



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 14 JULY 2021

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Bertie Van Zyl (Pty) Ltd (T/A ZZ2) and Others v The Minister of Agriculture, Forestry and Fisheries and Others
(549/2020) [2021] ZASCA 101 (14 July 2021)

Today the Supreme Court of Appeal (SCA) handed down a judgment upholding the appeal against the Gauteng Division of the High Court, Pretoria in part with costs, including the costs of two counsel.

The first appellant in this case was Bertie Van Zyl (Pty) Ltd t/a ZZ2. The second and third appellants were Tomato Producers' Organisation and Noordelike Uie Komitee. The fourth appellant was Fresh Produce Importers' Association NPC who is a Not for Profit Corporation. The appellants brought an application in the Gauteng Division of the High Court, Pretoria (the high court) for an order declaring s 3(1A)(b)(ii) read with s 3A(4) of the Agricultural Product Standards Act 119 of 1990 (the Act) unconstitutional and invalid. The appellants also sought to review and set aside the determination of inspection fees by the second respondent, Product Control for Agriculture (Procon).

The appellants in their application before the high court cited the assignees designated by the Minister. Procon was an assignee. So too was the seventh respondent, the Perishable Products Export Board (the Board). The Board was recognised as a juristic person in terms of the Perishable Products Export Control Act 9 of 1983. The Minister, Procon, the eighth respondent, South African Meat Industry Company (Meatco), and the Board opposed the application, though the Board limited its opposition to the appellants' constitutional challenge.

In the high court, the appellants contended that the challenged provision was a deprivation of property that infringed s 25 of the Constitution. The challenged provision was also said to offend against the rule of law and s 195(1) of the Constitution. The high court (per Baqwa J) dismissed this constitutional challenge. It also dismissed the review of Procon's fee determination on the basis that the appellants had failed to exhaust the remedy of appeal available to them in terms of s 10 of the Act. An order for costs, including the costs of two counsel, was made in favour of Procon, the Board and Meatco. With the leave of the high court, the appellants appealed to this Court.

In the SCA the appellants complained that the power of the assignee to determine its fees was a unilateral determination, not subject to supervision, nor to ministerial or other control. Such an untrammelled power, the appellants contended, could not survive constitutional scrutiny. First, the challenged provision was a deprivation of property that infringed s 25 of the Constitution. Second, the challenged provision offended against the rule of law and s 195(1) of the Constitution.

According to the SCA, the first issue that required consideration was did the determination of a fee and the obligation to pay that fee upon the exercise by the assignee of its powers constitute a deprivation of property? The SCA held that to receive a service for a fee was not a deprivation of property. This demonstrated that it was not

the requirement that if a fee was payable that constituted the deprivation of property. Rather, it was the power given to the assignee, without supervision, to determine the extent of the fee that was said to be objectionable.

The SCA was of the view that if the appellants' complaint was ultimately as to how an assignee might exercise its power to determine a fee, without oversight, then, even on the appellants' argument, the power was capable of being exercised in a manner wholly consistent with s 25. Therefore, the SCA held that there was no warrant to declare s 3(1A)(b)(ii) unconstitutional and invalid. It was also found that the appellants had not made out a case that s 3(1A)(b)(ii) infringed s 25 of the Constitution.

The appellants also contended that the challenged provision offended the rule of law and s 195(1) of the Constitution. The SCA held that the contention could not prevail on the basis that without justiciable rights to enforce, there was no basis upon which this Court could declare invalid a law that was inconsistent with a value or principle.

Further, on the issue whether the appellants enjoyed a remedy under s 10(1) to appeal their dissatisfaction with the fees determined by Procon, the appellants contended that they had no such remedy. The appellants argued that a determination of fees was not a decision and the SCA was of the view that since the determination of a fee was not a decision, so defined, s 10(1) provided the appellants with no remedy. The respondents opposing this aspect of the appeal contended that the words 'any decision' in s 10(1) should not be read narrowly. However, the SCA emphasised that if the exercise of the powers of an assignee in s 3A fell within the meaning of a decision in terms of s 10, it was not clear why a fee determination was not also a decision.

The appellants' review challenged Procon's determination of fees on two principal grounds. First, the appellants complained that the determination was procedurally unfair. Second, the appellants alleged that the determination was irrational. In this regard the SCA held that the consultative process did not meet the requirements of procedural fairness. It was also held that the fee determination made by Procon could not stand, since it was the outcome of an unfair process. Therefore it must be reviewed and set aside. The SCA also found that the determination of fees made by Procon was not rationally related to this purpose. The appellants' rationality review was found to have been established.

The SCA found that the high court had not considered the merits of the review because it found that the appellants had failed to exhaust their internal remedy. The SCA held that in that aspect the high court erred, and the appeal in respect of the high court's order dismissing the review succeeded. The SCA was of the view that no costs order should be made in respect of the failure by the appellants to prevail in their appeal on the constitutional challenge. As to the outcome of the appeal in respect of the review, there was no reason why the costs could not follow the result. In the result, the appeal was upheld with costs, including the costs of two counsel, in respect of the order of the high court to dismiss the review of the second respondent's determination of fees made in terms of s 3(1A)(b)(ii) of the Act. The appeal was dismissed in respect of the order of the high court dismissing the application to declare s 3(1A)(b)(ii) read with s 3A(4) of the Act unconstitutional and invalid and the order of the high court was amended.

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