THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 549/2020

In the matter between:

BERTIE VAN ZYL (PTY) LIMITED T/A ZZ2	**FIRST APPELLANT**
TOMATO PRODUCERS' ORGANISATION	**SECOND APPELLANT**
NOORDELIKE UIE KOMITEE	**THIRD APPELLANT**
FRESH PRODUCE IMPORTERS' ASSOCIATION NPC	**FOURTH APPELLANT**

and

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	**FIRST RESPONDENT**
PRODUCT CONTROL FOR AGRICULTURE	**SECOND RESPONDENT**
LEAF SERVICES (PTY) LIMITED	**THIRD RESPONDENT**
NEJAMOGUL TECHNOLOGIES & AGRIC SERVICES	**FOURTH RESPONDENT**

AGENCY FOR FOOD SAFETY (PTY) LIMITED **FIFTH RESPONDENT**

IMPUMELELO AGRIBUSINESS SOLUTIONS (PTY) LTD **SIXTH RESPONDENT**

PERISHABLE PRODUCTS EXPORT CONTROL BOARD **SEVENTH RESPONDENT**

SOUTH AFRICAN MEAT INDUSTRY COMPANY **EIGHTH RESPONDENT**

Neutral citation: *Bertie Van Zyl (Pty) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries and Others* (549/2020) [2021] ZASCA 101 (14 July 2021)

Coram: **PETSE DP, and SALDULKER, MAKGOKA JJA and GOOSEN and UNTERHALTER AJJA**

Heard: 10 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 14 July 2021.

Summary: Constitutional challenge to the power of an assignee to determine its fees – s 3(1A)*(b)*(ii) of the Agricultural Product Standards Act 119 of 1990 – s 25(1) of the Constitution – deprivation of property – rule of law – s 195(1) of the Constitution – judicial review – procedural fairness – rationality review.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baqwa J, sitting as the court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel, to the extent set out in 3.2 and 3.3 below.
2. The appeal is otherwise dismissed.
3. The order of the high court is set aside and substituted with the following order:

   '3.1 The application to declare s 3(1A)(*b*)(ii) read with s3A(4) of the Agricultural Product Standards Act 119 of 1990 (the Act) unconstitutional and invalid is dismissed.

   3.2 The second respondent's determination of inspection fees in terms of s 3(1A)(*b*)(ii) of the Act published as Notice 1 of 2017 in Government Gazette 40537 dated 6 January 2017 is reviewed and set aside.

   3.3 The costs of the review are to be paid by the first, second, and eighth respondents, including the costs of two counsel, where so employed.'

JUDGMENT

Unterhalter AJA (Petse DP, and Saldulker, Makgoka JJA and Goosen AJA concurring):

Introduction

[1] The first appellant, Bertie Van Zyl (Pty) Ltd t/a ZZ2, grows various types of fruit. The second and third appellants, Tomato Producers' Organisation and Noordelike Uie Komitee, are voluntary associations, which promote the interests, respectively, of tomato and onion growers. The fourth appellant, Fresh Produce Importers' Association NPC, is a 'Not for Profit Corporation'; it promotes the interests of fresh produce importers. The appellants brought an application in the Gauteng Division of the High Court, Pretoria (the high court) for an order to declare s 3(1A)*(b)*(ii) read with s 3A(4) of the Agricultural Product Standards Act 119 of 1990 (the Act) unconstitutional and invalid. The appellants also sought to review and set aside the determination of inspection fees by the second respondent, Product Control for Agriculture (Procon).

[2] The Act controls the sale, export and import of certain agricultural products. The first respondent (the Minister) may prohibit the sale of a prescribed product unless it complies with prescribed classifications and standards. In terms of s 2(1) of the Act, the Minister may designate a person in the employ of the Department of Agriculture (the Department) as the executive officer to exercise the powers and perform the duties conferred under the Act. The Minister may also, in terms of s 2(3)*(a)*, designate a person, with regards to a particular product, for the purposes of the application of the Act. A person so designated is styled an

'assignee' in respect of that particular product. The Act permits the executive officer and an assignee to conduct inspections aimed at ensuring that certain agricultural products meet the prescribed classifications and standards. They charge fees to do so. In the case of the executive officer the fee is prescribed. In the case of the assignee, the Act stipulates, in s 3(1A)*(b)*(ii), that 'the fee determined by such assignee shall be payable.' I shall refer to this provision, read with s 3A(4), which requires the owner of the product to pay the fee, as 'the challenged provision'.

[3] The appellants in their application before the high court cited the assignees designated by the Minister. Procon is an assignee. So too is the seventh respondent, the Perishable Products Export Board (the Board). The Board is recognised as a juristic person in terms of the Perishable Products Export Control Act 9 of 1983 (the PPEC Act). The Board is tasked with the orderly and efficient export of perishable products. The Board has also been designated as an assignee under the Act. The Minister, Procon, the eighth respondent, South African Meat Industry Company (Meatco), and the Board opposed the application, though the Board limited its opposition to the appellants' constitutional challenge.

[4] In the high court, the appellants contended that the challenged provision is a deprivation of property that infringes s 25 of the Constitution. The challenged provision was also said to offend against the rule of law and s 195(1) of the Constitution.[1] Section 195(1) sets out the basic values and principles governing public administration. The high court (per Baqwa J) dismissed this constitutional challenge. It also dismissed the review of Procon's fee determination on the basis that the

[1] Constitution of the Republic of South Africa, 1996.

appellants had failed to exhaust the remedy of appeal available to them in terms of s 10 of the Act. An order for costs, including the costs of two counsel, was made in favour of Procon, the Board and Meatco. With the leave of the high court, the appellants appeal to this Court.

The constitutional challenge

[5] The constitutional challenge has a simple premise. Section 2(3)*(a)* of the Act permits the Minister, with regard to a particular product, to designate a person, having particular knowledge of that product, an assignee for the purposes of the application of the Act. Procon and other respondents were designated as assignees by the Minister. Section 3(1A) permits fees to be charged in respect of the powers exercised and the duties performed by an assignee. The fee that shall be payable is the fee determined by the assignee. Among the powers exercised by an assignee is the power of inspection. It follows that when the assignee exercises a power of inspection, a fee is payable by the owner of the product inspected. That fee is determined by the assignee.

[6] The appellants complained that the power of the assignee to determine its fees is a unilateral determination, not subject to supervision, nor to ministerial or other control. Such an untrammelled power, the appellants contended, cannot survive constitutional scrutiny. First, the challenged provision is a deprivation of property that infringes s 25 of the Constitution. Second, the challenged provision offends against the rule of law and s 195(1) of the Constitution. Although the appellants in their heads of argument sought to revive a challenge, not pursued before the high court, based on s 217 of the Constitution, as to the legality of Procon's appointment, this challenge was abandoned before us. And nothing more need be said of it.

[7] I commence with a consideration of the s 25 challenge. The appellants contended that the power of the assignee to determine the fees it may charge in respect of the powers conferred upon it, without constraint or supervision, constitutes an arbitrary deprivation of property that infringes s 25 of the Constitution.

[8] The first issue that requires consideration is this. Does the determination of a fee and the obligation to pay that fee, upon the exercise by the assignee of its powers, constitute a deprivation of property? *First National Bank of SA Ltd t/a Westbank v Commissioner SARS and Another (First National Bank)*[2] has long stood as the leading authority as to the conceptual components that make up s 25. It proposes a capacious conception of property, while eschewing a comprehensive definition of deprivation. The cases have tended to shy away from this terrain, and have rather assumed a deprivation of property, and then considered the more familiar territory of arbitrariness. However, the Constitutional Court has, since *First National Bank*, explained that a constitutionally significant deprivation of property requires an interference with a property right that is substantial, in the sense that it 'must be extensive to have a legally significant impact on the rights of the affected party'.[3] With a somewhat different emphasis, O'Regan J put the matter this way in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*:[4]

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[2] *First National Bank of SA Ltd t/a Westbank v Commissioner SARS and Another* 2002 (4) SA 768; (2002) 7 BCLR 702 (CC) *(First National Bank).*
[3] *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others* [2017] ZACC 31; 2017 (11) BCLR 1370; 2017 (6) SA 287 (CC) para 59.
[4] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another* 2005 (2) BCLR 150; 2005 (1) SA 530 (CC) para 89.

'There can be no doubt that some deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property.'

[9] The appellants contended that the owner's liability to pay the assignee's fee amounts to a deprivation of property. This contention encounters the following difficulty. The appellants do not challenge the regulatory scheme of the Act in terms of which certain agricultural products may only be sold according to prescribed classes, grades or standards. Executive officers and assignees are appointed under the Act to carry out inspections so as to enforce this regulatory scheme. The Act permits fees to be charged in respect of the powers exercised and the duties performed by executive officers and assignees. The fees are charged for the service rendered by executive officers and assignees. Owners thus receive consideration for the payment of fees – the inspection of their products to ensure that they may be sold in compliance with the Act. That is not a deprivation of property any more than the payment of a price for goods sold and delivered constitutes such a deprivation. To receive a service for a fee is not a deprivation of property.

[10] It is of course the case that the regulatory impost under the Act is not a voluntary exchange because compliance with the Act is not optional. But that was not the appellants' complaint. They do not say that the regime of inspection and its object is unnecessary or fails to secure something of value, both for the public and the owners who sell agricultural products regulated under the Act. Nor, as I understand their case, do the appellants contend that a fee should not be payable for the inspections that take place. No objection is raised to the prescribed fees

raised by the executive officers. Rather, their complaint is that the assignees are given the power to determine the fee for which they carry out their duties. This demonstrates that it is not the requirement that a fee is payable that constitutes the deprivation of property. Rather, it is the power given to the assignee, without supervision, to determine the extent of the fee that is said to be objectionable.

[11] That too cannot amount to a deprivation of property. First, if the power is exercised to determine a reasonable fee for the service given, there is no deprivation of property. The owner gets fair value for the fee paid. But even if the fee is considered excessive, of what property is the owner deprived? To pay more for something than it is thought to be worth may be a common place experience, but it is not a deprivation of property rights. It is a bad regulatory bargain. It creates an obligation to pay more. It is difficult to conceptualise what specific property rights are thereby encumbered or restricted. The owner's liabilities increase to the extent of any excess, but no right to identifiable property is thereby diminished.

[12] Second, if the appellants' complaint is ultimately as to how an assignee might exercise its power to determine a fee, without oversight, then, even on the appellants' argument, the power is capable of being exercised in a manner wholly consistent with s 25. Therefore, it follows that there is no warrant to declare s 3(1A)*(b)*(ii) unconstitutional and invalid. This is an application of the principle articulated in *S and Others v Van Rooyen and Others*:[5] any power is capable of being abused, but that has no bearing on the constitutionality of the law concerned. The exercise of the power by an assignee, in a particular case, may give rise to

[5] *S and Others v Van Rooyen and Others* 2002 (8) BCLR 810; 2002 (5) SA 246 (CC) para 37.

complaint. Though, for the reasons given, I am unpersuaded that it is a complaint that the owners have been deprived of their property within the meaning of that concept in s 25.

[13] Third, the appellants' case, on this score, suffers from a further difficulty. If the property cannot be identified in respect of which the deprivation takes place, the consideration of arbitrary deprivation in terms of s 25 cannot take place. *First National Bank*,[6] holds that an arbitrary deprivation is one where the law does not provide a sufficient reason for the deprivation. That is determined by considering the deprivation in question and the ends sought to be achieved by the impugned law. But if the property rights affected are unclear, the extent of their deprivation cannot be ascertained, and hence the question of arbitrariness cannot be determined.

[14] I find, therefore, that the appellants have not made out a case that s 3(1A)*(b)*(ii) infringes s 25 of the Constitution.

[15] The appellants also contended that the challenged provision offends against the rule of law and s 195(1) of the Constitution. This contention cannot be sustained. Section 1*(c)* of the Constitution gives expression to the supremacy of the Constitution and the rule of law. These values, so the Constitutional Court has held, inform the Constitution, but do not give rise to enforceable rights that permit of the invalidation of legislation.[7] This is also the proper characterisation of s 195 of the Constitution. Section 195 sets out the basic values and principles governing public administration, but it does not contain

[6] *First National Bank* para 100.
[7] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & Others* 2004 (5) BCLR 445; 2005 (3) SA 280 (CC) para 21.

enforceable rights.[8] The appellants submitted that they do not seek to vindicate any rights, but rather that the challenged provision 'runs afoul of s 195(1)*(f)* of the Constitution'. Without justiciable rights to enforce, there is no basis upon which this Court may declare invalid a law that is inconsistent with a value or principle. Accordingly, the appellants' constitutional challenge to s 3(1A)*(b)*(ii) cannot prevail.

The review

[16] The appellants brought under review the appointment by the Minister of Procon as an assignee, and in the alternative, sought to review Procon's determination of inspection fees in terms of s 3(1A)*(b)*(ii) of the Act. As to Procon's determination of fees, the high court held that the appellants had failed to exhaust their internal remedy in terms of s 10 of the Act, and consequently the high court declined, in terms of s 7(2)*(a)* of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), to entertain the appellants' review.

[17] Section 10(1) of the Act provides as follows:

'Any person whose interests are affected by any decision or direction of the executive officer or an assignee under this Act, may appeal against such decision or direction to the Director-General.'

The issue is this: did the appellants enjoy a remedy under s 10(1) to appeal their dissatisfaction with the fees determined by Procon?

[18] The appellants contended that they had no such remedy. A determination of fees is not a direction. It is also not a decision, so they argued, because a decision means a decision that determines a dispute or issue. Although a decision may also mean a decision to do something, the

[8] *Chirwa v Transnet Ltd and Others* [2007] ZACC 23; 2008 (3) BCLR 251 2008 (4) SA 367 (CC) paras 74 -76.

Afrikaans text of s 10(1) uses the word 'beslissing', which connotes the adjudication of a dispute or some issue.[9] Since the determination of a fee is not a decision, so defined, s 10(1) provided the appellants with no remedy.

[19] The respondents opposing this aspect of the appeal contended that the words 'any decision' in s 10(1) should not be read narrowly. Procon referenced meanings of 'beslissing' in an Afrikaans dictionary that include, 'handeling van te beslis', and hence to make up one's mind. The respondents also submitted that a more generous reading of a decision would be a more sensible interpretation.

[20] There are limits to the utility of semantic contestation by recourse to dictionaries. Reading the Act as a whole does not yield a consistent use of language or concepts. Section 10(1) references any decision or direction. The scheme of the Act designates an executive officer or assignee as exercising powers and performing duties. The actions resulting from such exercise or performance are not given uniform descriptions. As the inspections, gradings and samplings contemplated in s 3A indicate, the exercise of powers by an assignee may variously result in classifications, inspections, cancellations, and directions. It is not at all clear that the exercise of these powers strictly amounts to a direction or a decision, in the sense of a determination of a dispute. But if that is so, then s 10(1) appears to have a very narrow remit and lacks utility. However, if the exercise of the powers of an assignee in s 3A does fall within the meaning of a decision in terms of s 10, it is not clear why a fee determination is not also a decision.

[9] The word 'beslissing'was so held to have this meaning in the interpretation of the Medical Schemes Act 131 of 1998 in *Bonitas Medical Fund v The Council for Medical Schemes* [2016] ZASCA 154; [2016] 4 All SA 648 (SCA) para 17.

[21] It is unnecessary, however, to express a definitive view. The high court did not consider the application of s 7(2) of PAJA in the light of the Constitutional Court's decision in *Koyabe*.[10] The Constitutional Court there recognised that the duty to exhaust internal remedies, though valuable, should not be rigidly imposed, and that the exceptional circumstances referenced in s 7(2)*(c)* of PAJA depend upon the facts and circumstances of the case.

[22] In the present case, there is considerable ambiguity as to whether a fee determination that may affect many owners is the type of decision contemplated by s 10(1) of the Act. The appellants observe that an appeal in terms of s 10(1) must be lodged in the prescribed manner. The Minister promulgated prescribed fees in respect of appeals concerning specific products, but not against the determination of fees by assignees. The Minister's understanding of s 10(1) does not determine its meaning. But it does evidence the lack of clarity as to the appeals that may be brought in terms of s 10(1). Given these uncertainties, in my view, the failure by the appellants to appeal under s 10(1), even if this was an available remedy, should not frustrate the appellants' review. Where the right to appeal is not made plain in the legislation, and, at best, it is cast as a right and not an obligation, the high court should have permitted the appellants, in the interests of justice, to proceed with their review. And I do so find.

[23] I proceed to consider the merits of the appellants' review. The appellants' review challenged Procon's determination of fees on two

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[10] *Koyabe and Others v Minister for Home Affairs and Others* [2009] ZACC 23; 2009 (12) BCLR 1192 2010 (4) SA 327 (CC) paras 38 – 40.

principal grounds. First, the appellants complained that the determination was procedurally unfair. Second, the appellants alleged that the determination was irrational. I consider these challenges in turn.

[24] The parties are in agreement that although the challenged provision does not prescribe a procedure to be followed so as to determine a fee, the determination must comply with the requirements of procedural fairness. Since it is also common ground that the determination of the fee is administrative action, the parties are in agreement that s 4 of PAJA is of application. Section 4 of PAJA sets out what an administrator must decide so as to give effect to the right to procedurally fair administrative action. In this case, Procon decided to follow a notice and comment procedure.

[25] The appellants complain that the notice and comment procedure followed by Procon failed to result in a fee determination that was procedurally fair. They point out that the Regulations on Fair Administrative Procedures, made in terms of s 10 of PAJA, require, amongst other matters, that the notice calling for comment by the public must be published in the Government Gazette and in a newspaper or newspapers that are distributed throughout the country and that the notice must contain sufficient information about the proposed administrative action to enable members of the public to submit meaningful comment. Furthermore, s 4(3)*(a)* of PAJA requires the administrator to take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them.

[26] The appellants alleged that Procon fell short. The proposed fees were published in the Government Gazette, but in no newspaper, nor over the radio and electronic media. The publication was in English only. The publication of the proposed fees did not disclose the basis or methodology used to determine the proposed fees. In particular, Procon failed to provide information as to whether the proposed fees were determined so as to recover costs or allowed also for a profit to be earned. In sum, for the public to make meaningful comments, the public must be given sufficient information. The public was not properly informed, and hence the notice and comment procedure was not fair.

[27] Procon set out in its answering affidavit the extensive consultative process that it followed with affected parties, in the course of which comments were received concerning the proposed fees. The appellants participated in this process and provided comments. Procon avered that it took these comments into account in making its fee determination. The fact that Procon did not agree with the methods of costing, reflected in certain of the comments received, did not mean that these comments 'were not recognised and considered'. In sum, the consultative process afforded the appellants a reasonable opportunity to participate, and it was thus fair.

[28] The record shows that there was indeed an extensive consultative process followed. Procon received comments on its proposed inspection fees from numbers of affected persons. The first appellant provided comments. But the yield of the process by way of comments does not meet the principal complaint made by the appellants as to its fairness. Two notices inviting comments in respect of Procon's proposed fees were

published in the Government Gazette: the first on 14 October 2016, and the second on 24 November 2016.

[29] The proposed inspection fees in the first notice reflected 3 categories. Each category listed various products. The proposed inspection fees were as follows: category 1, 1.8c per kg; category 2, 1.6c per kg; category 3, 1.4c per kg. The notice further indicated that the levies per kilogram would be based on net weight, and prices exclude VAT. A caveat was laid down: where an inspection service is delivered and levies are not sufficient to cover costs, '[Procon] reserves the right to, at its discretion, charge hourly and /or kilometre rates. . .'. These rates were then set out. In the second notice, certain revisions were made to the rates in each category, and the specified products listed in categories 1 and 3 were reduced, with residual products listed in category 3 as 'unspecified vegetables' at an inspection fee of 1.4c per kg.

[30] What is entirely absent from the two notices was any indication as to how the inspection fee was arrived at. Nor was there an explanation as to what determined the differential in the rates as between the categories in the first notice, and within the categories in the second notice. The first notice, as indicated, does reference the risk that the levies may not cover costs. But nothing is said as to whether the fees are fixed to recover costs or make a profit, and if so, how the rate expressed in cents per kilogram, in different categories, achieves that end.

[31] In my view, these omissions irredeemably compromise the fairness of the consultative process that was followed. It is clear from certain of the comments received that the basis of the proposed fees was questioned. In one meeting, held on 27 September 2016 between the first appellant,

Procon, and representatives of the Department, the first appellant raised the issue as to the basis upon which Procon used a rate per kilogram when products had different values unrelated to weight. The recorded response is that '[Procon] will engage with [the first appellant] on the matter.' What was required of Procon in the notices calling for comment was information as to the basis of a fee based on weight, the rationale for the fee structure, the logic underpinning the categories, rate differentials and their relation to cost recovery.

[32] Absent this information, those affected by the proposed fee determination, including the appellants, were not placed in a position to make meaningful and informed comments. As a result, the consultative process did not meet the requirements of procedural fairness. The fee determination made by Procon cannot stand, since it is the outcome of an unfair process. It must be reviewed and set aside.

[33] The appellants also sought to review Procon's determination of inspection fees on the basis that it was irrational, arbitrary and capricious. The exercise of public power, including the power to determine inspection fees by an assignee, must have a rational basis. In *Democratic Alliance v President of South Africa*,[11] the Constitutional Court framed rationality review thus:

'The aim of the evaluation of the relationship is not to determine whether some means will achieve the purpose better than others but only whether the means employed are rationally related to the purpose for which the power was conferred'.

[34] The essential complaint that the appellants made in the founding affidavit is this. The determination of inspection fees by Procon,

[11] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2012 (12) BCLR 1297; 2013 (1) SA 248 (CC) para 32.

published in the Government Gazette on 6 January 2017, followed the revision of the proposed fees, described above. In category 1, the listed products are charged an inspection fee of 1.8c per kilogram. In category 2, the listed products attract an inspection fee of 1.6c per kilogram, save for cauliflower and pumpkins that are charged a fee of 0.8c per kilogram. In category 3, the inspection fee for products, including 'unspecified vegetables', is 1.4c per kilogram, save for cabbages that are charged 0.8c per kilogram. The appellants contend that to charge fees in different categories according to weight means that products that weigh more attract a higher fee than products that weigh less, although the services to be rendered in respect of the products are the same. Nor is there any evident basis for the differentiation in fees as between and within categories. The determination of fees is accordingly irrational.

[35] The powers and duties conferred upon assignees in terms of the Act are public powers. Their purpose is to enforce the regulatory scheme of the Act. The regulatory scheme seeks to control the sale, export and import of certain agricultural products. The power of an assignee to determine a fee is no different from the characterisation of the assignee's other powers and duties. It is a public power, conferred to permit the assignee to carry out a public function, which is, to enforce the regulatory scheme of the Act. The purpose of the power of the assignee to determine a fee is to permit the assignee to be compensated for the cost of carrying out its duties in a competent and efficient manner. The question is then whether the fees determined by Procon are rationally related to this purpose.

[36] In its answering affidavit, Procon set out a lengthy disquisition as to the methodology it used to calculate the inspection fees. The deponent

explained that Procon calculated its costs for each of the markets to be served, estimated the anticipated volumes of product in each market expressed in kilograms, and then calculated the anticipated income it would need to derive, expressed as a rate of cents per kilogram, so as to break-even.

[37] What this exposition failed to explain was how the anticipated number of inspections and the costs associated with those inspections is rationally expressed by reference to the weight of the anticipated sales of products in each of the markets. While the volume of the products that require inspection is of relevance to a determination of cost, wholly unexplained is how that cost increases with the unit weight of a particular product. Nor does the deponent make intelligible how different products come to be categorised in categories 1, 2 or 3 and the differences in the fee, expressed in cents per kilogram, both within and between categories.

[38] The purpose of the power to determine inspection fees, as I have explained, is to secure compensation sufficient to meet the assignee's costs of carrying out its public duties in a competent and efficient manner. The determination of fees made by Procon is not rationally related to this purpose. The inspection fees, expressed in cents per kilogram for each product, arranged in 3 categories, with differential fees within and between categories, have no discernible or cognisable connection to the costs incurred by Procon so as to carry out its duties in a competent and efficient manner. The appellants' rationality review is thus established.

Conclusion

[39] The appellants' appeal succeeds in part and fails in part. The appellants sought to have the challenged provision declared unconstitutional and invalid. The appellants, I have found, cannot prevail on this issue. The appellants' review of Procon's fee determination is however well founded. The high court did not consider the merits of the review because it found that the appellants had failed to exhaust their internal remedy. In that it erred, and the appeal in respect of the high court's order dismissing the review succeeds.

[40] As to the question of costs, the appellants submitted that their constitutional challenge should have been dealt with on the basis of the well-known principle in *Biowatch Trust v Registrar, Genetic Resources and Others.*[12] An unsuccessful litigant in constitutional litigation should ordinarily not be ordered to pay the costs of litigation brought to vindicate their constitutional rights. The Board accepted the application of this principle to the appellants' constitutional challenge, should their appeal be unsuccessful. Procon and Meatco submitted that because Procon is a 'Not for Profit Company', without state funding, it should be awarded costs, as the high court had ordered. The Minister contended that the appellants, more especially the first appellant, were 'financially driven' in bringing their constitutional challenge and hence the litigation had a commercial object and was not an attempt to vindicate a constitutional right.

[41] The submissions made by the Minister, Procon and Meatco cannot be accepted. The identity of a respondent as a 'Not for Profit Company'

[12] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (10) BCLR 1014; 2009 (6) SA 232 (CC) at para 21.

does not alter the application of the principle that a litigant seeking to vindicate its constitutional rights should not be discouraged from doing so by the risk of an adverse costs order. Parties in the position of Procon and Meatco must decide whether to oppose a constitutional challenge in the knowledge that their successful opposition carries a cost, and the determination of the constitutional question is a public good that promotes our constitutional order. As to the Minister's submission, the vindication of a constitutional right may be commercially advantageous, but that does not detract from the importance that generally attaches to the freedom with which these rights may be litigated.

[42] It follows that, in my view, no costs order should be made in respect of the failure by the appellants to prevail in their appeal on the constitutional challenge. So too, the high court, which did not direct specific treatment to this issue in its award of costs, should have applied the *Biowatch* principle to the unsuccessful outcome of the constitutional challenge. As to the outcome of the appeal in respect of the review, there is no reason why the costs should not follow the result.

[43] The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel to the extent set out in 3.2 and 3.3 below.
2. The appeal is otherwise dismissed.
3. The order of the high court is set aside and substituted with the following order:

   '3.1 The application to declare s 3(1A)(b)(ii) read with s 3A(4) of the Agricultural Product Standards Act 119 of 1990 (the Act) unconstitutional and invalid is dismissed.

3.2 The second respondent's determination of inspection fees in terms of s 3(1A)(*b*)(ii) of the Act published as Notice 1 of 2017 in Government Gazette 40537 dated 6 January 2017 is reviewed and set aside.

3.3 The costs of the review are to be paid by the first, second, and eighth respondents, including the costs of two counsel, where so employed.'

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DN UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

For appellants:	M C Maritz SC (with him B C Stoop SC)
Instructed by:	Bernhard Van Der Hoven Attorneys, Pretoria Rosendorff Reitz Barry Attorneys, Bloemfontein.
For first respondent:	C E Puckrin SC (with him H C Janse van Rensburg) State Attorney, Pretoria
Instructed by:	State Attorney, Bloemfontein.
For second, fifth and eighth respondents:	H Epstein SC (with him M Mostert)
Instructed by:	Fairbridges Wertheim Becker, Johannesburg Phatshoane Henney Attorneys, Bloemfontein.
For seventh respondent:	A M Breitenbach SC
Instructed by:	Mothle Jooma Sabdia Inc., Pretoria Matsepes, Bloemfontein.