CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 234/16

In the matter between:

SOUTH AFRICAN DIAMOND PRODUCERS ORGANISATION	Applicant

and

MINISTER OF MINERALS AND ENERGY N.O.	First Respondent
DEPARTMENT OF MINERALS AND ENERGY	Second Respondent
MINISTER OF FINANCE	Third Respondent
DEPARTMENT OF FINANCE	Fourth Respondent
SOUTH AFRICAN DIAMOND, MINERALS AND PRECIOUS METALS REGULATOR	Fifth Respondent
STATE DIAMOND TRADER	Sixth Respondent

Neutral citation:	*South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* [2017] ZACC 26
Coram:	Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Khampepe J (unanimous)
Heard on:	11 May 2017
Decided on:	24 July 2017

Summary: Diamonds Act 56 of 1986 — constitutionality of section 20A — section is constitutional

Section 25 of the Constitution — right not to be deprived of property arbitrarily — deprivation analysis — no deprivation by section 20A — interference not substantial

Section 22 of the Constitution — right to choose trade, occupation or profession — no limitation on choice by section 20A — rational regulation of practice

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

The following order is made:

1. The late filing of the notice of appeal and the notice of cross-appeal is condoned.
2. The cross-appeal is dismissed.
3. The appeal against the declaration of invalidity of section 20A of the Diamonds Act 56 of 1986, made by the High Court of South Africa, Gauteng Division, Pretoria, succeeds.
4. The declaration of invalidity is not confirmed.
5. The order of the High Court is set aside and replaced with the following: "The application is dismissed. No order is made as to costs."
6. There is no order as to costs in this Court.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] These are proceedings in terms of section 172(2)(a)[1] of the Constitution for the confirmation of an order of constitutional invalidity of section 20A of the Diamonds Act[2] (Act), granted by Van der Westhuizen AJ in the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court declared section 20A to be unconstitutional insofar as it infringes on the rights of persons embodied in sections 22[3] and 25(1)[4] of the Constitution.[5]

[2] The first, second and fifth respondents (respondents) oppose the confirmation of the High Court's order of constitutional invalidity. The fifth respondent noted an appeal in terms of rule 16(2) of the Rules of this Court against the whole of the judgment of the High Court, and joint submissions were made on behalf of the respondents. The fifth respondent has also applied for condonation for the late filing of the notice of appeal.

[3] The applicant noted a cross-appeal against the costs order handed down by the High Court. The applicant has also applied for condonation of the late filing of its cross-appeal.

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[1] This section provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[2] 56 of 1986, as amended by the First and Second Diamonds Amendment Acts 29 and 30 of 2005, respectively.

[3] Section 22 provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[4] Section 25(1) provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[5] *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O.* [2016] ZAGPPHC 817 (High Court judgment).

Parties

[4] The applicant is the South African Diamond Producers Organisation (SADPO), a voluntary association whose aims include the streamlining of the diamond producers' industry and acting in concert with other structures in the diamond industry. Its members include diamond producers and diamond dealers.

[5] The first to sixth respondents are: the Minister of Minerals and Energy N.O., the Department of Minerals and Energy, the Minister of Finance, the Department of Finance, the South African Diamond, Minerals and Precious Metals Regulator (the Regulator),[6] and the State Diamond Trader,[7] respectively.

[6] The State Diamond Trader, the sixth respondent, has filed a notice of intention to abide the decision of this Court. Only the first, second and fifth respondents participated in the proceedings in this Court.

Background

[7] The diamond trade in South Africa is regulated in terms of the Act and regulations published under it. The purposes of the Act include controlling the possession, purchase, sale, processing, local beneficiation and export of diamonds.[8] The Act regulates, amongst other things, the possession, sale, purchase, import and export of unpolished diamonds; the premises where the sale and purchase of unpolished diamonds may take place; and the processes to be followed in order to

[6] The Regulator is an entity established in terms of section 3 of the Act. Its objects are to ensure that the diamond resources of South Africa are exploited and developed in the best interests of the people of South Africa; to promote equitable access to and local beneficiation of South Africa's diamonds; and to ensure compliance with the Kimberley Process Certification Scheme (see section 4 of the Act).

[7] The State Diamond Trader is an entity established in terms of section 14 of the Act. The objects of the State Diamond Trader are to promote equitable access to and local beneficiation of South Africa's diamonds (see section 15 of the Act). One way in which it does this is to acquire unpolished diamonds from producers and supply them to local beneficiators. All producers are required, in terms of section 59B of the Act, to offer the unpolished diamonds they produce in a particular cycle to the State Diamond Trader, who may purchase up to a specified percentage of those diamonds and supply them to local beneficiators.

[8] See the preamble to the Act.

export unpolished diamonds.

[8] Before the Act was amended in 2007,[9] a number of SADPO members, who were licensed dealers, had developed a mode of operation at their licensed business premises.[10] In terms of this practice, unpolished diamonds from local producers were offered on an anonymous tender basis to other South African licensed dealers for purchasing parcels of unpolished diamonds on offer. Non-licensed "experts", who attended on behalf of prospective foreign buyers, "assisted" the licensed purchasers. The experts were themselves often from abroad. The ultimate sale was concluded between the producer or licensed dealer and the South African licensed purchaser. This mode of operation allegedly not only assisted in determining the correct "international" market value, but also enabled local producers to mingle with prospective foreign purchasers. The result was that a prospective foreign purchaser was already lined up, should the decision be made that parcels purchased be exported and sold on. The business premises upon which this mode of operation took place became known as "tender houses". The term "tender house" is not used in the Act, and no specific provision is made for this practice. Those who participated in this practice submit that it is simply a business practice that evolved within the industry.

[9] Whether the conduct of business at the tender houses was lawful is the subject of dispute between the parties. While SADPO takes the view that this practice was lawful, as the pre-amendment Act did not prescribe the manner in which unpolished diamonds had to be bought and sold, the respondents argue that this practice has never been lawful and exploits a loophole in the regulatory framework in order to allow unlicensed persons to participate in the diamond trade.

[10] The First and Second Diamonds Amendment Acts came into operation on 1 July 2007. They amended the Act in material respects, including by providing for:

[9] The First and Second Diamonds Amendment Acts 29 and 30 of 2005 came into effect on 1 July 2007.

[10] These premises were either the business premises of a licensed diamond dealer or a licensed diamond exchange.

the establishment of the Regulator;[11] the establishment of the State Diamond Trader;[12] the restructuring of the licensing regime;[13] and the establishment of diamond exchange and export centres (DEECs).[14]

[11] The Amendment Acts inserted section 20A – the impugned provision – into the Act. This section provides:

> "(1) No licensee may be assisted by a non-licensee or holder of a permit referred to in section 26(e) during the viewing, purchasing or selling of unpolished diamonds at any place where unpolished diamonds are offered for sale in terms of this Act, except at a diamond exchange and export centre.
>
> (2) No holder of a diamond trading house licence referred to in section 26(f) or any person authorized in terms of this Act to sell unpolished diamonds may allow the assistance prohibited in subsection (1)."

[12] Aggrieved by certain of the amendments, SADPO approached the High Court to have various provisions of the Act, as amended, set aside.

In the High Court

[13] Initially, SADPO raised various constitutional issues relating to a number of amendments to the Act.[15] These were ultimately narrowed down to relate only to section 20A of the Act.[16]

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[11] Section 3.

[12] Section 14.

[13] Section 26.

[14] Section 59(b). This section provides that the Regulator shall establish DEECs, which shall facilitate the buying, selling, export and import of diamonds. Section 48A provides that all unpolished diamonds intended for export purposes must first be offered for local sale at a DEEC in the prescribed manner. Previously, diamonds could be exported through diamond exchanges, run by diamond exchange licensees. The DEEC alters this position, and is intended to be a "one-stop shop" for the export of unpolished diamonds. Any producer who exports unpolished diamonds must export from a DEEC and pay the relevant export duty. Temporary licensees may also purchase and export unpolished diamonds at the DEEC and pay the relevant export duty.

[15] Challenges were initially raised to sections 19, 20, 20A, 48(a), 59, 59A and 59B of the Act, as amended.

[16] High Court judgment above n 5 at para 6.

[14] SADPO argued that section 20A offends against sections 22 and 25 of the Constitution.[17] On the section 25 challenge, SADPO argued that the prohibition on unlicensed assistance in section 20A deprived SADPO's members of their property – the right to receive full market value for the unpolished diamonds they owned – without sufficient reason.[18] On the section 22 challenge, SADPO argued that section 20A is arbitrary and deprives members of their right to conduct their business in the manner they deem fit.[19] Further, SADPO argued that there is insufficient reason for section 20A; there is no rational connection between section 20A and a legitimate government purpose; and section 20A goes much further than necessary to achieve the legislative purpose.[20]

[15] The respondents argued that the High Court was bound by the decision of the Supreme Court of Appeal in *Saidex*[21] to find that the tender house practice had always been unlawful. If this practice was unlawful pre-amendment, SADPO's members could have accrued no legally protectable rights through the tender house practice. The respondents further argued that no property was deprived through the alleged loss of income, and that in any event there was no arbitrariness.[22] Further, section 20A does not limit the freedom of choosing a trade or occupation and in any event is not arbitrary.[23] According to the respondents, the rationale for section 20A was three-fold: first, to promote local beneficiation of South African diamonds; second, to tighten the regulation of unpolished diamonds and eliminate illegal practices that were taking place in the diamond trade; and third, to ensure compliance with the Kimberley

[17] Id at para 7.

[18] Id at para 38.

[19] Id at para 43.

[20] Id at para 8.

[21] *Saidex (Pty) Ltd v Minister of Minerals and Energy* [2011] ZASCA 102; 2011 JDR 0593 (SCA) (*Saidex*). The applicants in that case had sought an interim interdict to preserve their rights under the Act pending the finalisation of SADPO's application to have certain provisions of the Act declared unconstitutional. The Court held that the requirements for an interim interdict had not been met, as no *prima facie* right to conduct the tender houses had been established, and held that the practice was unlawful.

[22] High Court judgment above n 5 at para 45.

[23] Id at para 46.

Process Certification Scheme.[24]

[16] The High Court held that it was not bound by the decision in *Saidex* and that the business of tender houses was not unlawful pre-amendment.[25] The Court went on to consider the mischief section 20A was intended to address. It held that the first object – the promotion of the local beneficiation of unpolished diamonds – is sufficiently addressed in sections 59, 59A and 59B of the Act, which provide for the State Diamond Trader.[26] The Court held that the second object was premised on the view that the tender houses were unlawful (hence necessitating amendment by section 20A).[27] However, the High Court found that tender houses were lawful pre-amendment, rendering this aim nugatory. The High Court also appears to have accepted the argument that the monitoring of the movement of unpolished diamonds from South Africa is adequately dealt with in numerous sections of the amended Act, and that section 20A is unnecessary for this object.[28]

[17] The High Court held that section 22 of the Constitution "warrants the freedom of choosing of a trade, occupation or profession and thereby obtaining the maximum benefit and advantage accruing therefrom within the four corners of the law".[29] As a result, it held that prohibiting assistance other than at DEECs constitutes a limitation of the rights entrenched in section 22.[30] The Court also accepted that there was a deprivation of property, which it held was "irrational, arbitrary and disproportional".[31] It held that the respondents had failed to discharge their onus to prove the limitations

[24] Id at para 27. The Kimberley Process Certification Scheme is an international certification scheme for the international trade in unpolished diamonds, negotiated in the Kimberley Process. It aims to eradicate the circulation of conflict diamonds.

[25] High Court judgment above n 5 at paras 21-5.

[26] Id at paras 29 and 40.

[27] Id at para 31.

[28] Id at paras 41-2.

[29] Id at para 47.

[30] Id at para 48.

[31] Id at para 49.

justified in terms of section 36 of the Constitution.[32]

[18] The High Court declared section 20A of the Act to be unconstitutional insofar as it infringes on the rights embodied in section 22 and also declared the arbitrary deprivation in terms of section 25(1) of the Constitution of the rights accrued by persons who perform the functions of tender houses to be unconstitutional.[33] The Court also ordered that, pending confirmation of the declaration of invalidity, the respondents be interdicted from implementing section 20A, and ordered the six respondents to pay the costs of the application.[34]

In this Court

[19] The matter was then referred to this Court in accordance with section 172(2)(a) of the Constitution for the confirmation of the order of constitutional invalidity. As explained above, the respondents appeal against the entire judgment and order of the High Court.

Applicant's submissions

[20] First, SADPO argues that section 20A allows for the arbitrary deprivation of "the rights" of those SADPO members who are producers of diamonds, who had conducted business as tender houses, and who were holders of diamond exchange certificates. SADPO argues that producers have been deprived of the right to realise the full market value of the diamonds they own as a result of the prohibition on unlicensed assistance.[35] This right forms part of their *ius disponendi* (right to alienate their property). Additionally, dealers have been deprived of their right to receive full market value for their diamonds when selling, as they can only market to local

[32] Id at para 50.

[33] Id at para 51.

[34] Id.

[35] "Producer" is defined in section 1 of the Act as "any person entitled to win or recover diamonds in terms of sections 19, 25 and 27 of the Mineral and Petroleum Resources Development Act". These sections of the Mineral and Petroleum Resources Development Act 28 of 2002 deal with prospecting rights, mining rights and mining permits respectively.

licensees.[36] Similarly, previous holders of diamond exchange certificates have been deprived of the right to sell to the export market. The Amendment Acts abolished diamond exchanges; under the new regime, previous holders of diamond exchange certificates may apply for a trading house licence under section 26(f). SADPO argues that the trading house licence affords far fewer rights than the diamond exchange certificate did, as a trading house can only market to a local licensee; no foreign assistance is allowed; and trading house licensees may no longer export. Further, SADPO submits that the alleged deprivations are arbitrary as the law does not provide sufficient reason for the deprivation.

[21] Second, SADPO submits that section 20A infringes the rights of its members under section 22 of the Constitution in that it limits their right to choose and practise their trade freely, without sufficient reason or a rational basis having been shown by the respondents.

[22] Third, on the cross-appeal on costs, SADPO submits that the High Court should have awarded costs "including the costs of two counsel" (as opposed to simply ordering costs). In addition, SADPO argues that the High Court should have ordered that the costs be paid by the respondents jointly and severally.

Respondents' submissions

[23] The respondents argue that there is no legal right from which the practice of tender houses arose. The practice of tender houses was illegal, and therefore could not have produced anything close to a legal right. As a result, SADPO's members do not have protectable rights in terms of section 25(1) of the Constitution.

[24] The respondents further submit that the purpose of section 20A is to prohibit assistance by unlicensed persons in the dealing of unpolished diamonds. They had

[36] "Dealer" is defined in section 1 of the Act as "the holder of a diamond dealer's licence contemplated in section 26(a)". This licence entitles the holder to "carry on business as a buyer, seller, importer or exporter of unpolished diamonds".

identified the practice of tender houses as unlawful, which resulted in the prohibition in section 20A. The "nuisance" sought to be dealt with was unlicensed persons assisting local licensed dealers when viewing and buying unpolished diamonds in South Africa, and the resulting export of unpolished diamonds to these "experts" whose identities remained unknown to government.

[25] On the challenge based on section 22 of the Constitution, the respondents submit that the opportunity to earn an additional 30% from the tender house practice has no basis in law. They also submit that, even if that opportunity is a legally protectable right, government has the power in terms of section 22 to regulate the trade of a diamond dealer.

[26] The respondents submit that section 20A is intended to play an important role in the regulation of trading in unpolished diamonds. They state that 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 Kimberley Process Certification Scheme. As a result, the respondents submit that there are legitimate purposes behind section 20A, and that that section is rationally related to those purposes.

[27] 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 justifiable in terms of section 36(1) of the Constitution.

Issues

[28] This matter raises two principal issues—

(a) whether section 20A of the Act arbitrarily deprives SADPO's members of property, as envisaged in section 25 of the Constitution; and

(b) whether section 20A of the Act violates the right of SADPO's members to choose their trade, occupation or profession freely, as enshrined in section 22 of the Constitution.

[29] I deal with each of these issues below. Though much is made of it in the papers, the issue whether the tender house practice was lawful before the Act was amended is not relevant to determining the matter. I proceed on the assumption that the practice was previously lawful.

Preliminary issues: jurisdiction and condonation

[30] As these are confirmation proceedings in terms of section 167(5) of the Constitution, this Court's jurisdiction is necessarily engaged.

[31] The fifth respondent has applied for condonation of the late filing of its notice of appeal. The notice was filed one day late, on 28 September 2016. The reason for the delay was that, when the candidate attorney attempted to file the notice on 27 September 2016, the Registrar quite properly declined to accept the document as there was no proof of agreement between the parties for service by email; nor was there acknowledgement of receipt from all of the respondents. The defect was remedied and the notice was filed on the following day. This explanation is satisfactory and the delay is minimal. This matter engages important constitutional issues and involves a declaration of invalidity of a legislative provision. Moreover, there has been no prejudice to the applicant, particularly as service was effected timeously. It is in the interests of justice that condonation be granted.[37]

[32] The applicant has applied for condonation for the late filing of its notice of cross-appeal. The applicant states that it assumed that it had 10 days after the date of the fifth respondent's notice of appeal to file its cross-appeal, as an application for

[37] *Head of Department, Department of Education, Limpopo Province v Settlers Agricultural High School* [2003] ZACC 15; 2003 (11) BCLR 1212 (CC) at para 11 and *S v Mercer* [2003] ZACC 22; 2004 (2) SA 598 (CC); 2004 (2) BCLR 109 (CC) at para 4.

leave to cross-appeal in terms of rule 19 of the Rules of this Court must be filed within 10 days of the filing of the application for leave to appeal. In this instance, however, there was no application for leave to appeal filed in terms of rule 19, as the notice of appeal was lodged in terms of rule 16, which does not require an application for leave to appeal. Rule 16 does not specify time-limits for the noting of a cross-appeal. The applicant notes that the reference to an appeal in rule 16 may include a cross-appeal, which would mean that the notice of cross-appeal was required to be lodged by the same date as the fifth respondent's notice of appeal – 27 September 2016. The applicant therefore requests condonation for the late filing of the notice of cross-appeal to the extent necessary.

[33] The applicant's cross-appeal is in effect an appeal against the order of the High Court, and is governed by rule 16. The time periods in rule 16 therefore apply, and the notice was required to be filed by 27 September 2016. The applicant's notice of cross-appeal was filed on 14 October 2016 – two and a half weeks late. Again, the delay is not significant, and there has been no prejudice to the respondents. Given the narrow issues raised by the cross-appeal, which deals only with the costs award, it is in the interests of justice that condonation be granted.

The challenge based on section 25

[34] Section 25(1) provides that "no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". In order for there to be an infringement of section 25(1), (1) the thing in question must be property; (2) there must be a deprivation; and (3) the deprivation must be arbitrary.[38] The test was enunciated by this Court in *FNB*:

> "(a) Does that which is taken away from FNB by the operation of section 114 amount to 'property' for purpose of section 25?
>
> (b) Has there been a deprivation of such property by the Commissioner?

[38] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*) at para 46.

(c) If there has, is such deprivation consistent with the provisions of section 25(1)?

(d) If not, is such deprivation justified under section 36 of the Constitution?

(e) If it is, does it amount to expropriation for purpose of section 25(2)?

(f) If so, does the deprivation comply with the requirements of sections 25(2)(a) and (b)?

(g) If not, is the expropriation justified under section 36?"[39]

[35] SADPO argues that the property rights in issue are twofold: the ownership of the *diamonds* won by the producers and bought and sold by the dealers; and the ownership of the diamond dealer *licences* and concomitant ownership of their businesses.

[36] In relation to the diamonds, SADPO contends that producers and dealers are deprived of 30% of the market value of the diamonds they sell, because section 20A prohibits a key part of the price-forming mechanism – unlicensed expert assistance. Without this assistance, producers and dealers are unable to obtain the prices they were previously able to obtain, and suffer a loss of 30% compared to the prices they were previously able to obtain. On SADPO's argument, this constitutes interference with their members' *ius disponendi* which, they argue, includes the right to obtain the highest possible price for that property. In relation to the licences, SADPO contends that diamond dealers have been deprived of property in that the activities they were previously entitled to engage in under their licences have been limited.

[37] The test laid down by this Court in *FNB* requires us to ask, first, whether the things at issue here constitute property; second, whether there has been a deprivation; and third, whether the deprivation is contrary to section 25(1) (in that it is arbitrary).[40]

[39] Id.

[40] In *FNB* id, this Court set out a sliding scale for determining whether a deprivation of property is arbitrary: the standard can range from rationality, to something more akin to proportionality, depending on the circumstances. At paras 65-6, this Court held:

> "In its context arbitrary, as used in section 25(1), is not limited to non-rational deprivations, in the sense of there being no rational connection between means and ends. It refers to a wider concept and a broader controlling principle that is more demanding than an enquiry into mere

SADPO's contention is that its members have been deprived of (1) 30% of the value of the diamonds they purchase and sell; and (2) the right to engage in activities they were previously entitled to engage in in terms of their licences. When approaching the *FNB* enquiry on these facts, there appear to be two possible ways to approach the first two legs of the test ("property" and "deprivation").

[38] On one approach, we could proceed on the basis that the "property" in issue is the diamonds and the licences, and then, at the "deprivation" stage of the enquiry, consider whether what has been taken away from licensees (30% of the previous market value, and the entitlement to engage in business in a particular way) constitutes a right or interest worthy of protection, and is substantial enough that its removal constitutes "deprivation". From there, if there is a deprivation of property, we would proceed to the arbitrariness analysis. An alternative approach would be to begin by enquiring what it is that has been taken away (30% of the previous market value, and the entitlement to engage in business in a particular way), and consider whether those "rights" or interests constitute "property" for the purposes of section 25. Only if those rights or interests constitute property would we move on to the next stages of the test.

[39] The former approach is preferable in this instance. The "property" at issue here is the ownership of the diamonds, and the ownership of the licences (assuming the licences are property). That ownership brings with it certain rights and entitlements. SADPO alleges that these include the interests it seeks to protect on behalf of its members.

> rationality. At the same time it is a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36. This is so because the standard set in section 36 is reasonableness and justifiability, whilst the standard set in section 25 is arbitrariness. This distinction must be kept in mind when interpreting and applying the two sections.
>
> It is important in every case in which section 25(1) is in issue to have regard to the legislative context to which the prohibition against arbitrary deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary."

[40] Below, I consider the ownership of the *diamonds* won by the producers and bought and sold by the dealers and the purported ownership of the diamond dealer *licences* in turn, in order to determine whether section 20A permits the arbitrary deprivation of property.

Ownership of diamonds

[41] The ownership of a corporeal movable object has long been recognised as property, both under common law and for the purpose of section 25.[41] That SADPO's members hold constitutionally protectable property in the physical diamonds they buy and sell is uncontroversial: the diamonds are clearly property for the purposes of section 25.

[42] The more complex question is whether section 20A deprives producers and dealers of ownership of their diamonds. The deprivation enquiry was first encapsulated by this Court in *Mkontwana*:

> "Whether there has been a deprivation depends on the *extent of the interference* with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, *substantial interference* or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."[42]

[43] The Court in *Mkontwana* thus did not delineate the precise ambit of what constitutes "deprivation", but noted that a substantial limitation, beyond the normal expected restrictions on property, would constitute deprivation.

[44] This Court again had occasion to comment on the deprivation analysis in *Offit*. It affirmed that there must be a "substantial interference", and developed the enquiry:

[41] This Court in *FNB* above n 38 at para 51 held that "ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property".

[42] *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 32. My emphasis.

> "Our jurisprudence is clear that the physical taking of property is not required to constitute a deprivation, and it suffices for one or more of the entitlements of ownership to be impacted upon. Whilst direct or physical interference is not necessary, the impact must be of *sufficient magnitude to warrant constitutional engagement*. A court must give consideration to the extent to which the use and the enjoyment of land have been diminished."[43]

[45] The Court in *Offit* rejected an argument that the continued threat of expropriation, which could have a negative effect on the market value of the property, was sufficient to constitute a deprivation of property as envisaged in section 25(1).[44]

[46] This Court also had occasion to consider its approach to the deprivation analysis in *Link Africa*.[45] Dealing with section 22 of the Electronic Communications Act,[46] which permitted electronic communications network service licensees to enter onto municipal land and install and maintain communications infrastructure, the Court set out the enquiry as follows:

> "Does section 22 inflict a deprivation? This *depends on the extent of the intrusion* in the property or limitation of its use or enjoyment. There must be interference with property that is significant enough to 'have a legally relevant impact on the rights of the affected party before deprivation of property under section 25 is established'."[47]

[47] In that case, it was held that there was no deprivation, as it had not been shown that Link Africa's intended actions amounted to substantial interference with the City's infrastructure:

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[43] *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) (*Offit*) at para 41. My emphasis.

[44] Id at para 44.

[45] *Tshwane City v Link Africa* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC) (*Link Africa*) at paras 166-73.

[46] 36 of 2005.

[47] *Link Africa* above n 45 at para 167. Footnotes omitted. My emphasis.

> "In this court the City has equally shown no harm. . . . There is no iota of evidence that installing Link Africa's electronic communications network damages or impairs City infrastructure. Nor is there any evidence that it could cause harm or prejudice to the City or its people. Precisely put, the City has provided no evidence that Link Africa's installation of fibre-optic cables is beyond normal restriction of use and enjoyment of the property where the cables are installed."[48]

[48] This Court's approach to the deprivation enquiry may be summarised thus: there will be a deprivation only where the interference is "substantial" – meaning that the intrusion must be so extensive that it has a legally relevant impact on the rights of the affected party.

[49] In order to consider whether there has been a deprivation in this instance, we must consider what it is that section 20A takes away from producers and dealers. As explained above, SADPO contends that producers and dealers are deprived of 30% of the market value of the diamonds they sell. This constitutes interference with their members' right to alienate their property, which they argue includes the right to obtain the highest possible price for that property.

[50] Does section 20A interfere with producers' and dealers' right to alienate their diamonds in a legally relevant way? Surely not. The first hurdle for SADPO is that the deprivation analysis requires an enquiry into the extent of the interference with the right in question. Even assuming that the involvement of an unlicensed foreigner is necessary to determining, and thus obtaining, the full market value of unpolished diamonds, on the facts before the Court it is impossible to quantify the "loss" SADPO's members have suffered as a direct result of section 20A. SADPO argues that the price of diamonds has dropped by 30% since the presence of unlicensed persons has been prohibited by section 20A. As a result, it contends that producers and dealers are deprived of 30% of the value of their diamonds. The respondents, however, allege that the 30% referred to is actually the lost commission opportunity,

[48] Id at para 172.

rather than the fair market value of the diamonds. Nothing in the way of empirical evidence for this alleged drop in price is included in the papers. SADPO's argument on this score is vague and speculative. As was the case in *Link Africa*, no loss has been proved. It is not clear how the Court can, in the circumstances, make a finding that there has been interference to the extent that constitutes a "deprivation". It is not even clear on the facts whether the interference has any impact on the value of SADPO's members' property at all.

[51] Further, an attempt to calculate the alleged loss in value is beset by the difficulty of locating the point in time at which the "loss" is to be measured. Measuring the extent of the loss entails comparing the price of unpolished diamonds at a past point in time, to the price sometime after the amendments were effected. But which future price are we to use for purposes of comparison? Should this be the price directly after the amendments were effected? The price a year later, once the market has adapted to the new regulations? The price at the time papers were filed? In any market, business adapts to new regulation and creates new business practices around that regulation. A market is an ever-changing place, with the market value of goods similarly fluid. It is not possible to consider the effect of section 20A as though the market would not otherwise have changed. Again, it seems it is not possible on the facts before us to assess whether the interference in question is sufficiently substantial to constitute a "deprivation".

[52] Moreover, even if the loss were proved to our satisfaction, there would still be no deprivation, as no legally protectable interest or entitlement is removed by section 20A. Producers and dealers are still permitted to sell their diamonds, and to realise full market value for them. Section 20A does not prohibit sale, nor does it require that a portion of the proceeds be donated to the state. What is limited is the way in which producers and dealers are to conduct sales – not the right to sell itself. Producers and dealers still have the same right as before to obtain the highest possible price for the diamonds they sell. What has changed is (1) the *manner* in which they may alienate their diamonds; and (2) the market conditions that determine what the

highest price will be, as producers and dealers are no longer entitled to obtain the assistance of unlicensed persons when determining the price of their diamonds, except at a DEEC.

[53] The limitation on the manner in which producers and dealers may alienate their diamonds is not sufficiently substantial to constitute a "deprivation" of property in those diamonds. Producers and dealers do not generally have a legally protectable interest in conducting a sale according to a particular practice. And, a market is an inherently regulated space, and prices obtainable in that market are necessarily impacted by government regulation. A property holder does not generally have a legally protectable interest either in obtaining a specific value for his goods, or in valuing his goods according to a particular method.

[54] As a result, the limitation imposed by section 20A clearly does not constitute a substantial interference with licensees' rights of ownership in their diamonds, and there is no deprivation of property.

[55] In the result, the test laid down in *FNB* has not been met: diamond producers and dealers have not been deprived of property in their diamonds and there is accordingly no infringement of section 25(1).

"Ownership" of licences

[56] SADPO also submits that its members are deprived of property in their diamond dealer's licences.

[57] Do these licences constitute "property" for the purposes of section 25? This Court in *Shoprite* held that licences may, in some instances, be considered property.[49] In that case, the majority[50] held that a grocer's wine licence is property. However, it

[49] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (*Shoprite*).

[50] Comprising the judgments of Froneman J and Madlanga J.

is not necessary to answer this question in this matter.[51] Assuming that the licences in issue do constitute property, I am nevertheless of the view that there is no deprivation.

[58] SADPO contends that diamond dealers have been deprived of property in that the activities they were previously entitled to engage in under their licences have been limited. Again, the question is whether there is a substantial interference: is the extent of the intrusion such that it has a legally relevant impact on the rights of the affected party?

[59] How does section 20A interfere with dealers' licences? These licences entitle dealers to buy, sell, import and export unpolished diamonds. None of those entitlements is removed by section 20A. What is removed (assuming the tender house practice was previously lawful) is their entitlement to be assisted in these activities by unlicensed foreigners at locations other than a DEEC. This entitlement was never subject to a licence, but was rather a business practice that grew up in relation to the permissions granted in terms of the licence. This may be contrasted to the situation in *Shoprite*, where a legal entitlement previously conferred by the licence in question was removed.[52]

[60] What SADPO seeks to protect is their members' interest in conducting their

[51] This is because I do not consider the question of whether the licences constitute property to be of relevance to determining the matter: even assuming they are property for the purposes of section 25 of the Constitution, there is no deprivation. To decide whether the licences here are property would require an analysis of whether the conditions set out in *Shoprite* as underlying a finding that the licence was property, have been met. But, although the majority in *Shoprite* above n 49 did find that the licence in issue there was property, the two judgments comprising the majority on this issue based their findings on different reasons. To determine whether the licences here are property would require the Court to decide which approach to the enquiry – that set out in the judgment of Froneman J, or that in the judgment penned by Madlanga J – is to be preferred. That is an important issue, on which we have had the benefit neither of the parties' views, nor those of the High Court. As this is not a case where the question whether the licence is property has any impact on the outcome, it is not an appropriate matter for this Court to pronounce authoritatively on which of the two approaches to determining when a licence constitutes property set out in the judgments comprising the majority in *Shoprite*, ought to be preferred. This must be left for a more apposite case.

[52] Compare *Shoprite* above n 49 at paras 74-6, where Froneman J held that grocer's wine licences had conferred on their holders certain legal entitlements, including the ability to sell wine and groceries on the same premises. The relevant regulatory changes, providing that liquor could only be sold from premises selling liquor exclusively, meant that holders of grocer's wine licences in the position of Shoprite lost a legal entitlement. Froneman J held that the fact that a legal entitlement was lost meant that there was a deprivation under section 25(1).

business in terms of their licences according to a particular preferred strategy. There can be no deprivation in a change of regulation that alters the strategies licensees are entitled to pursue in the course of conducting licensed activities. Favourable business conditions, including favourable regulatory conditions, are transient circumstances, subject to inevitable changes.

[61] It cannot be that, every time a government decision or regulation makes a particular business strategy unlawful, persons who preferred to conduct their business in accordance with that strategy have been deprived of property. As explicated above, a market is an inherently regulated space, and it cannot be that any alteration to the way in which market forces play out constitutes a deprivation of property. To the extent that the licences in issue are in fact property, the limitation imposed by section 20A is not substantial, as it does not have a legally relevant impact on the rights of the affected party.

Diamond exchange certificates

[62] SADPO also argues that holders of diamond exchange certificates have been deprived of property. The argument is that, because the First and Second Diamonds Amendment Acts abolished diamond exchanges and replaced them with trading house licences, previous exchange licensees who paid R500 000 for their licences have been deprived of property. SADPO argues that the trading house licence affords far fewer rights. However, it is not clear how the rights of these licensees are affected by section 20A in particular. If the complaint is with the change in the licensing regime, the attack should have been brought against the relevant provisions. Section 20A neither abolishes diamond exchange licences nor establishes trading house licences.

[63] In the result, there is no limitation of the rights of SADPO's members under section 25 of the Constitution. The order of invalidity based on section 25 of the Constitution cannot be confirmed.

The challenge based on section 22

[64] Section 22 provides:

> "Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[65] Section 22 comprises two elements: the right to *choose* a trade, occupation or profession freely, and the proviso that the *practice* of a trade, occupation or profession may be regulated by law. Though both the "choice" of trade and its "practice" are protected by section 22,[53] the level of constitutional scrutiny that attaches to limitations on each of these aspects differs. If a legislative provision would, if analysed objectively, have a negative impact on choice of trade, occupation or profession, it must be tested in terms of the criterion of reasonableness in section 36(1). If, however, the provision only regulates the practice of that trade and does not affect negatively the choice of trade, occupation or profession, the provision will pass constitutional muster so long as it passes the rationality test and does not violate any other rights in the Bill of Rights.[54] In that case, there is no limitation of section 22 and no section 36 analysis is required. As this Court held in *Affordable Medicines*, "restrictions on the right to practise a profession are subject to a less stringent test than restrictions on the choice of a profession".[55]

[66] The first question, then, is whether section 20A imposes restrictions on the choice of a trade, occupation or profession, or only on its practice. This Court has not yet laid down specific guidance for determining when a legislative provision "is likely to impact negatively on the choice" of profession, trade or occupation, as opposed to simply regulating the practice of that trade, occupation or profession. However, some guidance may be sought from *Affordable Medicines*, the leading judgment on the interpretation of section 22.

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[53] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 63.

[54] Id at para 92.

[55] Id at para 93.

[67] In *Affordable Medicines*, this Court held that a law requiring medical practitioners who wished to dispense medicines to obtain a licence, did not have the effect of influencing negatively a person's decision whether to become a medical practitioner. This was because the provision did not purport to regulate entry into the medical profession, nor did it affect the continuing choice of practitioners as to whether to remain medical practitioners or not.[56] It merely regulated the specific circumstances in which medical practitioners may, if they choose, dispense medicines. The Court further held that it was "difficult to fathom" how a person who has chosen to pursue a medical profession could be "deterred from that ambition by the requirement that, if, upon qualification, he or she wishes to dispense medicine as part of his or her practice, he or she would be required, among other things, to dispense medicines from premises that comply with good dispensing practice."[57]

[68] Clearly, then, a law prohibiting certain persons from entering into a specific trade, or providing that certain persons may no longer continue to practise that trade, would limit the choice element of section 22; in these cases there is a *legal barrier* to choice. This would be the case where, for instance, a licence is necessary to conduct a particular trade, and that licence is withdrawn. However, one may also conceive of legislative provisions that, while not explicitly ruling out a group of persons from choosing a particular trade, does so in effect, by making the practice of that trade or profession so undesirable, difficult or unprofitable that the choice to enter into it is in fact limited.

[69] These provisions must also fall within the ambit of provisions that limit choice, as they create an *effective limit* on choice. Indeed, this Court in *Affordable Medicines* seems to have taken into account both the fact that the legislation in issue did not present a legal barrier to entry into the profession, and that it did not impose an effective limit on that choice in that it would not "deter" persons from entering into

[56] Id at para 69.

[57] Id at para 71.

the profession.

[70] On this understanding of what it means to limit choice for the purposes of section 22, does section 20A limit the right of SADPO's members to choose their trade, profession or occupation? No. Not only does section 20A not impose a formal legal bar to choosing to practise the trade of diamond dealer or producer, but no case has been made out that section 20A presents an effective bar to choosing to practise these trades. All section 20A does is prohibit licensees from being assisted by unlicensed persons when viewing, purchasing or selling unpolished diamonds, except at a DEEC. Producers and dealers are still able to obtain assistance if they so wish, but that assistance must either be rendered by a licensed person (outside a DEEC) or, if they specifically seek the assistance of a person who is not licensed, this assistance may be rendered only at a DEEC. This cannot, without more, render trading as a diamond producer or dealer so unprofitable as to obviate choice.

[71] Accordingly, the freedom to choose one's trade, occupation or profession is not limited by section 20A. The impugned provision simply regulates the practice of the trades of diamond producing and dealing.

[72] The next question is then whether section 20A regulates these trades within constitutionally permissible limits. The test is one of rationality. This test was first proposed in *Lawrence*[58] in the context of section 22's predecessor, section 26 of the Interim Constitution. In that case, this Court stated the test as follows:

> "The requirement that the measures be justifiable in an open and democratic society based on freedom and equality means that there must be a rational connection between means and ends. Otherwise the measure is arbitrary and arbitrariness is incompatible with such a society."[59]

[58] *S v Lawrence, S v Negal, S v Solberg* [1997] ZACC 11; 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) (*Lawrence*).

[59] Id at para 41.

[73] The rationality test was also accepted in relation to section 22 of the Final Constitution in *Affordable Medicines*, where the Court rejected the suggestion that a reasonableness test applied.[60] The Court held that the standard for determining whether the regulation of the practice of a profession falls within the purview of section 22 is whether the regulation of the practice of a profession is rationally related to a legitimate government purpose and does not infringe any of the rights in the Bill of Rights.

[74] The rationality standard is aimed at achieving a proper balance between the role of the legislature on the one hand, and the role of the courts on the other.[61] As this Court held in *Affordable Medicines*:

> "The rational basis test involves restraint on the part of the Court. It respects the respective roles of the courts and the Legislature. In the exercise of its legislative powers, the Legislature has the widest possible latitude within the limits of the Constitution. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society. It is this guiding principle that should inform the test for determining whether legislation that regulates practice but does not, objectively viewed, impact negatively on choice, passes constitutional scrutiny."[62]

[75] This means that the question is whether there is a rational basis for section 20A; whether another measure may have been more effective, or less disruptive, is not relevant. In *Lawrence*, this Court held that legislation should not be set aside by a court as infringing economic freedom "simply because it may consider the legislation to be ineffective or is of the opinion that there are other and better ways of dealing with the problems".[63]

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[60] The Court in *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (E) applied a reasonableness test. This Court in *Affordable Medicines* above n 53 discusses this finding at para 81:

> "If the Court intended to adopt reasonableness as a standard for reviewing legislation that regulates the practice of a profession, I am, with respect, unable to agree."

[61] *Affordable Medicines* above n 53 at para 86.

[62] Id.

[63] *Lawrence* above n 58 at para 44.

[76] Is there a rational basis for section 20A? First, we must look to its purpose. Some guidance is found in the preamble to the Second Diamonds Amendment Act, which introduced section 20A. It provides that the Second Diamonds Amendment Act seeks, amongst other objects, "to prohibit assistance to licensees by non-licensed persons at any place where unpolished diamonds are offered for sale". Section 20A achieves this object, by prohibiting unlicensed assistance at all places where unpolished diamonds are offered for sale, with the exception of the DEECs. This does not, however, assist in ascertaining the purpose of section 20A – *why* this prohibition was put into effect.

[77] The respondents submit that the prohibition on assistance from unlicensed persons in places other than the state's DEECs serves two key purposes: promoting local beneficiation of unpolished diamonds, thereby regulating the diamond trade in the public interest; and ensuring that the movement of unpolished diamonds is properly monitored and recorded, in furtherance of the country's obligations under the Kimberley Process Certification Scheme. That these were the purposes sought to be achieved by the First and Second Diamonds Amendment Acts is clear from the Memorandum on the Objects of the Diamonds Amendment Bill that was published at the time the amendments were first proposed.

[78] These are clearly legitimate government purposes, and SADPO does not argue that they are not. Its complaint, however, is that section 20A does not achieve these purposes; as a result, it is irrational. On local beneficiation, SADPO argues that this purpose is sufficiently achieved through other provisions of the Act. On monitoring, it argues that the previous system provided for adequate monitoring of unpolished diamonds, and that section 20A adds nothing to the system that was already in place.

[79] This argument is unsustainable. It is not difficult to imagine that creating a one-stop shop, in the form of state-run DEECs, for exports of all unpolished diamonds, and prohibiting unlicensed persons from being involved in trade except at

these centralised locations, is rationally related to the legitimate purpose of monitoring the movement of unpolished diamonds. The more involvement unlicensed persons are permitted to have in the process of buying, selling and exporting unpolished diamonds, the greater the risk of illegal transactions going unnoticed. It is plausible that it would be easier for the state to control and monitor diamond trading if all persons who engage in the trading process outside the DEECs are at least known to the state through a licensing process. Based on this purpose alone, section 20A is not irrational in the manner in which it seeks to regulate the trade of diamond producing and dealing. As a result, there is no limitation of section 22 of the Constitution, and the order of invalidity based on that section cannot be confirmed.

[80] Accordingly, I decline to confirm the declaration of invalidity and uphold the appeal of the first, second and fifth respondents.

Costs

[81] According to *Biowatch*,[64] no costs ought to be awarded.

[82] As I decline to confirm the High Court's order, including its order on costs, it follows that SADPO's cross-appeal on costs fails.

Order

[83] The following order is made:

1. The late filing of the notice of appeal and the notice of cross-appeal is condoned.
2. The cross-appeal is dismissed.
3. The appeal against the declaration of invalidity of section 20A of the Diamonds Act 56 of 1986, made by the High Court of South Africa, Gauteng Division, Pretoria, succeeds.

[64] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

4. The declaration of invalidity is not confirmed.
5. The order of the High Court is set aside and replaced with the following:
   "The application is dismissed. No order is made as to costs."
6. There is no order as to costs in this Court.

For the Applicant:	J L Gildenhuys instructed by Cranko Karp & Associates Inc
For the First, Second and Fifth Respondents:	I A M Semenya SC and T J Machaba instructed by Mkhabela Huntley Adeyeke Inc