



## CONSTITUTIONAL COURT OF SOUTH AFRICA

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

**CCT 234/16**

**Date of hearing: 11 May 2017**  
**Date of judgment: 24 July 2017**

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#### **MEDIA SUMMARY**

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*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 24 July 2017 the Constitutional Court handed down judgment in an appeal arising from an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court), in which the High Court declared section 20A of the Diamonds Act 56 of 1986 (Act) unconstitutional insofar as it infringes on the rights embodied in sections 22 (right to choose trade, occupation or profession) and 25(1) (right not to be deprived of property arbitrarily) of the Constitution. The applicant, the South African Diamond Producers Organisation (SADPO), sought confirmation of the declaration of invalidity. The first, second and fifth respondents (respondents) appealed against the High Court’s judgment and order.

The First and Second Diamond Amendment Acts came into operation on 1 July 2007, and inserted section 20A – the impugned provision – into the Act. This section provides that no licensee may be assisted by a non-licensee during the viewing, purchasing or selling of unpolished diamonds at any place where unpolished diamonds are offered for sale in terms of the Act, except at a diamond exchange and export centre (DEEC).

Before the Act was amended, a number of SADPO members, who were licensed diamond dealers, had developed a mode of operation at their licensed business premises, whereby parcels of unpolished diamonds from local producers were offered on an anonymous tender basis to other South African licensed dealers. Non-licensed “experts”, who attended on behalf of prospective foreign buyers, “assisted” the licensed purchasers. This practice allegedly not only assisted in determining the correct “international” market value of the diamonds, but also enabled local producers to mingle with prospective

foreign purchasers with the result 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”. Whether the conduct of business at the tender houses was lawful was disputed between the parties. Section 20A effectively put an end to this practice.

SADPO approached the High Court to have section 20A declared unconstitutional. The High Court declared section 20A of the Act 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” unconstitutional.

The matter was then referred to this Court in accordance with section 172(2) of the Constitution for the confirmation of the order of constitutional invalidity. The fifth respondent noted an appeal to this Court against the whole of the judgment and order of the High Court, which was supported by the first and second respondents. SADPO noted a cross-appeal against the High Court’s judgment and order on costs.

On the property challenge, SADPO argued 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 30% loss. This interferes with their members’ right to alienate their property which, they argued, includes the right to obtain the highest possible price for that property. SADPO also contended that diamond dealers have been deprived of property in their licences. On the section 22 challenge, SADPO submitted that section 20A limits its members’ right to choose and practise their trade freely, without sufficient reason or a rational basis. On the cross-appeal on costs, SADPO submitted that the High Court should have awarded costs “including the costs of two counsel” (as opposed to simply ordering costs), and should have ordered that the costs be paid by the respondents jointly and severally.

The respondents argued that the practice of tender houses was illegal, and that SADPO’s members therefore do not have protectable rights in terms of section 25(1) of the Constitution. Further, section 20A is not arbitrary as it pursues the legitimate purpose of prohibiting assistance by unlicensed persons in the dealing of unpolished diamonds. On the section 22 challenge, the respondents submitted that the government has the power in terms of section 22 to regulate the trade of a diamond dealer, that there are legitimate purposes behind section 20A, and that the section is rationally related to those purposes.

In a unanimous judgment by Khampepe J, the Constitutional Court upheld the appeal and declined to confirm the declaration of invalidity. On the section 25 challenge, this Court held that there was no deprivation of property, as section 20A does not interfere with producers’ and dealers’ right to alienate their diamonds in a legally significant way. The deprivation analysis requires an enquiry into the extent of the interference with the right in question. On the facts before this Court it was impossible to quantify the “loss”

SADPO's members have suffered as a direct result of section 20A. Even if the loss had been proved, this Court held that there would still be no deprivation of property, as no legally protectable interest or entitlement is removed by section 20A. Producers and dealers do not generally have a legally protectable interest in conducting a sale according to a particular practice. Furthermore, 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. This Court also held that SADPO's members had not been deprived of any property they may have in their licences.

On the section 22 challenge, this Court held that section 20A does not limit the freedom to choose one's trade, occupation or profession. The impugned provision simply regulates the practice of the trades of diamond producing and dealing, and would pass constitutional muster provided that it is rationally related to a legitimate government purpose. This Court held that section 20A was rationally related to the legitimate purpose of monitoring the movement of unpolished diamonds. As a result, the Court held that there is no limitation of the rights contained in section 22 of the Constitution.

The declaration of invalidity was, accordingly, not confirmed. SADPO's cross-appeal on costs also failed.