



**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Case : 270/2007
REPORTABLE

In the appeal between:

THE MINISTER OF AGRICULTURE

First Appellant

**THE DIRECTOR: ANIMAL HEALTH,
DEPARTMENT OF AGRICULTURE**

Second Appellant

and

BLUELILLIESBUSH DAIRY FARMING (PTY) LTD

First Respondent

GRASSLANDS AGRICULTURE (PTY) LTD

Second Respondent

Before: Cameron JA, Nugent JA, Cloete JA, Maya JA, and
Cachalia JA
Heard: Tuesday 20 May 2008
Judgment: Thursday 29 May 2008

Animal Diseases Act 35 of 1984 – compensation under s 19(2) read with regulation 30 – animals slaughtered because of infection or reasonably suspected infection with bovine tuberculosis – dairy herd – ‘fair market value’ connotes value of animals free of infection

Neutral citation: Minister of Agriculture v Bluelilliesbush Dairy Farming (270/07) [2008] ZASCA 60 (29 May 2008)

JUDGMENT

CAMERON JA:

[1] This is an appeal by the Minister of Agriculture (the minister), the director of animal health in the department (the director) and the Member of the Executive Council for agriculture in the Eastern Cape against a judgment of Jansen J sitting in the High Court in Port Elizabeth. The judgment reviewed and set aside a decision of the minister confirming a recommendation of the director about the basis on which compensation was to be calculated for animals slaughtered under the Animal Diseases Act 35 of 1984 (the Act).¹ The judgment upheld the basis for which the respondent companies contended, and ordered payment to them of R14 395 537 (plus interest).² The appeal, brought with leave granted by Jansen J, requires us to resolve the parties' contesting approaches to the question of compensation.

[2] In May 2004, an outbreak of bovine tuberculosis (TB) occurred on the farms on which the two respondents (the claimants) conduct dairy farming. The disease is extremely contagious and though it can be treated the animals affected remain infectious: hence

¹ The Act has been repealed by the Animal Health Act 7 of 2002, which has not yet been brought into operation.

² *Bluelilliesbush Dairy Farming (Pty) Ltd v Minister of Agriculture* [2007] 3 All SA 35 (SE).

policy is to cull those found or suspected to have the disease. The claimants form part of a group of companies that runs the largest dairy farming operation in the Eastern Cape, and one of the largest in the country. The first claimant owns the dairy cattle, while the second is the trading entity that leases assets from other companies within the group. The outbreak affected all eight farms on which the group farms. More than 7 000 cows, heifers, heifer calves, bull calves and bulls had to be slaughtered. A director of both claimants, Mr Elliott (who was the claimants' chief voice in the litigation), described the outbreak in the months immediately after it occurred as 'a catastrophic disaster'.

[3] The appeal concerns the extent to which public funds may mitigate the disaster. The Act provides that the owner of an animal destroyed under its provisions may claim compensation for the loss.³ The basis on which compensation may be awarded is set out in s 19(2) (subsections (3) and (4) are not germane to the appeal):

³ Animal Diseases Act 35 of 1984, s 19(1):

'The owner of any animal or other thing which has been destroyed or otherwise disposed of pursuant to any control measure, or any provision of section 17(3) or (5), or any other provision of this Act, by the director or on his authority, may submit an application for compensation for the loss of the animal or thing to the director.'

Section 1 read with s 2(1) defines 'director' as the director of animal health of the department of agriculture, 'who shall be a veterinarian'.

'The director may, taking into consideration –

- (a) the applicable compensation, based on a fair market value of the animal or thing, which has been prescribed for purposes of this section or, where no compensation has been so prescribed, any amount fixed by him in accordance with any criterion deemed applicable by him;
- (b) the value of any thing which has in connection with the animal or thing been returned to the owner;
- (c) any amount which is due by the owner pursuant to any provision of this Act in respect of the animal or thing to the State; and
- (d) any amount which may accrue to the owner from any insurance thereof, fix a fair amount of compensation.⁴

[4] The statute provides that a person who feels aggrieved by any decision of or steps by the director may lodge an objection with the Minister (s 23(1)).⁵ The objection must be lodged with the director-general of agriculture, 'who shall submit it together with his recommendation to the Minister for a final decision'⁶ (s 23(2)).⁶ In this case, the Minister, after considering a written report submitted to her in terms of s 23(3)(a),⁷ upheld the director's decision.

⁴ The provisions of s 21 of the repealing 2002 statute appear to be substantially identical to s 19 of the Act.

⁵ Section 23(1):

'Any person who feels aggrieved by any decision of or steps taken by the director, or by any other person or body referred to in section 10(7)(a) [that is, a person or body empowered by the Minister to exercise powers and duties under an animal health scheme established in terms of s 10], or by any employee or other person under the control or direction of any such person or body, in terms of this Act, may within the prescribed time and on payment of the amount which is prescribed, lodge in accordance with the provisions of this section an objection against the decision or steps with the Minister.'

⁶ Section 23(2):

'An objection shall be submitted in the prescribed manner to the Director-General, who shall submit it together with his recommendation to the Minister for a final decision.'

⁷ Section 23(3)(a):

'For the purposes of his recommendation contemplated in subsection (2), the Director-General may, if he deems it necessary, designate one or more senior officers in the department to institute an investigation regarding the reasons for the objection and the circumstances which gave rise to the complaint, and to submit to him a written report concerning it.'

[5] In a letter recording her decision dated 19 January 2006, the Minister indicated that she had decided to uphold the director's decision:

'The reasons for my decision are that the Director was correct in determining the fair amount of compensation and did not act contrary to the provision[s] of section 19 of the Animal Diseases Act ...

The Director has fixed the price at slaughter price as the animals infected with TB cannot recover from the disease and will certainly die.'

[6] The appellants insisted that the decision to be targeted in the review was not that of the Minister (who merely considers an objection to the director's decision), but that of the director himself. Though nothing turns on this, since both Minister and director are before the court, in my view the claimants rightly targeted the decision of the Minister, since in case of objection the statute subjects the decision of the director to overruling by her, while making hers the 'final decision'⁸.

[7] It was common cause that the determination of the basis on which compensation should be calculated constituted administrative

(Sub-paragraph (b) disqualifies the director and any other officer who has been involved in the decision or steps from being designated to investigate.)

⁸ Section 23 (2), read with 23(4)(a):

'The Minister may, after consideration of the objection and the recommendation of the Director-General, confirm, vary or set aside the relevant decision or steps ...'

action under the Promotion of Administrative Justice Act 3 of 2000 (PAJA),⁹ which was liable to review under that statute.

[8] Section 19(2) of the Act makes clear that –

- (i) the power to fix compensation is vested in the director;
- (ii) the compensation must be ‘a fair amount’;
- (iii) in addition to the factors set out in subparagraphs (b)-(d), the director is obliged to take into consideration in terms of (a) the applicable compensation prescribed for purposes of s 19, where such compensation is prescribed; and
- (iv) when compensation is prescribed, it must be ‘based on a fair market value of the animal’.

[9] The power to make regulations conferred by s 31 of the Act was indeed exercised,¹⁰ and reg 30 provides:

‘Compensation

When compensation is payable to a responsible person [defined as a manager or owner of land or an owner of animals] in terms of section 19 of the Act, the applicable compensation shall –

- (a) in the case of an infected animal, be 80 per cent of the fair market value thereof;
- (b) in the case of an animal killed for any controlled veterinary act or for the prevention of the spreading of a controlled animal disease, be 100 per cent of the fair market value thereof;

⁹ Section 1 of Act 3 of 2000 defines ‘administrative action’ as ‘any decision taken ... by (a) an organ of state when – ... (ii) exercising a public power or performing a public function in terms of any legislation; ... which adversely affects the rights of any person and which has a direct, external legal effect ...’. On the interpretation of this definition, see *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) paras 21- 24.

¹⁰ Animal Disease Regulations, Government Notice R2026, published in Government Gazette 10469 of 26 September 1986.

(c) in the case of an infectious thing, excluding an animal, and a contaminated thing, be 50 per cent of the fair market value thereof.'

[10] The parties' dispute centres on the meaning to be given to 'fair market value' in reg 30(a). Although the dispute was presented as requiring interpretation of the concept of 'fair market value', this is not quite correct. The meaning of that phrase by itself is clear – it means the price that a willing buyer would pay a willing seller in the open market. The real question is this: what is to be the subject of the valuation? Is it to be the animal in its infected state (as the Minister and director contended) – in which case its value is that of a slaughter animal (being the value of the usable parts of the slaughtered carcass)? Or is it to be the animal in its uninfected condition (as the claimants contended) – in which case the fair market value is that of a productive dairy animal, which is about five times its value for slaughter?

[11] To value the animals as if they were fit only for slaughter would, the claimants point out, reduce their compensation to a fraction of the animals as a dairy herd. But the director – supported by the departmental officers who conducted the statutory investigation, and confirmed by the Minister – contends that compensation under reg 30(a) is limited to slaughter value. This is because

once an animal is infected its value is irredeemably diminished. Such an animal cannot be used for breeding or milking, it will never recover from the disease, and it is anyhow infectious. It can therefore never be sold for any purpose other than slaughter. This, the director says, is definitive of its statutory value.

[12] Were subparagraph (a) to be taken on its own, the subject of the valuation (that is, the 'infected animal' before or after it became infected) may be opaque. But it does not stand on its own. It must be read with subparagraph (b), from which the subject of the valuation emerges limpidly. This prescribes compensation at '100 per cent of the fair market value' of an animal killed 'for any controlled veterinary act or for the prevention of the spreading of a controlled disease'. The Act's definition of 'controlled veterinary act',¹¹ read with its definition of 'controlled

¹¹ Animal Diseases Act, s 1, definitions:

"controlled veterinary act", in relation to any animal or thing, means –

(a) the isolation, detention, inspection, testing, immunization, observation, sampling, marking, treatment, care, destruction or any other disposal of;

(b) the carrying out of any operation or of any post-mortem examination on; or

(c) the rendering of any service pertaining specially to the veterinary profession referred to in the rules made under section 30 (1) (a) of the Veterinary and Para-Veterinary Professions Act, 1982 (Act 19 of 1982), in respect of, any such animal or thing for any controlled purpose'.

purpose',¹² reveals that subparagraph (b) killings are for prevention only. The animals are in other words uninfected.

[13] It was common cause that the animals in this appeal were slaughtered under (a), not (b). (The claimants' founding affidavit asserts that because of a certain number of 'false positive' responses to the tests for bovine TB, and because all animals suspected of being infected were slaughtered, the animals slaughtered necessarily included some uninfected animals.¹³ In his answering affidavit, the director, Dr Botlhe Michael Modisane, disputes this, though he concedes that 'once there is an outbreak of a disease such as bovine TB, most animals [testing positive] are normally condemned for slaughter as a control measure' – impliedly conceding that at least some of the animals slaughtered may not have had the disease.)

[14] Nevertheless, the compensatory scheme contemplated by (b) illuminates that in (a). The compensation to be paid under (b) is clearly the full fair market value of a healthy animal (in the case of

¹² Animal Diseases Act, s 1, definitions:

"controlled purpose" means the prevention of the bringing into the Republic, or the prevention or combating of or control over an outbreak or the spreading, or the eradication, of any animal disease or, where applicable, of any parasite'.

¹³ Regulation 1 defines 'infected animal' as including an 'animal that is infected, or is on reasonable grounds suspected to be infected'.

a dairy cow, its value as a productive animal, and not merely its value for slaughter). The same compensatory scheme is plainly contemplated in (a), which envisages that same value being reduced by one-fifth for compensation purposes when the animal is (or is reasonably suspected of being) infected. Indeed, that (a) allows for compensation at only a portion (four-fifths) of the 'fair market value' of the animal seems to me to indicate conclusively that the regulation envisages the value of the animal as if it was not infected. For if it was a reference to the value of the animal in its infected condition there is no apparent reason why compensation should be set at only 80%. It would if that were so serve the owner better to send the animal to slaughter him- or herself, and thereby receive the full value of its carcass on slaughter. The regulation's compensatory scheme retains coherence only if the value to which it refers is the value to be placed on the animal as if it is not infected.

[15] The Minister and the director have not attacked the validity of the regulations – indeed, they relied on them as correctly guiding the director in determining a fair amount as compensation under s 19. And counsel for the Minister did not suggest in argument that

the basis of valuation in (b) could be anything other than disease-free value; nor that the basis of valuation in (a) could be any different than in (b).

[16] It follows that the contentions of the claimants are correct and that the review was rightly granted, for substantially the reasons set out by Jansen J.

[17] It should be added, however, that reasons of policy and good sense appear to underscore the meaning in the regulations. The history that led to the dispute is partly chronicled in departmental memoranda and records released to the claimants in response to the application. It appears that a voluntary animal health scheme was introduced in 1969 to eradicate bovine TB. All animals testing positive were sent for slaughter: the compensation paid to farmers was based on 80% of the full market value (not slaughter value) of the animal. In 1992, after farmers and stock-owners from the former homelands joined the department's control scheme, the department reduced compensation to R200 per animal slaughtered, irrespective of value, because of lack of funds. Unsurprisingly, this proved unpopular with farmers, according to an account set out in a departmental memorandum,

and very few presented their herds for testing. This led the department to recommend in September 1999 that a new system of compensation be introduced to take account of the slaughter value of the animals – which was an improvement on the previous system, but ignored the productive value of dairy herds.

[18] As the claimants pointed out, the departmental policy inadequately takes account of the Act's objectives, which are designed to elicit the voluntary cooperation of farmers. (The bovine TB control scheme is itself voluntary.) To give infected or suspect dairy cows their slaughter value for compensation purposes offers no incentive to farmers, small-scale or large-scale, to participate in disease control measures.

[19] By corollary, as the claimants also pointed out, if fair market value were assessed on the basis that the animals destroyed were infected, the state would not be required to pay any compensation at all – since the farmer could simply sell the infected cattle out of hand for whatever could be achieved on the open market (that is, the animal's hide and whatever meat could be salvaged from it). The meaning in the regulations, by contrast, ensures the cooperation of farmers and their continued ability to

farm. It also eliminates the prejudicial disadvantage dairy farmers would have suffered in comparison with beef farmers had the director's basis prevailed.

[20] Jansen J granted the claimants the full amount of compensation they claimed in their notice of motion, declining over the Minister's initial opposition to refer the matter back to the director for reconsideration, as PAJA requires bar in exceptional cases.¹⁴ In doing so, he took account of a detailed schedule the claimants attached to the application, setting out extensive details of the cattle destroyed, the meat and hide value recovered, and the dairy value as indicated by sworn valuations. The answering affidavit's disputation of these details was oblique, and no controverting facts of bases for valuation were put forward.

[21] However, in argument before this court, the claimants conceded that the figure awarded should be reduced to 80% of the market values they set out in the schedule, since their claim had been made under reg 30(a), and not (b), as seems to have been assumed in the court below. In the result, the claimants conceded that the amount awarded in the court below fell to be

¹⁴ PAJA s 8(1)(c)(ii), Remedies in proceedings for judicial review, provides that a court that sets

reduced. After an adjournment to enable Mr Buchanan on behalf of the claimants to consult, the agreed figure that is reflected in the order below was proffered to the court, and accepted by the Minister and the director.

[22] In the light of this, Mr Nthai on behalf of the Minister and the director, after the same adjournment, indicated that he conceded, were the claimants' contentions on fair market value to prevail, that there would be no need to remit the matter.

[23] Although the reduction of the amount of compensation represents a measure of success for the appellants in monetary terms, the main and indeed overriding focus of the proceedings all along has been the correct method of calculating the compensation payable under the regulations. It was the Minister's and director's approach to this issue that obliged the claimants to go to court and to defend the judgment on appeal. It would therefore be unjust to deprive them of any portion of their costs.

[24] The following order is issued:

1. The appeal succeeds to the extent that the amount of compensation the first and second appellants are ordered to pay is reduced from the sum of R14 395 537 to R10 853 777.

2. Save in this respect, the appeal is dismissed with costs.

**E CAMERON
JUDGE OF APPEAL**

**CONCUR:
NUGENT JA
CLOETE JA
MAYA JA
CACHALIA JA**