

SCA decision bodes well for future engagement with assignees

The Agricultural Product Standards Act allows the executive officer of Product Standards to appoint a private entity as 'assignee' to perform critical inspection functions on behalf of the Department. The Act also permits the assignee to set and levy fees whenever these inspection services take place. Some time ago a group of agribusinesses in the vegetable value chain took the assignee and the Department to court over the fees levied for inspections by the assignee. After an initial setback in the High Court, the Supreme Court of Appeal upheld the appeal yet both parties claimed a degree of success. We delve into the matter to provide some clarity.

The appellants in the case of [Bertie van Zyl \(Pty\) Ltd t/a ZZ2 and Others v Minister of Agriculture, Forestry and Fisheries and Others](#) based their arguments on two broad grounds:

- Firstly, that the provisions of the APS Act are unconstitutional which allows a state function to be performed by a private entity and for that entity to charge agribusinesses for this service;
- Secondly, that the fees as set down by the assignee were done in a manner that was procedurally unfair and are irrational.

The Court dismissed the constitutional challenge and hence reaffirmed that the principle of assignees and the levying of fees was constitutional. The appellants based their arguments on section 25 of the Constitution (property rights). In the court's reasoning, it held that fees are levies for a service, albeit that the producers have no choice in procuring the service since it is mandated by the Constitution. Paying fees is not the same as having vested property deprived and as a result, there was no basis in section 25 to challenge the system. The first ground was therefore unsuccessful and the court clarified that the system of assignees is in fact constitutional.

The second argument, however, held true as the decision to impose fees was reviewed and set aside. The court held that the fees were both procedurally unfair as well as irrational. In determining procedural fairness, the court ruled that the Promotion of Administrative Justice Act (PAJA) requires publication for public comments but also direct consultation where the affected parties can be identified. The consultations must be substantive and the affected parties must be provided with sufficient detail so that they can respond meaningfully. In this case, the court ruled that the consultation procedure was not sufficient as:

- the publication did not disclose the basis or methodology used to determine the fees;
- it failed to specify if the fees were based purely on a cost-recovery basis or whether the assignee accounted for a profit; nor
- did it disclose how or why differential rates are applied to different products.

The latter also had a big impact on the rationality of the fees. Differential fees were applied to different commodities based on weight, which in turn implies that the different commodities differed in value. However, the court held that there is no rational reason to differentiate in this manner as the service rendered by the assignee (the inspection) is the same irrespective of the product. Accordingly, the court ruled that the fees were irrational and the assignee must now restart the consultation process to determine a fee structure under the Act.

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Indeed, the ruling did not invalidate the system of assignees but it set the bar for consultation and rationality at a pleasingly high level. Because of this ruling, whenever assignees are tasked to set a fee for services rendered on behalf of the state the consultation will have to be detailed and meaningful. If nothing else, the ruling confirmed that consultation with the industry cannot be a mere 'rubber stamp' exercise. This will surely stand all parties in good stead with future consultations as assignees are appointed to perform regulatory functions on behalf of the Department. The judgement could not have come at a better time since consultations are underway for the inspection of different various products. The principle of assignment is also not restricted to the APS Act as a number of the Department's legislative functions are capable of assignment. Draft legislation currently in the pipeline will also make provision for additional functions to be assigned, so this ruling is a timely reminder of what meaningful consultation entails.