



CONSTITUTIONAL COURT OF SOUTH AFRICA

**South African Diamond Producers Organisation v
Minister of Minerals and Energy N.O. and Others**

CCT 234/2016

Date of hearing: 11 May 2017

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 11 May 2017 at 10h00 the Constitutional Court will hear an application for confirmation and an appeal against costs arising from an order of the Gauteng Division of the High Court, Pretoria (High Court), declaring section 20A of the Diamonds Act 56 of 1986 (Diamonds Act), to be constitutionally invalid insofar as it infringes on the rights of persons embodied in sections 22 (freedom of trade, occupation and profession) and 25(1) (prohibition on arbitrary deprivation of property) of the Constitution.

Section 20A provides that a licensee in terms of the Diamonds Act may not, during the viewing, purchasing or selling of unpolished diamonds, be assisted by a person who does not hold a licence or permit in terms of the Diamonds Act. This prohibition applies at any place where unpolished diamonds are offered for sale, except at a diamond exchange and export centre.

Prior to the insertion of section 20A into the Diamonds Act, a number of licensed dealers had developed a business practice at their licensed business premises whereby unpolished diamonds were offered on an anonymous tender basis to other South African licensed dealers for purchasing. Non-licensed persons, who attended on behalf of prospective foreign buyers, assisted the licensed purchasers. The ultimate sale was concluded between the producer or licensed dealer and the South African licensed purchaser. This practice allegedly not only assisted in determining the alleged correct “international” market value, but also enabled local producers to mingle with prospective foreign purchasers.

Section 20A now prohibits assistance being provided by non-licensed persons. SADPO submits that this is constitutionally invalid on two grounds: section 20A constitutes arbitrary deprivation of the property of SADPO members within the meaning of section 25(1) of the Constitution; and section 20A infringes on the rights of SADPO members in terms of section 22 of the Constitution.

First, SADPO submits that section 20A deprives diamond producers and dealers of their property rights both in the diamonds they produce and sell and in their licences, in that they are deprived of the right to realise the full market value of the diamonds they produce and sell. SADPO alleges that these deprivations are arbitrary and that the limitations are not justifiable in terms of section 36 of the Constitution. The respondents submit that the practice of tender houses was previously illegal, and that, as a result, SADPO's members do not have a protectable property right founded in this practice. They further submit that the drop in value alleged by SADPO actually refers to the commission previously paid by unlicensed foreign buyers in return for the assistance of licensed dealers. The respondents submit that, in any event, any limitation is not arbitrary and, section 20A is aimed at achieving legitimate government purposes.

Second, SADPO submits that section 20A constitutes arbitrary regulation of the rights of SADPO members to choose and practice their trade freely. SADPO submits that section 20A makes it impossible to carry on the trade of a diamond trading house, and seriously affects the sustainability of small-scale diamond producers, to the extent that they will not be able to choose and freely practise these trades. The respondents submit that the opportunity to earn the commission has no basis in law and that, even if that opportunity is a legally protectable right, then government has the power in terms of section 22 to regulate the trade of a diamond dealer. The purposes of section 20A are to promote the local beneficiation of South African diamonds; to tighten the regulation of the diamond trade and eliminate illegal activities that were occurring in the diamond trade; and to comply with the Kimberly Process Certification. Further, they submit that there is a rational relationship between section 20A and the means sought to be achieved – the abolishment of the unregulated sale and export of unpolished diamonds and the need to record, document and identify foreign buyers of unpolished diamonds.

In the event that this Court decides that section 20A does limit any of SADPO's members' rights, the respondents submit that any limitation is reasonable and justified in terms of section 36(1) of the Constitution.