

SOUTH AFRICA / JUDGMENT

Ukhahlamba Poultry Farm (Pty) Ltd v South African Poultry Association (AR446/2017) [2018] ZAKZPHC 30 (3 August 2018) [2018] ZAKZPHC 30

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Gorven, Balton, Bezuidenhout

CASE / FILE NUMBER

AR 446/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Reportable

Case

No: AR 446/2017

In

the matter between:

UKHAHLAMBA

POULTRY FARM (PTY) LTD APPELLANT

and

THE

SOUTH AFRICAN POULTRY ASSOCIATION RESPONDENT

JUDGMENT

Delivered on: 3 August 2018

Gorven J (Balton and Bezuidenhout JJ concurring)

- [1] The appellant was the defendant in the court a quo, where the respondent was the plaintiff. In this judgment the parties shall be referred to as in that court. The plaintiff is the levy administrator. It is appointed to collect levies under a notice (the notice)[1] promulgated under the Marketing of Agricultural Products Act (the Act).[2] The notice was promulgated by the Minister of Agriculture, Forestry and Fisheries pursuant to s 15 of the Act. The

defendant is a producer as defined in the Act.[3] It produces eggs of the species *Gallus domesticus*. This was proclaimed to be an agricultural product to which a levy applied. The plaintiff sued the defendant for payment of the levy imposed in the notice. It relied for its claim on two alternative grounds. One was that it had invoiced the defendant monthly for the levy, which the defendant was obliged to pay directly to the plaintiff. The other was that Huhtamaki South Africa (Pty) Ltd (HSA) had supplied packaging material to the defendant. The defendant was thus obliged to pay the levy to HSA and the plaintiff had taken cession of the claim of HSA against the defendant.

- [2] Various defences were raised which need not be dealt with here. The parties applied to court to separate the issues. At the hearing, one issue required determination. The order concerning that issue was:

‘[O]n an interpretation of the Statutory Measure which is Government Notice No. R954 dated 9 October 2009 and its various

amendments, in the context of the Act in terms of which was published, being the Marketing of Agricultural Products Act, No. 47 of 1996, a determination be made whether the levy imposed by the Act and the said notice is to be paid by the Defendant in terms of the

provisions of clause 8(b) of the notice, as read with clause 4 and the definitions contained in the schedule to the notice.’

Both parties agreed before us that the separated issue was whether clause 8(b) of the notice required the defendant to pay the levy to the plaintiff. It did not deal with whether the defendant was liable to pay the levy by virtue of the cession.

- [3] The matter came before D Pillay J. No evidence was led. It was dealt with by way of argument alone. The court a quo found for the plaintiff on the issue. This appeal is with her leave.

- [4] The notice imposes a levy on two classes of agricultural products. The first is day old female parent broiler chickens sold by breeders for commercial use. The second is for packed eggs for commercial use.[4] Clause 8 reads as follows:

‘The levy imposed in terms of this notice shall be paid by-

- (a) the breeder of day old female parent broiler chickens at the sale of such chickens and the breeder will then pay it over to the levy administrator; and
- (b) the supplier of packaging material for the packing of eggs at the sale of such packaging material and the supplier will then pay

it over to the levy administrator on behalf of the egg producers.’

The court a quo found that clause 8(b) rendered the defendant liable to pay the levy to the plaintiff.

[5] The law concerning the approach to interpretation of documents has been variously stated. Wallis JA held:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory

instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’[5]

The Constitutional Court has held:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).’[6]

The Constitutional Court recently approved what was said in *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd*: [7]

‘The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (*Jonnes v AngloAfrican Shipping Co. (1936) Ltd.*, 1972

(2) SA 827 (AD) at p. 834E). Very few words, however, bear a single meaning, and the “ordinary” meaning of words appearing in a contract will necessarily depend upon the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract.’[8]

[6] The law reports are replete with formulations of the approach to interpretation. These, however, do not provide a mathematical formula which, when applied, results in an interpretation akin to a mathematical proof. In essence, interpretation proceeds in a series on concentric circles, much like the ripples produced by dropping a pebble into a still pond of water. The larger ripples are found near the centre. The ripples diminish in size and effect as they spread. In interpreting legislation, a court is enjoined to promote the spirit, purport and objects of the Bill of Rights in our Constitution.[9] That is the overarching consideration. Within that framework, the centre is the words used, followed by the purpose of the provision,

the immediate context within the document, the wider context which gave rise to the generation of the document and, finally, whether the interpretation arrived at results in absurdities and impracticalities.

[7] The words of clause 8(b) are grammatically clear. The entity which must pay the levy to the levy administrator is the ‘supplier of packaging material for the packing of eggs’. This is reinforced by the clause providing that ‘the supplier will then pay it over to the levy administrator’. There is no provision in the Act or the notice that egg producers should pay any levy to the levy administrator. The only mention in the entire notice of egg producers is at the conclusion of the clause. This states that ‘the supplier will then pay it over to the levy administrator on behalf of the egg producers.’[10] It is thus clear that, leaving aside questions of any cession, the levy administrator may look only to the supplier of packaging

material for payment of the levy. In the present matter, therefore, the plaintiff cannot look to the defendant for payment. Clause 8(b) does not render the defendant liable to make that payment to the plaintiff.

[8] Before us, the plaintiff made much of the phrase highlighted above. It pointed to the distinction between this provision and that in clause 8(a) concerning broiler chickens. In that clause, the breeder is made liable to pay to the levy administrator and no mention is made that the payment is to be made on behalf of another entity. It submitted that this means that the entity liable to pay the levy to the levy administrator in clause 8(b) is the egg producer. The submission was to the effect that the notice creates a form of statutory agency. The liability to pay is that of the egg producer. In making payment, the supplier of packaging material simply discharges the obligation of the egg producer. On this premise, it was submitted that the plaintiff is entitled to look to the principal rather than to the agent. It is not necessary to express myself as to whether a form of agency is created. Nor is it necessary to find whether the primary liability lies with the egg producer. Even if I accept, without finding, that a form of agency is created, this submission ignores the clear wording

of the clause. What is clear is that clause 8(b) does not require the egg producer to pay the levy to the levy administrator.

- [9] The interpretation that the supplier of packaging material is required to pay the levy does no injury to the stated purpose of the notice. The notice itself sets out the purpose and aims.[11] Clause 3 of the notice provides that the levies are to be employed in consumer education, consumer assurance, research and development,

industry liaison, transformation and administration. These are aligned to the purpose. This purpose is in no way affected by which

party is required to pay the levy. The purpose is aligned to the Bill of Rights. If payment of the levy is made by either party, it promotes the spirit, purport and objects of the Bill of Rights.

- [10] Consideration must now be given to the immediate context of the words requiring payment by the supplier of packaging material. This entity is defined in the notice as:

‘a supplier of packaging material for the packing of commercial eggs of the species *Gallus domesticus*; excluding those entities that have been exempted by the levy administrator after application to the levy administrator as provided for in the registration notice . . .’.[12]

Apart from this definition, clause 8(b) is the only provision which mentions a supplier of packaging material. I can conceive of no reason why a supplier of packaging

material can apply for exemption unless such an entity is liable for payment. Nor could the plaintiff suggest one in argument. In contrast, there is no definition in the notice of egg producers. The Act contains a definition which applies to egg producers but makes no provision for any exemption to be obtained. Clause 8(b) contains the only mention of egg producers. No clause in the Act or notice makes egg producers liable to pay the levy to the levy

administrator. The immediate context thus supports the interpretation that only the supplier of packaging material is liable to pay the levy to the levy administrator.

- [11] Consideration must be given to the context which gave rise to the promulgation of the notice. The immediate context is provided by s 15 of the Act. This empowers the Minister to introduce a levy on an agricultural product and requires the notice to contain, inter alia, particulars set out in subsection 4(c) which reads:

‘(c) the different levies introduced on different classes of agricultural products and at different points in the marketing chain between the producer and consumer for each such class . . .’.

In its judgment, the court a quo said that ‘[i]t would be of no interest and probably unfair if not ultra vires the Minister’s powers to impose an obligation to pay on the packaging industry for the benefit of the poultry industry.’

The statement was said to be made ‘in passing’. Here I differ. The Act pertinently allows a levy to be imposed ‘at

different points in the marketing chain between the producer and consumer’.[13] This section was not dealt with by the court a quo. During argument, it was agreed by both parties that a supplier of packaging material forms part of the marketing chain of packed eggs. This context is therefore also consistent with the requirement that a supplier of packaging material is liable to pay the levy.

[12] No reason was suggested why this interpretation would lead to impracticalities or an unbusinesslike outcome. Nor can I think of any. The matter was argued on the pleadings. No evidence was led which might have highlighted any impracticalities. The plaintiff’s own approach militates against any. This is because, even if one accepts that the supplier of packaging material makes payment as agent for the egg producers, it remains a payment which is made by the supplier. If the supplier can make payment as agent, I can think of no practical reason why this cannot be done without invoking agency.

[13] In my respectful view, accordingly, the court a quo erred in reaching its conclusion that clause 8(b) of the notice makes the defendant liable to pay the levy to the plaintiff. Taking into account the principles of interpretation

mentioned above, the only entity liable to pay the levy to the plaintiff is a supplier of packaging material as defined in the

notice. Whether the defendant is liable to pay the levy to HSA and, accordingly, whether the plaintiff can succeed in its claim based on the cession in this matter does not arise in this appeal. No determination is made on that issue.

[14] In the result, the appeal is upheld with costs and the order of the court a quo is set aside and replaced with the following order:

‘1. Clause 8(b) of Government Notice No. R954 dated 9 October 2009 makes a supplier of packaging material, and not the defendant, liable to pay to the plaintiff the levy relating to packed eggs.

2. The plaintiff is directed to pay the costs of suit relating to the separated issue.’

____Gorven J

Date of Hearing: 30 July 2018

Date of Judgment: 3 August 2018

Appearances

For the Appellant: AJ Troskie SC,

instructed by Cox Yeats Attorneys,

locally represented by Stowell & Company

For the Respondent: RM Van Rooyen,

instructed by Ramsurjoo & Du Plessis Inc., locally represented by Venns Attorneys

- [1] ‘Establishment of statutory measure and determination of guideline pricing: Levies relating to broiler chickens and packed eggs’ GN R954, GG 32616, 9 October 2009.
- [2] Marketing of Agricultural Products Act 47 of 1996.
- [3] Section 1 defines ‘producer’ as ‘a person who produces an agricultural product’.
- [4] Section 4 of the Notice.
- [5] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) para 18 (references omitted). Cited with approval in Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd 2018 (1) SA 94 (CC) para 52.
- [6] Cool Ideas 1186 CC v Hubbard & another 2014 (4) SA 474 (CC) (2014 (8) BCLR 869; [2014] ZACC 16) para 28 (references omitted).
- [7] Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 (1) SA 641 (A) at 646B.
- [8] Trinity Asset Management (Pty) Ltd v Grindstone Investments 132 (Pty) Ltd para 53.
- [9] Section 39 of the Constitution of the Republic of South Africa, 1996.
- [10] My emphasis.
- [11] Clause 2 is to the following effect: ‘2 Purpose and aims of the statutory measure and the relation thereof to objectives of the Act The statutory levy is required by the poultry industry to fund:
- (a) Empowerment and development of black emerging poultry producers;
 - (b) Consumer education;
 - (c) Consumer assurance;
 - (d) Research and development; and
 - (e) Industry liaison, information and training. The levy is not detrimental to any of the objectives of the Act and, in particular, shall not be detrimental to the number of employment opportunities or fair labour practice in the poultry industry. The levy is necessary to finance the above-mentioned functions and the levy shall be utilised in accordance with the levy application.

The Auditor-General shall also be responsible for auditing the statutory levies collected.’

- [11] Clause 2 is to the following effect:

‘2 Purpose and aims of the statutory measure and the relation thereof to objectives of the Act

The statutory levy is required by the poultry industry to fund:

- (a) Empowerment and development of black emerging poultry producers;
- (b) Consumer education;
- (c) Consumer assurance;
- (d) Research and development; and
- (e) Industry liaison, information and training.

The levy is not detrimental to any of the objectives of the Act and, in particular, shall not be detrimental to the number of employment opportunities or fair labour practice in the poultry industry.

The levy is necessary to finance the above-mentioned functions and the levy shall be utilised in accordance with the levy application.

The Auditor-General shall also be responsible for auditing the statutory levies collected.’

[12] Section 1 of the Notice.

[13] Section 15(4)(c) of the Act.

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