Case No 552/91 /MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

SIDNEY BONNEN BIRCH Appellant

- and -

KLEIN KAROO AGRICULTURAL
CO-OPERATIVE LIMITED Respondent

CORAM: HOEXTER, VIVIER, GOLDSTONE JJA
et NICHOLAS, VAN COLLER AJJA.

HEARD: 8 March 1993

DELIVERED: 19 March 1993.

J U D G M E N T

VIVIER JA/

VIVIER JA.

The appellant is an ostrich farmer in the Grahamstown district. The respondent is a co-

operative society incorporated under the provisions of the Co-operatives Act 91 of 1981 ("the 1981 Act"). The respondent, which is based in Oudtshoorn, has as one of its objects the disposal of ostriches and ostrich products. At the request of the respondent, the Minister of Agriculture, acting under and by virtue of the powers conferred upon him by sec 241(3) (b) of the 1981 Act, by Government Notice No R981 published in the Government Gazette of 17 May 1988 declared that from that date no producer of ostriches or ostrich products in the Republic of South Africa would be allowed to sell or otherwise dispose of any ostriches or ostrich products otherwise than through the respondent. In terms of the notice "ostrich products" were defined to mean anything derived from ostriches,

whether processed or not, but not ostrich egg-shells. Specifically excluded from Government Notice No R981

were, firstly, the sale or disposal of ostriches and ostrich eggs by a producer to any producer in a specified exempted area and, secondly, the sale or disposal of ostrich products by a producer if those ostrich products had already been sold or otherwise disposed of once in any form whatsoever through the respondent.

The appellant thereafter applied on notice of motion to the Cape Provincial Division for an order declaring Government Notice No R981 to be invalid on the ground that by issuing the notice the Minister had exceeded his powers under the enabling legislation. The application was opposed by the respondent. The matter came before MARAIS J who dismissed the application with costs but granted leave to the appellant to appeal to this Court.

Sec 241 of the 1981 Act, pursuant to which

Government Notice No R981 was issued, does not itself contain any enabling provision conferring upon the Minister a power similar to that which had previously been vested in him by sec 102(1) of the Co-operative Societies Act 29 of 1939 ("the 1939 Act") which was repealed by the 1981 Act. Sub-sec 241(3) (a) of the 1981 Act provides, however, that any notice or proclamation issued or deemed to have been issued under sec 102 of the 1939 Act and which was in force immediately before the commencement of the 1981 Act shall, the repeal of such section notwithstanding, continue in force until it is withdrawn by the Minister under paragraph (b) of that subsection. In terms of paragraph (b) the Minister may amend, substitute or withdraw any notice or proclamation issued or deemed to be issued under sec 102 of the 1939 Act. By Government Notice No R981 previous Government Notices Nos 640 of 9 May 1958, 1166 of 31 July 1959 and 875 of

5 June 1970 were repealed and new provisions were substituted. The question whether the Minister was empowered to issue Government Notice No R981 accordingly turns on a proper construction of sec 102(1) of the 1939 Act.

That Act repealed and superseded all existing legislation governing co-operative societies and companies. Under the Co-operative Societies Act 28 of 1922 ("the 1922 Act") there had been no form of compulsion. A farmer was free to join a co-operative society or company as he pleased and only those who had voluntarily become members of a society or company were bound by the regulations thereof. Non-members were free to dispose of their agricultural products or manufacture them into the finished product as they pleased (Orient Tobacco Co Ltd v Ko-operatiewe Tabakplanters-vereniging 1927 AD 49 at 54). In 1925 the 1922 Act was amended by Act 38 of 1925 ("the 1925

Act") and in terms of sec 17(1) thereof, as subsequently amended by sec 10(a) of Act 2 of 1930, the Minister of Agriculture was for the first time empowered to compel each producer of a particular kind of agricultural produce in a particular district, area or province to sell his produce through a particular co-operative agricultural society or company registered under the principal Act irrespective of whether the producer in question was a member of that society or company.

The powers conferred upon the Minister by sec 102(1) of the 1939 Act broadly resembled those which the repealed sec 17 (1) of the 1925 Act had previously conferred upon him. Sec 102 (1) of the 1939 Act provided as follows :-

"102(1) Whenever the Minister is satisfied -

(a) that at least seventy-five per cent of the number of the Europeans who <u>in any area</u> produce any kind of

agricultural produce are members of a co-operative agricultural society or company which is registered under this Act and has as one of its objects the disposal of that kind of agricultural produce; and (b) that the members of that society or company produce at least seventy-five per cent of the total quantity of that kind of agricultural produce produced by Europeans in that area, he may, at the request of that society or company, by notice in the Gazette declare that, from a date to be stated in the notice, no producer of that kind of agricultural produce in that area, which shall be defined in the notice, shall sell or otherwise dispose of such produce produced by him in that area otherwise than through the said society or company, whether he is a member thereof or not; and any producer who, after the date so fixed, sells or otherwise disposes of any such produce otherwise than through the said society or company, and any person

> who, after such date buys or otherwise acquires such produce from any such producer otherwise than through the said society or company, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred pounds." (my emphasis)

It will be seen that whereas the 1925 Act had authorised the Minister to impose the restriction in "any district, area or province" the words "district" and "province" no longer appeared in the 1939 Act and the Minister's power related simply to "any area", which it was for the Minister to define. In terms of the 1939 provision the Minister of the day issued the aforesaid Government Notices Nos 640 of 9 May 1958 and 1166 of 31 July 1959 (both of which declared the Union of South Africa to be an area in which the restrictions therein set out were to apply) and Government Notice No 875 of 1970, which declared the

Republic of South Africa to be such area. By Government Notice No R981 the Minister likewise sought to impose a country-wide prohibition. This, the appellant contends, the Minister was not empowered to do.

The case turns upon the meaning of the words "any area" in sec 102(1) of the 1939 Act and particularly whether they may encompass the whole of the Republic of South Africa .

It is a well-established principle of construction that in construing a statutory provision the object should be to ascertain from the language used the intention which the Legislature meant to express. In ascertaining this intention, regard is to be had both to the language of the enactment and to the context, using this word in a wide sense. See Ebrahim v Minister of the Interior 1977(1) SA 665 (A) at 677-8 and the authorities there cited; Protective Mining and

Industrial Equipment Systems (Pty) Ltd (Formerly Hampo Systems (Pty) Ltd) v Audiolens (Cape) (Pty) Ltd 1987(2) SA 961 (A) at 991 F-H and Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of The M V Jade Transporter 1987(2) SA 583 (A) at 596 G - 597 B. However, where the language of a statute is unambiguous, and its meaning is clear, the Court may only depart from such meaning if it

> "would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account". (per INNES CJ in Venter v Rex 1907 TS 910 at 915; Shenker v The Master and Another 1936 AD 136 at 142).

According to its ordinary, literal and grammatical sense the word "area" means a piece of ground or any particular surface or region or

territory. (cf Black's Law Dictionary, 5th ed; Oxford English Dictionary, 2nd ed; and Webster's Third New International Dictionary sv "area"). An "area" may therefore be of any size or extent. The fact that areas differ in extent, such as the different areas of different spaces, surfaces or regions, does not affect the clear ordinary meaning of the word. Uncertainty as to the extent of the area must not be confused with uncertainty as to the meaning of the word. The permissible extent of an "area" in any particular statutory enactment will depend on whether the Legislature has expressly or by implication placed a limitation on such extent. In the present case there is no limitation, express or implied, in sec 102(1) of the 1939 Act upon the size of the area which the Minister may specify in the notice which he issues under that section. The words "any area" in sec 102(1) may therefore encompass the entire country.

In R v Sachs 1953(1) SA 392 (A) this Court held that,

depending upon the context in which the word "area" is used, it may embrace the whole country. The appellant in that case had been convicted of contravening sec 11(h) read with sec 9 of the Suppression of Communism Act 44 of 1950, in that he had attended a meeting in contravention of a notice served upon him by the Minister. The validity of the notice was attacked on the ground, inter alia, that whereas sec 9 of the Act authorised the Minister to prohibit a person from attending any gathering in any place "within an area" specified in the notice, the Minister prohibited the appellant from attending any gathering within the then Union of South Africa and the then Territory of South West Africa. It was contended that this large stretch of country was not an "area" within the meaning of sec 9, and reliance was placed on the meaning of the word "area" in sec 10 of the Act. Centlivres CJ said at

403 H - 404 A

> "I cannot agree with this contention. Secs 9 and 10 are entirely distinct and separate. While the word 'area' in sec 10 may, by necessary implication from the context in which it is used, have to be construed as an area less than the Union and South West Africa there is no such implication in sec 9. That section contains no limitation, express or implied, upon the size of the area which the Minister may specify in the notice which he issues under that section. The fact that he has specified the largest area which he could specify under the section does not, in my opinion, invalidate the notice".

The provisions of sec 102(1) of the 1939 Act are, as was pointed out by counsel for the appellant, of a far-reaching and drastic nature. All producers of agricultural produce are made subject to ministerial control and may be deprived of the right to sell their produce to buyers of their own choice. In Orient Tobacco Company Ltd v Ko-operatiewe Tabakplanters-vereniging, supra at 54 DE VILLIERS JA described the

power conferred upon the Minister by sec 17 of the 1925 Act as

> "certainly of an extraordinary character and fraught with the gravest consequences to individual producers".

That case turned upon the meaning of the words "each producer of that kind of produce" in sec 17 of the 1925 Act. This Court held, at p 56, that the words were unambiguous and quite general and that although the position created for the appellant was one of great hardship, the Court had no option but to give full effect to them. So too, in R v Sachs, supra, CENTLIVRES CJ said at 400 F-G :

> "But the mere fact that autocratic powers are conferred by the section on the Minister does not mean that the section is ambiguous. In my opinion it is clear that Parliament intended to confer autocratic powers upon the Minister and it is the duty of courts of law to give effect to the intention of Parliament."

In my view the same applies to the present

case. The words "any area" are unambiguous and plainly so wide in import that it is clear that the Legislature was intent upon conferring coercive powers upon the Minister to issue a notice in respect of the total area of the Republic of South Africa, despite the hardship the exercise of such powers might create for individual producers. The Court has no option but to give full effect to such intention.

Counsel for the appellant sought to interpret . the words "any area" by reference to the language of sec 17(1) of the 1925 Act, particularly the use of the word "area" in conjunction with the words "district" and "province" in that subsection. He contended that a comparison of sec 17(1) with sec 102(1) of the 1939 Act indicated that the expression "any area" in the latter Act was intended to bear the same restricted meaning it had borne in the context of the 1925 provision. This Court has laid down that once the

meaning of a statutory provision is found to be clear and unambiguous it is not permissible to have recourse to pre-existing legislation for the purpose of construing the statutory provision. See Collie, NO v The Master 1972(3) SA 623 (A) at 629 F - 630 B and Ebrahim v Minister of the Interior, supra at 680 B-C. But even regard to the pre-existing legislation would not detract from the clear meaning of the words "any area" in the 1939 Act, but tends to confirm it. In my view the change in context by the omission of the words of limited import in the subsequent statute signifies an intention to use the words "any area" in their unrestricted sense as not only encompassing the terms "district" and "province" hitherto used but indeed the entire country. (cf Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986(2) SA 555(A) at 561 H).

The 1939 Act must accordingly be construed as

having empowered the Minister to issue a notice which could apply to the entire country. It follows that notice R981 cannot be said to have been ultra vires.

In the result the appeal is dismissed with costs, such costs to include the costs occasioned by

the employment of two counsel.

W. VIVIER JA.

HOEXTER JA)
GOLDSTONE JA)
NICHOLAS AJA) Concur.
VAN COLLER AJA)