Reduced profits is not expropriation

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The South African Constitutional Court has held that a property owner doesn't have a legal right to value property using a particular method, or to get a specific value when selling the property. In *South African Diamond Producers Organisation v Minister of Minerals and Energy*, the court found that a change to the way a market is regulated isn't unlawful deprivation of property by the state, and isn't unconstitutional.

The court was asked to consider the changes to the market practice commonly used by diamond producers when selling diamonds, which is regulated in terms of the Diamonds Act (No 56 of 1986). Previously, diamond producers could use so-called "tender houses", where non-licenced foreign experts, representing foreign buyers, would assist licenced purchasers with their purchase of parcels of unpolished diamonds.

The Diamond Act was amended to prohibit unlicensed experts from assisting licenced purchasers, effectively outlawing the common business practice used in tender houses. Two constitutional questions were raised against the legal amendments. First, does the prohibition of the market practice result in an unlawful deprivation of property? Secondly, does the prohibition of the market practice infringe on a person's right to choose a trade?

The court held that the amendments to the Diamonds Act were constitutional; confirming government's right to regulate markets and change regulations, even when changes decrease the market value that could be realised when selling goods.

First constitutional question: unlawful deprivation of property

The South African Diamond Producers Organisation (SADPO) argued that outlawing of the tender house practice deprived diamond producers of the right to receive full market value for their property when selling diamonds because they could now only market to local licence holders. They argued that a key part of the markets price-forming mechanism was being prohibited, leading to a 30 percent reduction in the market value that diamond producers could realise. This, they argued, was an interference with the right to alienate property at the highest possible price.

The test the Constitutional Court applies a three stage test to determine if there has been an unconstitutional deprivation of property by the state: (i) is the thing being considered "property"; (ii) is there a "deprivation" of that property; and (iii) is the deprivation arbitrary. If all three questions are answered affirmatively, then the deprivation of the property by the state is unlawful.

The Constitutional Court has held in previous cases that property doesn’t need to be physically taken in order for there to be deprivation. To be classified as a deprivation of property there must, however, be some form of substantial interference going beyond normal restrictions that an open and democratic society would place on property.

The court recognised that a diamond producer has a clear constitutional property right in the physical diamonds themselves, but it was not convinced that these property rights were deprived by merely changing the regulations governing the methods that may be used to sell the property.

The producers still had a right to sell their property, albeit now using different methods. Even if a 30 percent loss in market value could be proved, this isn't depravation of the producer's property rights because they could still sell their diamonds and receive full market value. The only effect was in the methods that could be used to sell the diamonds and the market conditions that determine the highest price - the right to sell was not impacted by the legal amendments.

The court held that markets are inherently regulated, and that an owner of property doesn't have a legal right to value his goods using a particular method, or to obtain a specific value for his goods—there is no protectable interest to conduct a sale using a particular practice.

On the first constitutional question, the court accordingly held that there was no deprivation of property by the state through the amendments to the Diamonds Act that outlawed the business practice used in tender houses.

Second constitutional question: the infringement of the right to trade

SADPO alleged that that outlawing the tender house practice infringed its members right to conduct their business as they deemed fit, breaching their freedom of trade, and their right to conduct an occupation or profession.

The court held that this constitutional right had two distinct elements.

The first element was if the right to choose a trade, occupation or profession was limited. The court held that the amendments didn’t place any hard legal barrier to choosing a trade. It also considered if the amendments placed an effective limit on the trade by effectively barring the entry to the trade by making the practice of the trade so undesirable or unprofitable. The court held that there was no effective limit either—the producer was still able to get assistance through either a licenced person outside of a Diamond Exchange and Export Centre (DEEC), or by an unlicensed person at a DEEC.

The second element was if the regulation of the trade was rational and related to a legitimate governmental purpose. The test for rationality is important; it is not a test of whether the regulation reasonable or effective, or whether the objectives can be achieved in better ways. The court ultimately held that the amendments to the Diamonds Act were rationally connected to the promotion of local beneficiations and the monitoring of the movement of unpolished diamonds.

Accordingly, the court rejected all suggestions that the outlawing the tender houses were unconstitutional, holding that the reduction of a producers profits resulting from a change in the regulation of a market is not unlawful deprivation of property because no property was in fact deprived, and doesn’t infringe the right to conduct a trade if the regulation has a rational purpose.

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