constitutes good pharmacy practice. The said s. 35(A)(b) provides that:

"*With regards to the control of the pharmacy practice –*

(b) the Council shall be entitled to make rules as to:

(ii) what constitutes good pharmacy practice."

[16] The applicant contends that the new GPP Rule does not constitute a universally acceptable standard because it exists only in this country and not in others. By implication it is the applicant's case that the first respondent should only make rules which embody universally acceptable standards. For the following reasons the applicant's view is, in my view, somewhat skewed. Firstly, the applicant contends that the new GPP Rule is irrational because nowhere in the world is it applied in the manner in which the first respondent has done it. Counsel for the applicant argued, and it was so contended by the applicant, that although supermarkets

were universally permitted nowhere does good pharmacy practice require such pharmacies to be demarcated in their entirety by a physical enclosure from the rest of the supermarket. The applicant contends furthermore on that basis that the absence of such a regulation constitutes a universal standard applicable to the practice of pharmacy in a supermarket model. This, in my view, is not the correct test. This approach fails to take the uniqueness of each country into account. This is South Africa. The first respondent's view is that it must make rules which take into account the conditions in South Africa. The crucial question is therefore not what is done in other countries but what are the unique situations that pertain to South Africa? What is done somewhere does not necessarily have to be done in this country. The test should, in my view, be whether in making the DPP Rules, the first respondent had any reasons for doing so. Secondly, the power to establish, develop, maintain and control universally accepted standards of pharmaceutical practices is merely one of many powers vested in the first respondent. The new GPP Rule constitutes, in my view, a rational measure whose target is the promotion of health of the South African population.

[17] So far it is clear as crystal that one of the purposes of the Act, as set out in the preamble, was quite unequivocally to extend the control of the first respondent over pharmacy practices; to establish the general powers of the first respondent in the practice of pharmacy and to enable the first respondent, through pharmacy practice, to achieve the objects of the Act.

I consequently find that, having regard to the provisions of s.4 and s.35(A) of the Act, the first respondent is empowered to make rules relating to good pharmacy practice and that such powers include the power to make the impugned rule.

[18] THE FIRST RESPONDNT ACTED ULTRA VIRES

What then are the other grounds on which the applicant contends that the first respondent acted ultra vires. The applicant contends that:

i) there is no rational connection between the impugned rule and the purpose of the empowering provisions;

ii) there is no rational connection between the amendment, its purpose or the reasons given for it;

iii) there is no rational connection between the amendment and the information before the administrator;

iv) the impugned rule is unreasonable and not proportional; and

v) the first respondent, when taking the decisions to enact the impugned rule, took irrelevant considerations into account and failed to consider relevant considerations; and

vi) the impugned rule was arbitrary.

[19] RATIONALITY AND REASONABLENESS (SECTIONS 6(2)(f)(ii) AND 6(2)(h) OF PAJA

Referring to the provisions of s. 33(1) of PAJA, it was argued by counsel for the applicant that the Constitution grants the right to administrative

action that is "lawful", reasonable and procedurally fair. Relying on the authority of **Pharmaceutical Manufacturers Associations of South Africa and Another: in Re Ex parte President of the Republic of South Africa and Others 2000(2) S.A. 674 CC at paragraph 90** he submitted that the core component of reasonable administrative action is rationality and that as set out in **Head, Western Cape Education Department v Governing Body, Point High School 2008(5) S.A. 18 SCA at paragraph 16**, such an administrative action must meet the test of reasonableness.

[20] Accordingly the test is whether the new GPP Rule is rational and reasonable.

[21] Before dealing with these issues of rationality and reasonableness, I wish to pause here and recapture the submission made by the first respondent's counsel that counsel for the applicant dealt with the concepts, "rationality" and "reasonableness", as if they have the same meaning or were one concept. He cautioned against that perception and submitted that they are two different concepts and each one of them with its own unique content.

[22] The source of the word "reasonable", as referred to by counsel for the applicant, was s. 33(1) of the Constitution which provides as follows:

"*33.1 Everyone has the right to administrative action but is lawful, reasonable and procedurally fair.*"

PAJA itself states as follows:

"*6(2)(h) A Court or a tribunal has the power to judicially review an administrative action if –*

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function."

PAJA does not explain what "reasonable" entails.

[23] Before dealing with reasonableness, I wish to refer to s. 6(2)(f) of PAJA. S. 6(2)(f) of PAJA refers to rationality. It provides as follows:

"*6(2) A Court or tribunal has the power to judicially review an administrative action if –*

(f) the action itself:

(ii) is not rationally connected to:

(aa) the purpose for which it was taken;

(bb) the purpose of empower legislation;

(cc) the information before the administrator;

(dd) the reasons given for it by the administrator."

[24] What then is the difference between "reasonableness" and "rationality"? Again PAJA does not express itself as to what "rationality" is. What then is the test for "reasonableness"? In **Kruse v Johnson (1898)(2) QB 91 at 99-100** Lord Russel of Killoween CJ made the following expression of test:

"*Notwithstanding what Cockburn CJ said in Bailey v Williamson, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as those who were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they are found to be partial and equal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might say: "Parliament never gave authority to make such rules".*

It is clear that in this context, the word "unreasonableness" denotes partiality and inequality, manifest injustice and oppressive or uncalled for interference with rights. The Court will regard such an administrative action on the basis that it never was the intention of the legislation to make laws or rules which produced such results. Accordingly, according to the above test, any administrative action which in its application produces partiality, inequality, or which manifests injustice, bad faith or is oppressive or gratuitously interferes with rights will be unreasonable.

[25] In her book "The Administrative Law in South Africa" Cora Hoexter has the following to say about "reasonableness":

"*6.3 Reasonableness in s. 33(1) and PAJA.*

(a) The elements of reasonable administrative action

No single meaning can be attributed to reasonableness, whether in administrative law or in South African Public Law more broadly. However in administrative law it is now uncontroversial that the first element promised by "reasonable" administrative action in s. 33(1) is rationality." See page 340.

It is clear that Hoexter does not recognise "reasonableness" and "rationality" as two distinct concepts. According to the learned author, there is only one concept which is "reasonableness" and which has two elements, one being rationality and the other being proportionality. By rationality is meant according to her, that "*decisions must be supported by the evidence and information before an administrator as well as the reasons given for it.*" It will be observed that when the author deals with rationality, she actually deals with it as set out particularly in paragraph 6(2)(f)(ii) of PAJA and not as a general concept. What is of paramount importance about the learned author is that there is only one concept and that is that concept being "reasonableness" and that it has two elements.

[26] Referring to the authority of **Thebe Ya Bophelo Health Care Administrators (Pty) Ltd vs National Bargaining Council for Road Freight Industry 2009(2) SA 201(W) at paragraph 23** he observed that:

"*I wondered whether the ground of rationality (or rational connectivity) in PAJA had been subsumed into more general grounds of reasonableness.*" (s. 6(2)(h) of PAJA).

In paragraph 23 of the Thebe authority Willis J, as he then was, had remarked that:

"*It is not clear what the impact of sidumo and Another v. Rustenburg Platinum Mines Ltd and Others 2008(2) SA (CC) on the "rationality" or "rational connectivity" test has been.*

When the constitutional court decided the Pharmaceutical Manufacturers case which affirmed a rationality principle, it did not make a decision by reference to PAJA ....

It seems that, in regard to administrative action, at least, the Constitutional Court may have taken the decision on the rationality to suffuse "rationality" into "reasonableness" ....

It seems that the rest of s. 6 of PAJA (apart from that relating to procedural aspects) may have become, as a result, more excrescences or garnishes – it is the reasonableness test (that seems to prevail)."

I am left with a solid impression that Thebe constitutes no solution to the burning issue whether reasonableness and rationality are two different concepts:

That rationality can only be defined within the context of PAJA and that out of it reasonableness prevails. It would appear that as rationality is subsumed by reasonableness.

[27] I now turn to the Pharmaceutical Manufacturers authority to establish how the Constitutional Court was able, as pointed out by Willis J in Thebe in paragraph 23, to affirm the rationality principle without referring to PAJA. It is to be noted that the Pharmaceutical Manufacturers matter was heard on 11 November 1999 and judgment handed down on 25 February 2000. On the other hand PAJA only came into operation on 30 November 2000. It is for this reason that when the Constitutional Court dealt with the concept "rationality" in paragraph 90 thereof, it did not do so within the context of s. 6 of PAJA. I doubt if there would be any material difference in the meaning of rationality even if PAJA was in operation at the time. It has not been drawn to my attention that the meaning of the word "rationality" as set out in the said paragraph 90 has, since the becoming into operation of PAJA, changed. I will therefore accept that "rationality" as a concept still retains its independence as a concept separate from "reasonableness".

[28] It is further to be noted that, unlike Cora Hoexter, the Constitutional Court did not deal with the concept "rationality" as an element of "reasonableness" and did not at all deal with "reasonableness". In **Calibre Clinical Consultants v. NBC for Road Freight Industry 2010(5) SA 457** Nugent J took a step forward to show that the concepts are two different concepts. Each one of them has its own unique meaning. In paragraph 58 he had this to say about "rationality" quite distinct from "reasonableness":

"*In the ordinary meaning of the term, a decision is "rationally" connected (to the purpose for which it was taken, at etc.) if it is connected by reason, as opposed to being arbitrary or capricious."*

Then in paragraph (60) page 477, he observed that:

"*If a decision is founded upon reason, then it is difficult to see how it could be said to be so unreasonable that no reasonable person could come to it, and the converse is equally true."*

[29] Quite clearly Nugent J treated the concepts "rationality" and "reasonableness" as distinct concepts. In a word, his impression is that "rationality" does not mean "reasonableness". He is also saying that rationality is not an element of reasonableness and is one concept that must be regarded independently of "rationality". He also confirmed the concept "rationality" as applied in Pharmaceutical Manufacturers' case. It is crucial, in my view, to point out that, although Nugent J drew a distinction between the two concepts within the context of PAJA, he relied

also on the meaning of the word "rational", as set out in Pharmaceutical Manufacturers' case. He did not attempt to ascribe any new meaning to it in accordance with PAJA. He did not say that if the Constitutional Court had, at the time, the benefit of PAJA, it would have used the word quite differently than it would have done after the passing of PAJA.

[30] On this basis I accept the submission by counsel for the respondents that the words "rationality" and "reasonableness" are two different concepts and furthermore that they must be treated as such.

[31] It is a principle of our law that rules and regulations made by a person or body acting under the authority of an Act of Parliament are subject to the test of reasonableness. The applicant does not challenge the legality of the demarcation rule. On the contrary, its case is that the demarcation rule that existed before the amendment in which the rule merely required the pharmacy premises to be clearly demarcated was, according to it, wholly rational, reasonable and proportionate to the object of the Act. The applicant complains about the method that the first respondent has chosen to achieve a clear demarcation. Accordingly, the question now is whether the method of demarcation introduced by the GPP Rule 1.2.2.2 is rational and reasonable.

[32] Counsel for the first respondent submitted that when assessing the rationality of the amendment, a court is not concerned with whether the

same purpose could have been achieved by less restrictive or intrusive mechanism. Jurisprudence is awash with rudimentary authorities that make it clear that rationality is more concerned with whether there is a relationship between the means and the end than with whether the same end could have been achieved by less restrictive means. In the Pharmaceutical Manufacturers' case the Constitutional Court had the following to say about rationality:

"*(85) It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the 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 an Executive and other functionaries must, at least, comply with the requirement. If it does not, it falls short of standards demanded by our constitution for such action.*

(86) The question whether a decision is rationally related to the purpose for which the power is given calls for an objective enquiry. Otherwise a decision is that, viewed objectively, is in fact irrational, might pass muster simply because the person who took in mistakenly and in good faith believed it to be rational. Such a conclusion would place from above substances and undermine an important constitutional principle.

(90) Rationality in this sense is a minimum threshold requirement applicable to access of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent

with the requirements for our Constitution and therefore unlawful. The setting of this standard does not mean that the courts can or substitute their opinions as to what is appropriate for their opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of power is within the authority of functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it or considers that the power of exercise is inappropriate."

[33] The approach set out in the said authority of **Pharmaceutical Manufacturers Association of SA and Another** was adopted by the Constitutional Court subsequently in **Affordable Medicines Trust and Others vs. Minister of Health and Others 2006(3) SA 247 CC at paragraph 78**. I already have pointed out that jurisprudence has so far made it plain that rationality is more concerned with whether there is a rational relationship between the means and the end and not whether the same end could be achieved by less restrictive means. In this regard I wish to refer to the authority of **Albutt vs. Centre for Study or Violence and Reconciliation and Others 2010(3) SA 293 CC at paragraph 91**. In this paragraph, the court had the following to say:

"*The executive has a wide discretion in selecting the means to achieve its conditionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, because there are other more appropriate means that could have been selected. But, where*

the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objectives sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of a standard demanded by the constitution."

[34] In **Democrative Alliance vs. President of the Republic of South Africa and Others 2013(1) SA 248 CC at paragraph 29** the Court put it as follows:

"*The reasoning in these cases shows that rationality review is rarely concerned with the evaluation of a relationship between the means and the ends; the relationship, connection or link (as it is variously referred to) between the means employed to achieve a particular purpose on the one hand and a purpose or end itself. The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred."*

[35] REASONABLENESS

The challenge of the amendment on the basis of "reasonableness" is based on the provisions of s. 6(2)(8) of PAJA. It was submitted by counsel for the applicant that the standard of "reasonableness" incorporates the

requirement of proportionality. According to the applicant, there must be a proper relationship between the action and the object which is sought to be achieved. There must be an avoidance of any imbalance between the adverse and the beneficial effects of the conduct. According to the applicant, the balance between the adverse and beneficial effects of the conduct can be achieved by the use of a method which is in the least drastic or oppressive to achieve for the desired results.

[36] In his heads of argument, counsel for the applicant detailed the following reasons why the applicant contended that the decision to make the amendments was one which a reasonable decision maker could not make. The facts that he referred to are:

(a) lack of any apparent need for the rules that regulate deficiency or more thoroughly the demarcation of supermarket pharmacies;

(b) lack of cogent or compelling reasons which the first respondent gave for its decision to make the new GPP Rules;

(c) lack of consideration to simply enforcing the status quo;

(d) the choice of an extremely costly and invasive demarcation method.

It is contended on behalf of the applicant that this chosen method is calculated to disrupt and potentially destroy the applicant's supermarket pharmacy model; that the first respondent bluntly rejected the applicant's objections and representatives and failed to furnish any reasons for doing so; that the amendments were discriminating and finally that they would be counterproductive.

[37] On the other hand the first respondent contends, and it was also so argued by its counsel, that the new amendment is reasonable.

[38] In paragraphs 8 and 9 supra I set out some of the grounds that prompted the first respondent to amend the GPP Rules. I also indicated that these grounds were set out in the first respondent's answering affidavit. The applicant contends that the reasons furnished by the first respondent in its answering affidavit differ from the reasons the first respondent had set out in the letter dated 26 April 2012. I need to pause here and point out that it is for these reasons, among others, that the applicant contended, and it was so argued on its behalf, that the decision to amend the GPP Rules was unreasonable on account of the fact that they lacked cogency and were not compelling.

[39] The applicant does not complain about the reasons furnished by the first respondent in its answering affidavit. In its heads of argument it was contended by the applicant's counsel that the reasons the first respondent furnished in the aforementioned letter did not adequately justify the decision to amend the GPP Rules. I take this point that the applicant consisted that the first respondent has furnished reasons. Its case is therefore that it is not satisfied that the reasons that the first respondent furnished in the said letter are cogent. It is the duty of this court to determine whether there are any merits in the reasons that the first

respondent furnished both in the aforementioned letter and also in its answering affidavit. I wish to point out, however, that having gone through both the letter and the affidavit the first respondent did not only indicate the aspects in the rules that had to be amended but also furnished the reasons for its decision for doing so.

[40] The first respondent contends that the letter was not intended to be a place where the first respondent set out fully the rationale for its decisions and secondly, that the answering affidavit was indeed the platform through which lucidly the first respondent explained the reasons for its decisions. Accordingly, the answering affidavit should be considered in the determination as to whether or not any reasons were given for the decision of the first respondent.

[41] In the authority of **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004(4) SA 490 (CC)** supra, the authority on which the parties rely, though for different reasons, the court stated as follows at paragraph [45] on page 413:

"*What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, identity and expertise of the decision maker, the range of factors relevant to the decision, the reasons given for the decision, the*

nature for the competing interest involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that a decision taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution."

For instance, on page 1 of the letter dated 26 April 2012, it was stated as follows:

"*The council identified the need, in amending Rule 1.2.2, to differentiate between the rules for another business within a pharmacy, and a pharmacy within another business."*

Thereafter follows the reasons for the said differentiation and it was stated as follows:

"*The reasons for the distinction and differentiation are recognition that there is a need for differed rules for the two very distinct business scenarios."*

Secondly, on the same page it is stated as follows:

"*It is recorded that the Council does not and cannot regulate the various and numerous business models that may be applied in operating a pharmacy or providing pharmaceutical services. However, such business models must conform and continue to conform to the legislation pertaining*

to pharmacy. This is not limited to the Pharmacy Act, 53 of 1974, but includes the Medicines and Related Substances Act, 101 of 1965. As business models evolve it may become necessary for the Council to review the prevailing legislation in order to ensure that the Council in serving the public interest and in terms of its statutory obligations continues to ensure quality pharmaceutical services for all the people of South Africa."

Thereafter follow the reasons for this amendment. It is stated as follows:

"*Vital to this is the commitment of the pharmacy profession to promote excellence in practice for the benefit of those they serve. The public and other professions will judge the pharmacy profession on how that commitment is translated into the practice they observe."*

On the second page of the said letter, which is page 165 of the paginated papers it is stated as follows:

"*In order to provide practice substance to the definition of a pharmacy and thus clearly indicating the jurisdictional bounds of the Council it is imperative to ensure that the premises defined as a "pharmacy" is clearly demarcated which demarcation needs to be clearly identified and permanent."*

Then follows the reason:

"This has proved to be problematic where a pharmacy is situated within another business, and has in practice given rise to colloquial, yet arbitrary, "white line" concept to demarcate the area registered as the pharmacy. This is evident in pharmacies situated within healthcare facilities or group practices, institutional pharmacies which have a section directly accessible by members of the public and pharmacies situated within an ordinary retail environment e.g "supermarket model"."

[42] Another reason furnished by the first respondent for making the said amendment was set out as follows:

"The absence of the permanent demarcation of the pharmacy premises has led to a lack of definitive jurisdiction of the Council and in some circumstances definitive jurisdiction vis 'n vis other statutory health council's in the application of Ethical Rules. In addition the "white line" can be moved without notice and may at the extreme even vary from day to day."

Finally on this point it is stated as follows at the bottom of page 165:

"At the highest level, the lack of permanent, visible, therefore known demarcation brings into question of where does the pharmacy begin and end and thus where do the rules and laws begin and end in terms of pharmacies and pharmaceutical services."

[43] One of the tests of "reasonableness" of an administrative action is whether such an action is impartial or produces between the same classes any inequality. The GPP Rule 1.2.2.2 was not designed to target the applicant in any way. The said rule was designed to regulate the practice of pharmacies which operated within or conducted their businesses within other businesses. In its application, the applicant complained about the onerous practical implications of implementing the new rule. It was set out in the heads of argument that if the new demarcation rules were to stand, they would have a radical and prejudicial impact on the applicant, its employees and the provision of pharmacy services; that physically, to bring existing pharmacies into line with the new rules, the applicant would have to erect, in respect of each store, a box-like construction in front of the counter with a single exit; that the core of such a physical construction would be extremely problematic with the result that it would further threaten the viability of Medirite; that the physical construction work at each of the pharmacies would disrupt both the business of the pharmacy and the business within which the pharmacy operates among others.

[44] Firstly, the respondent's approach is that the new GPP Rule was not directed specifically at Medirite business model but on the contrary, at all pharmacies which may be located in other businesses or which are currently located in other businesses, irrespective whether such business are controlled by the applicant or not. The new GPP Rule is consequently, and on that basis, impartial and does not discriminate. The crucial

question is whether the Rule is reasonable. The applicant has, on this issue of "reasonableness", complained that the new rule is unreasonable and prejudicial because the costs would be prohibitive or it will be inconvenient both to it and the supermarkets in which it operates. The appropriate test still is whether the means adopted by the respondent are reasonable. If indeed they are, then *caedit quaestio*. The first respondent contends that the new GPP Rule is reasonable. It was argued on behalf of the first respondent that persons who do business in a highly regulated field must proceed on the basis that the regulating landscape will change. It is indeed so. This does not only apply to persons who do business in a highly regulated field only. Even persons who conduct business in a sphere that is regulated by legislation must always expect that, owing to certain circumstances, the law may change and that when it does it should not be a cause for concern. Counsel for the first appellant relied, on this principle, on the affirmation by American Supreme Court where the Court stated as follows in **New York Central Railroad Company v White 243 US 188 at 199 and 61 LED 662 at 672**:

"*The law itself, as a rule of conduct, may be changed as they will, or even at a whim, of legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy the defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.*"

Accordingly whether or not the new Rule will cause not only the applicant but all the pharmacies that operate within other businesses prejudice or inconvenience to the existing businesses is not the determinative test. The test is whether or not the amendment is reasonable.

[45] Secondly, and moreover, the first applicant was granted an opportunity to make representations and to propose alternatives to the requirements of the floor to ceiling model but failed to do so. At the meeting of 26 August 2012 the first respondent's representatives specifically played open and fair cards with the applicant. The applicant, who was then represented by Mr. Howard, was requested to suggest a plausible alternative if it had physical limitations about its ability to implement the new rule that determined that the demarcation should commence on the ground and reach the ceiling. The applicant does not deny that it failed to come up with any plausible alternatives. Instead its attitude is first that it was irrelevant whether in the process of challenging the administrative action, it had provided alternatives other than remaining with the prior position. The applicant was unwavering in its view, secondly, that the white line model of demarcation should be retained. As far as it was concerned the issue was whether or not the administrative action could be sustained in law.

[46] Was the administrative action reasonable? Could it be sustained in law? "Reasonableness" is an objective enquiry based on the need for adequate regulation of all pharmacies. The first respondent's case is that the

administrative action taken by it was reasonable because there was a reason for it and that the reason was the need for adequate regulation of all pharmacies:

"*If a decision is found upon reason, then it is difficult to see how it could be said to be unreasonable that no person could come to it and the converse is equally true.*" See paragraph 28 supra.

[47] The decision to make the amendment complies, in my view, with the requirements of the Batho Star Fishing (Pty) Ltd authority. It was reasoned that in terms of the Act the first respondent could take the decision; the reasons were found in both the letter dated 26 April 2012 and the respondent's answering affidavit; the amendment was made by the first respondent whose preoccupation it was to regulate the Pharmacy Practice.

[48] Consequently I find that the decision was reasonable and that it was one which a reasonable person exercising his powers or performing the functions entrusted to him, could take.

[49] The first respondent contends that the GPP Rule is, on the following ground, reasonable. It contends furthermore that it has legitimate interest in regulating the demarcation of pharmacy and to establish rules to determine where the pharmacy begins and where it ends if it is located within other businesses. That the applicant accepts that the first

respondent has legitimate interest in the regulation of the demarcation of a pharmacy and its power to make rules to determine the boundaries of the pharmacy that is located within other business premises, is evidenced by its contention that the demarcation rule that was enforced before the new GPP Rule was wholly rational, reasonable and proportional to the object.

[50] It was submitted by the first respondent's counsel that there is a marked difference between Rule 1.2.2 and Rule 1.2.2.2. Firstly, the demarcation prescribed by the new rule is more visible to customers in a supermarket, unlike the old rule. In terms of the old rule, a customer shopping inside the supermarket would not know the significance of a white line if he or she saw it in a supermarket. He would not even care to enquire what it meant and no one would be there to explain its significance to him or her. Secondly, in terms of the new GPP Rules the demarcated area would be of a permanent nature. It is for the purposes, firstly, of implementation, secondly, for convenience that the first respondent requires permanent demarcation. Thirdly, it is to enable the customers to know where the pharmacy is and furthermore to know that where they do their businesses from a clearly regulated area. They will know where to obtain medical advice of the products that they buy. The visibility of the demarcation structure is crucial when it comes to the sale of Schedule "0" substances.

[51] In Calibre Clinical Consultants at paragraph 59 it was stated that:

"*In assessing reasonableness, the essential enquiry is whether in making the decision the functionary concern has struck a balance fairly and reasonably open to him.*"

[52] I am satisfied that the decision to make the amendment was reasonable. The application can therefore not succeed. Accordingly I make the following order:

(1) The application is dismissed.

(2) The applicant is hereby ordered to pay the costs of this application which costs shall include the costs of two counsel.

P.M. MABUSE
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants:	*Adv. JJ Gauntlet (SC)*
	Adv. M Janisch
Instructed by:	*Werksmans Attorneys;*
	C/o: Van Der Merwe Du Toit Inc.
Counsel for the respondents:	*Adv. A Cockrell (SC)*
	Adv. A Friedman
Instructed by:	*Potgieter Marais Attorneys*
Date Heard:	*14 October 2013*
Date of Judgment:	*20 December 2013*