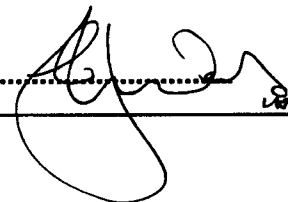


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

6/9/2016.
CASE NO.: 98085/2007

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED.
6/9/2016	
	

In the matter between:

SOUTH AFRICAN DIAMOND PRODUCERS
ORGANISATION

Applicant

and

THE MINISTER OF MINERALS & ENERGY N.O.

First respondent

THE DEPARTMENT OF MINERALS AND
ENERGY

Second respondent

THE MINISTER OF FINANCE

Third respondent

THE DEPARTMENT OF FINANCE

Fourth respondent

THE SOUTH AFRICAN STATE DIAMOND AND
PRECIOUS METAL REGULATOR

Fifth respondent

THE SOUTH AFRICAN STATE DIAMOND
DEALER

Sixth respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This application relates to amendments that were made to the Diamonds Act, No. 56 of 1986 and alleged to be in conflict with the provisions of the Constitution of South Africa, 1996.

2. When this matter was called, there was only appearance on behalf of the plaintiff, the fifth and sixth respondents. There was no appearance on behalf of the first, second, third and fourth respondents, despite answering affidavits having been filed by them and, in respect of first and second respondents; heads of argument were also filed on their behalf.
3. Mr Grobler SC assisted by Ms Gildenhuys appeared on behalf of the plaintiff. Mr Semenya SC assisted by Machaba appeared on behalf of the fifth respondent and Mr Habedi appeared on behalf of the sixth respondent.
4. In this application a number of constitutional issues are raised. These arose as a result of amendments made to the Act that were made in accordance with the Diamonds Amendment Act, No. 29 of 2005 (the First amendment) and No. 30 of 2005 (the Second amendment) respectively.
5. The applicant contends that the aforementioned amendments infringe upon its members' rights and in particular the rights protected in terms of the provisions of section 22 of the Constitution, 1996.
6. Initially a number of constitutional issues were raised relating to a number of amendments to the Act. These were narrowed down to only section 20A of the Act.
7. The applicant contends that section 20A of the Act offends against the provisions of section 22 and section 25(1) of the Constitution, in that
 - (a) Section 22 of the Constitution is infringed by section 20A of the Act, the latter infringing upon the applicant's members' constitutional right to choose their trade, occupation or profession freely; and

(b) Section 25(1) of the Constitution is infringed by section 20A of the Act whereby the latter arbitrarily deprives the applicant's members of their property.

8. The applicant defines in its heads of argument the contravention of section 22 and section 25(1) of the Constitution by section 20A of the Act as follows:

(a) There is no sufficient reason for the regulation in question; and/or

(b) There is no rational connection between section 20A and the legitimate government purpose of the Amendments; and/or

(c) It goes much further than what is necessary to achieve the purpose of the Amendments, i.e. that the effect of the amendments is disproportional in relation to the legitimate government purpose they seek to attain.

9. The submissions on behalf of the applicant in respect of the aforementioned contentions are premised upon the position pre-amendment and post-amendment of the Act.

10. In considering the applicant's submissions, they are to be measured against what the position was pre-amendment. This can be summarised as follows:

10.1 Producers¹ could be in possession of a diamond, sell or export it;²

¹ Defined in Section 1 of the Act

² Sections 18(a), 19(a) and 24(a) of the Act

- 10.2 A producer may only sell to a licensee or a holder of a permit in terms of section 26(e) of the Act;³
- 10.3 A number of licensed dealers created a *modus operandi* at their licensed business premises whereby unpolished diamonds were offered on an anonymous tender basis to other South African licensed dealers for purchasing parcels on offer. Non-licensed experts, who attended on behalf of prospective foreign buyers, assisted the licensed purchasers.
- 10.4 The sale was concluded between the producer or licensed dealer and the South African licensed purchaser;
- 10.5 The *modus operandi* described above, allegedly not only assisted in determining the alleged correct market value, but also enabled local producers to mingle with prospective foreign purchasers.
- 10.6 Allegedly, by following the *modus operandi* described above, a prospective foreign purchaser was lined up, should the parcels purchased be exported and sold on.
- 10.7 The business premises upon which the aforementioned *modus operandi* was conducted became known as “*Trading Houses*”.
11. During 1993, the Diamond Board of South Africa issued a directive in terms of which a condition on all diamond cutting and dealers licenses was imposed, that reads as follows:

“A licensee or his authorised representative may when viewing or purchasing unpolished diamonds on premises approved in terms of Section 48(1)(d) (selling office) or a premises approved

³ Section 21(a) of the Act

in terms of Section 48(2)(d) (buying office), only be assisted by another licensee or a natural person registered as an authorised representative in terms of Section 54 of the Diamonds Act, 1986.”

12. The said directive was contained in a letter addressed to all holders of a diamond cutter's or diamond dealer's licence. A copy of that letter is attached to this judgment.
13. It was further explained in the said letter that assistance was no longer permitted in a buying office of a cutter/dealer or a selling office of a diamond producer at specified and stipulated areas. The said letter further explained that the directive also applied to the purchasing of diamonds in the selling offices of diamond producers in certain specified and stipulated areas.
14. It was specifically mentioned in the aforesaid letter that the directive did not apply to the viewing or purchasing of diamonds in any of the premises of the Diamond Bourse of South Africa, the business premises of a licensed cutter or dealer (the particulars of such premises being reflected on the respective licences), or the premises of Trans Hex in Parow.
15. Section 48 of the pre-amended Act stipulated the premises upon which unpolished diamonds may be sold and purchased. That section provided as follows:

“(1) No producer, manufacturer of synthetic diamonds, dealer or holder of a permit referred to in section 40(1)(a) or (2) shall sell any unpolished diamond elsewhere than on-

- (a) the business premises of a licensee;*
- (b) any premise registered as a diamond exchange in terms of this Chapter;*
- (c) the premises referred to in subsection (2)(d); or*

(d) *such other premises as the Board may approve under section 49 on application in writing by such producer, manufacturer or holder.*

(2) *No Licensee or holder of a permit referred to in section 40(1)(b) shall receive or purchase any unpolished diamond elsewhere than on-*

(a) *the business premises of a licensee;*

(b) *any premises registered as a diamond exchange in terms of this Chapter;*

(c) *the premises referred to in subsection (1)(d); or*

(d) *such other premises as the Board may approve under section 49 on application in writing by the licensee.”*

16. The Act, pre- and post-amendment, is coached in language of prohibition.

17. In order to consider the aforementioned alleged infringements and to determine whether section 20A of the Act impinges upon sections 22 and 25(1) of the Constitution, the scope of section 20A of the Act is to be determined.

18. Section 20A of the Act provides as follows:

“(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).”

19. The provisions of section 20A effectively put an end to the practice that evolved pre-amendment of the Act and described above as the conducting of "*Trading Houses*". Put differently, it practically extended the directive of 1993 to all premises upon which unpolished diamonds may be sold, offered for sale, viewed and purchased in terms of the Act.
20. In this regard, the parties hold different views of whether the pre-amendment position relating to the "*Trading Houses*" was lawful or unlawful. Mr Semenya submitted with reference to the decision in *Saidex (Pty) Ltd v Minister of Minerals and Energy* 2011 JDR 0593 (SCA) that the conducting of "*Trading Houses*" was unlawful and that I am bound by that decision.
21. The Supreme Court of Appeal in *Saidex* had limited information relating to the letter of 1993 referred to above. That letter was not before the Supreme Court of Appeal and only limited passages were quoted in the record before the Supreme Court of Appeal. The appellants in that matter attempted to rely on an alleged exclusion contained in that letter. On the limited information before it, the Supreme Court of Appeal ruled that the conducting of the business of "*Trading Houses*" was unlawful.
22. The said letter forms part of the papers before me. I have referred thereto above. On a clear and purposive reading of that letter, no exclusion is contained therein. It merely records that in terms of a directive of the Diamond Board, assistance of non-licensed persons are no longer permitted on certain specified premises and with reference to specific areas. The letter does not seek to address an illegal practice. Both parties debated the ambit of the 1993 letter.
23. As referred to above, the Act pre- and post-amendment is couched in language of prohibition. Pre-amendment, the Act did not specifically prohibit the practice of "*Trading Houses*". It merely stipulated the acts

and premises on which those acts may be exercised under the particular licence granted. The Act pre-amendment did not prescribe a method of conducting the business of producer or dealer. It did not prohibit any specific or particular method of business. The Act pre-amendment required that the sale and purchasing of unpolished diamonds were to be between licensed persons. The issue of “assistance” was not addressed in the Act pre-amendment.

24. It is clear from the description of the so called “*Trading Houses*” that viewing, selling, offering for sale and purchasing of unpolished diamonds were in law permitted on those premises. Such viewing, selling, offering for sale and purchasing of unpolished diamonds were conducted following the particular *modus operandi* as described above. The sale and purchase of unpolished diamonds on the premises of the “*Trading Houses*” were concluded between licensed persons as prescribed by the pre-amended Act.
25. It follows that the conducting of the business of “*Trading Houses*” pre-amendment was not unlawful as contended for by the respondents.
26. It stands to be determined what mischief the amendment introduced in section 20A of the Act aimed to address.
27. It is submitted on behalf of the respondents that the mischief is three-fold. Firstly, the amendment sought to promote local beneficiation of South African unpolished diamonds. Secondly, it was aimed at tightening the regulation of unpolished diamonds and to eliminate the illegal activities that were taking place in the diamond trade. A third aim was to comply with the Kimberley Process Certification Scheme.
28. There appears to be no real dispute in respect of the third aim referred to above and it requires no further consideration.

29. The first mischief is addressed in sections 59, 59A and 59B of the amended Act. Those sections provide for the establishment of the State Diamond Trader, the sixth respondent, and its functions in respect of local beneficiating of unpolished diamonds. In terms of section 59B, the Minister is obliged to determine the percentage of diamonds produced in a production cycle as may be required for local beneficiation and what the Stated Trader may purchase. It is common cause between the parties that at present the percentage determined is 10% of the production of unpolished diamonds in a production cycle.
30. In respect of the second mischief aimed at, Mr Grobler submitted that, once there has been compliance with the provisions of section 59B of the post-amended Act, the remaining percentage of diamonds produced in the relevant cycle may be dealt with by the producer as he may be deemed fit, provided that there is compliance with the prescribed provisions of the post-amended Act. Mr Grobler further submitted that the mischief, if there was such, of the *modus operandi* at “Trading Houses” no longer impacted upon local beneficiating of unpolished diamonds.
31. The respondents’ contention in respect of the *modus operandi* of the so-called “Trading Houses” is premised upon the view that the business of “Trading Houses” was unlawful, hence necessitating the amendment by section 20A. I have already found that conducting the described business of “Trading Houses” was not unlawful pre-amendment.
32. The business of “Trading Houses” in facilitating local buying and selling of unpolished diamonds, such that was done pre-amendment, is acknowledged in section 26 of the post-amended Act. The Act defines “diamond trading houses” as meaning “*the premises at which the holder of a diamond trading house licence may facilitate local buying and selling of unpolished diamonds.*” The concept of what

constitutes "*facilitation*" is not defined in the Act. It bears its ordinary meaning.

33. It follows that *per se*, the rights of the applicant's members in conducting the business of "*Trading Houses*" have not been impacted upon negatively by the amendment contained in section 20A, other than the prohibition as to the described *modus operandi* that was previously followed.
34. The real dispute appears to be the prohibition of the described *modus operandi* that was previously followed, i.e. that no licensee may be assisted by a non-licensee or holder of a permit referred to in section 26(e) of the post-amended Act in respect of the viewing, purchasing or selling of unpolished diamonds other than at a diamond exchange or export centre.
35. The dispute between the parties in this regard relates to whether the described *modus operandi* was unlawful or not. The respondents contend that such method of business was unlawful as was held by the Supreme Court of Appeal in *SAIDEX, supra*, hence the prohibition in section 20A.
36. If the principle of facilitation permitted in section 20A of the Act at exchange and export centres relates to *being assisted by a non-licensee or holder of a permit referred to in section 26 (e)*, it is the very act that is submitted by the respondents to have been previously unlawful. The applicant contends otherwise.
37. Mr Grobler urged me to hold that the past inequality of local beneficiation is addressed in sections 59, 59A and 59B of the amended Act and hence that the prohibition in section 20A of the Act was irrational and arbitrary and offends against the provisions of sections 22 and 25(1) of the Constitution.

38. It was submitted on behalf of the applicant that the prohibition was arbitrary⁴ in the sense that it deprived the applicant's members of their property, the right to receive full market value, in the absence of sufficient reason being provided. He further submitted that it was irrational with reference to legitimate government purpose and that it goes much further than what is necessary.⁵
39. Mr Grobler submitted that the alleged rational for the prohibition in section 20A, related to local beneficiation of unpolished diamonds; vague references being made in the answering papers to the Kimberley Process Certification Scheme and the need to monitor the movement of unpolished diamonds from South Africa.
40. The issue of local beneficiation is dealt with above.
41. The issue relating to the Kimberley Process Certification Scheme is of no real consequence and is not affected by the prohibition in section 20A. It is addressed in section 69 of the Act.
42. The remaining issue of monitoring the movement of unpolished diamonds from South Africa is appropriately dealt with in numerous sections of the amended Act. The reliance on that issue is premised upon a misplaced interpretation of the *modus operandi* at the described "Trading Houses". The establishment of the State Diamond Trader in any event addresses that issue comprehensively. The establishment of diamond exchanges and export centres further addresses that issue.⁶

⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Service et al; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002(4) SA 768 (CC) at [100]; see also *Reflect-All 1025 CC v MEC for Public Transport, Gauteng* 2009(6) SA 391 (CC) at [48]-[49]

⁵ cf. *Affordable Medicines Trust et al v Minister of Health of the Republic of South Africa et al* 2005(6) BCLR 529 CC at [60], [74], [77,] [80]

⁶ Section 59 of the Act

43. It was further submitted on behalf of the applicant that the prohibition in section 20A is arbitrary, with no proportionality, and deprives the applicant's members of their right to conduct their business in the best manner they deem fit.
44. Nothing untoward appears in following the described *modus operandi*. The amended Act countenances that very method at a diamond exchange and export centre. There is no rational in permitting the *modus operandi* at exchange and export centres, but prohibiting it at trading houses.
45. Mr Semenya submitted on behalf of the respondents that the alleged loss of income complained of by the applicant, i.e. the earning of a lesser profit due to not being assisted by knowledgeable non-licensees, does not constitute an arbitrary and disproportional deprivation of rights under sections 22 and 25(1) of the Constitution. He submitted that no "property" was deprived of in that regard.
46. It was further submitted on behalf of the respondents that section 20A does not limit the freedom of choosing a trade or occupation and hence is not in conflict with section 22 of the Constitution.
47. In my view, 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.
48. It follows that, whilst the prohibited assistance is permitted at a diamond exchange and export centre, prohibiting assistance elsewhere constitutes a deprivation of rights entrenched in sections 22 and 25(1) of the Constitution.
49. In my view, that deprivation is irrational, arbitrary and disproportional.

50. It is common cause that the onus relating to the provisions of section 36 of the Act is upon the respondents. The respondents have for the foregoing failed to discharge that onus.

51. It follows that the application must succeed on the limited issue.

I grant the following order:

(a) It is declared that:

- (i) Section 20A of the Diamonds Act, 56 of 1986, as amended by the First and Second Diamonds Amendment Acts, 29 and 30 of 2005 respectively, insofar as it infringes upon the rights of the members of the applicant as embodied in section 22 of the Constitution of South Africa Act, 1996; and
- (ii) The arbitrary deprivation in terms of section 25(1) of the Constitution of South Africa Act, 1996 of the rights accrued by those members of the applicant who perform the functions as tender houses,

to be unconstitutional;

- (b) Pending confirmation of prayer (a) by the Constitutional Court in terms of section 172 of Act 10 of 1996, the first, second and fifth respondents be interdicted, prohibited and restrained from implementing section 20A of the Diamonds Act, 56 of 1986;
- (c) Costs to be paid by the respondents.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	G L Grobler SC
Instructed by:	J L Gildenhuys Cranko, Karp & Associates Inc
On behalf of Fifth Respondent:	I A M Semanya SC
Instructed by:	T J Machaba Mkhabela Huntly and Reynecke Inc
On behalf of Sixth Respondent:	H Habedi
Instructed by:	Routledge Modise

South African Diamond Board
Suid-Afrikaanse Diamantraad

533 LM 3
1st Floor, S.A. Centre
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Johannesburg 2001

All correspondence to be addressed to: The Chief Executive Officer
Alle briefwisseling gerig te word aan: Die Hoof Uitvoerende Beampste

260499
Excom 2023

(011) 29-8444/9
Fax: (011) 29-9167

Reference:
Verwysing:

C J Hambly

Date
Datum

24 March 1993

The Directors
Rand Vaal Diamonds (Pty) Ltd
3rd Floor Sterns Centre
240 Commissioner Street
JOHANNESBURG
2000

Attention: Mr A Katz

Dear Mr Katz

CONDITION IMPOSED ON ALL DIAMOND CUTTING AND DEALERS LICENCES
IN TERMS OF SECTION 30 OF THE DIAMONDS ACT, 1986

The Board, at its meeting held on 18 March 1993, imposed with immediate effect, the following condition on all diamond cutting and dealers licences:

"A licensee or his authorised representative may when viewing or purchasing unpolished diamonds on a premises approved in terms of Section 48(1)(d) (selling office) or a premises approved in terms of Section 48(2)(d) (buying office), only be assisted by another licensee or a natural person registered as an authorised representative in terms of Section 54 of the Diamonds Act, 1986."

In terms of the Board's decision, assistance is no longer permitted in a "buying office" of a cutter/dealer or a "selling office" of a diamond producer. The decision therefore applies to the viewing and purchasing of unpolished diamonds in places such as Wolmaransstad; Lichtenburg; Schweizer-Reneke; Barkly West; Kimberley; Boshof; Christiana; Vredendal; Port Nolloth; and Springbok.

The decision also applies to the purchasing of diamonds in the "selling offices" of diamond producers such as, Benguela Concessions/Merwest; Robbaai Beleggings; Carrig Diamonds; Rovic Diamonds; Broad Acres Investments; Good Hope Diamonds and Estates; Messina; Namagroen Prospecting & Investments; Kuboes Diamonds; North Bay Canning Co; Samada Diamonds; Berliner Missionswerk; Baggers/Solid Pump/Commercial; and Port Nolloth Municipality.

[Handwritten initials and signature]

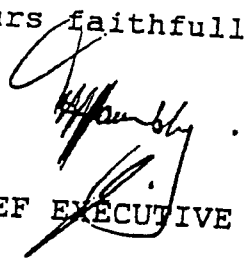
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Please note, however, that the Board's decision does not apply to the viewing or purchasing of diamonds on any of the following premises:

- (a) The premises of the Diamond Bourse of S A;
- (b) the business premises of a licensed cutter or dealer (the particulars of such a premises are reflected on a cutter or dealer's licence); and
- (c) the premises of Trans Hex in Parow.

You are kindly requested to submit to the Board, within 14 days of the date of this letter, your original licence document(s) for the necessary endorsement.

Yours faithfully


CHIEF EXECUTIVE OFFICER

