

BRAND JA:

[1] The first respondent is the Minister responsible for the National Department of Agriculture ('the Department'). The second respondent is the officer in the Department who was appointed by the Minister as the 'registrar' in terms of s 2 of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 ('the Act'). During the first half of 2003, officials in the Department, acting under delegation of the registrar, seized two consignments of pesticide called Aldicarb which had been imported by the appellant (Volcano) from China. After that, both consignments remained in a warehouse under the control of the Department.

[2] About two years later, Volcano brought an application in the Durban High Court against the Department for the return of the two consignments, essentially on the basis that it was the owner and thus entitled to possession of the Aldicarb. In the alternative, it sought an order, based on s 16(6)(a)(i) of the Act, that it be allowed to export the Aldicarb to another country. Though the second respondent was cited, in his official capacity, as an interested party, no specific relief was sought against him. The court *a quo*, Norman AJ, found both Volcano's claims wanting. Consequently she dismissed the application with costs. The appeal against that judgment is with her leave.

[3] Although the papers are surprisingly lengthy and abound with immaterial squabbles, the salient facts are quite simple and, for the most part, common cause. So it appears that Aldicarb is a pesticide destined for use in the control of soil pests. It therefore constitutes an 'agricultural remedy' as defined in the Act. Hence it is required to be registered by the registrar in terms of s 3. An agricultural remedy not so registered may not be imported in terms of s 16(1) nor sold in terms of s 7(1). In fact, both the importation and the sale of an unregistered agricultural remedy are rendered criminal offences by s 18(1)(c). It is common cause that the Aldicarb involved had not been registered under s 3 prior to importation and that Volcano had therefore contravened s 16(1) in respect of both consignments. It also appears to be undisputed, at least as far as the first consignment is concerned, that it had been sold by Volcano in

contravention of s 7 to a distributor in Polokwane who, in turn, resold part of it to a farming operation for illegal use in this country.

[4] Criminal charges under s 18(1)(c) – read with s 7 – were brought against the distributor in Polokwane, arising from its sale to the farmer. Yet, in the two years between the seizure and the present application, no charges have been brought against Volcano or any of its employees with regard to either of the two consignments. In fact, I may add in passing, it is common cause that even at this stage nothing further has happened in this regard. In the absence of any criminal prosecution, Volcano demanded the release of the consignments from the Department for the sole purpose of exportation to Zimbabwe, pursuant to a request by a prospective purchaser in that country. These demands proved to be fruitless. This led to Volcano's application in the court *a quo* which, as we now know, also met with no success.

[5] The court *a quo* seems to have accepted – rightly in my view – that, particularly in the absence of any evidence to the contrary, Volcano had established its ownership of the Aldicarb. Yet, the court held, ownership in itself could not serve as a basis for the claim that the substance be returned. The reason for this finding, as it appears from the court's judgment, was that, because ss 3, 7 and 16(1) of the Act had been contravened, Volcano could not be in lawful possession of the Aldicarb. Hence it could not, despite its common-law ownership, seek the court's assistance in attaining what would amount to unlawful possession of the substance. As to Volcano's alternative claim based on s 16(6)(a) of the Act, the court *a quo* held that Volcano is precluded from exercising the option afforded by the section – to which I shall presently return – because it not only infringed s 16(1) by importing the Aldicarb illegally, but also contravened s 7 of the Act by selling it in this country.

[6] Whilst s 16(6)(a) of the Act only constituted an alternative basis for Volcano's claim in the court *a quo*, it somehow evolved into the mainstay of its case on appeal. This appears, *inter alia*, from the way in which the primary issue to be decided on appeal was formulated, namely, whether Volcano, as an illegal importer under s 16(1) was precluded from exercising the option available to it in

terms of s 16(6)(a), in circumstances where it had also contravened ss 3 and 7 of the Act.

[7] Pivotal to this issue is, of course, the wording of s 16(6)(a). It provides:

'(6)(a) If any . . . agricultural remedy . . . has been imported contrary to the provisions of this section, such . . . agricultural remedy . . . shall at the option of the importer thereof-

(i) at the expense of such importer be removed by him from the Republic within such period as the registrar may determine; or

(ii) be forfeited to the State and be either destroyed or otherwise disposed of as the registrar may direct,

and if such importer fails to remove such . . . agricultural remedy . . . in terms of the provisions of subparagraph (i) within the period referred to in that subparagraph, it shall be forfeited to the State, and be either destroyed or otherwise disposed of as the registrar may direct.'

[8] The court *a quo's* reasoning as to why the option under s 16(6)(a) is not available to an importer who, apart from s 16(1), also contravened some other provision of the Act, appears from the following passage in its judgment:

'In my view, s 16(6)(a) must be given its ordinary meaning and the words "contrary to the provisions of this section", must be confined to s 16 only and not be extended to include other sections. Having said that, I am of the view that the option is not available to the applicant where there has been a contravention of ss 3 and 7 which are not part of s 16 of the Act. In such circumstances, the registrar is entitled to exercise the powers conferred upon him by the Act which include destroying the agricultural remedy or having it forfeited to the State.'

[9] I proceed to analyse this reasoning which, essentially, also formed the basis of the Department's argument on appeal. As to the court's reliance on the phrase 'contrary to the provisions of this section', it must, of course, be borne in mind that the phrase is introduced by the verb 'imported'. Read in this context, it seems to indicate no more than the threshold requirement for the option becoming available to the illegal importer. Thus, the jurisdictional fact, as it were, on which the option depends is that the substance involved must have been imported in contravention of s 16(1). Nothing more is required. As I see it, the plain wording of the section therefore indicates that if this jurisdictional fact is present, the importer can exercise the option and it matters not that some other provision of the Act has also been contravened.

[10] As to the court's reference to contraventions of ss 3 and 7, I find it convenient to deal with s 3 first because the reference to this section serves no other purpose than to obfuscate. As I understand the position, a contravention of s 16(1) presupposes a contravention of s 3. An exclusion of the importer's option under s 16(6)(a) whenever s 3 has been contravened would thus render the option nugatory. This, I think, makes any further consideration of s 3 in the present context unnecessary.

[11] With regard to s 7, the court's perception appears to have been that an infringement of this section – either on its own, or in combination with an infringement of s 16(1), which of the two, is not entirely clear – somehow bestows an automatic right on the registrar to have the substance involved forfeited or destroyed. This is simply not so. Section 16(6)(a) itself certainly affords the registrar no such automatic right. The registrar's power to do so under this section only becomes available to him when the illegal importer chooses not to remove the substance from the Republic or proves to be unable to do so. After all, the purpose of the section is clearly not to penalise, but to ensure that unregistered substances are not allowed into the Republic. And once in the Republic to be safely and expeditiously removed or destroyed. The only other reference to forfeiture in the Act, apart from s 16(6)(a), is to be found in s 18(2). In so far as it is relevant, this section provides:

'The court convicting any person of an offence under this Act, may, upon the application of the prosecutor, declare any . . . agricultural remedies . . . in respect of which the offence has been committed and all . . . agricultural remedies . . . of a similar nature to that in respect of which such person has been convicted, and of which such person is the owner, or which are in his possession, to be forfeited to the State.'

[12] In terms of s 18(2) a contravention of s 7 will therefore only lead to forfeiture if two requirements are satisfied. One, there must be a prosecution followed by a conviction. Two, the court – and not the registrar – must declare the substance involved, forfeited. And I do not believe that the position is any different when both s 16(1) and s 7 are contravened. Succinctly stated, the illegal importer in that situation is entitled to exercise the option in terms of s 16(6)(a), unless the Department initiates a prosecution for the contravention of s 7 and then, upon conviction, obtains a forfeiture order from the court under s 18(2).

[13] To complete the picture: as the quoted passage from the court *a quo*'s judgment shows, the sum total of the Department's case in this matter – which was upheld by the court – was that the Aldicarb had automatically become forfeited to the State. Though raised as a theoretical possibility in argument on appeal, the Department's case on the papers was not that it should be allowed to retain the Aldicarb pending a prosecution and conviction of Volcano for contravening s 7, in which event it then intended to seek a forfeiture order. If this were the Department's case, there would be no basis upon which the court *a quo* could, as it proposed to do, place the Aldicarb at the disposal of the Department to be either forfeited or destroyed. What is more, that case would have required some indication of a serious intent on the part of the Department to proceed with criminal proceedings against Volcano. Even an express statement of such intention – which there was not – would have raised the question why no such steps had been taken during the more than two years that had elapsed before Volcano's application was brought. It seems virtually self-evident that, if the Department seeks to employ this stratagem to retain contravening goods, a prosecution must follow within reasonable time which, *prima facie*, two years is not (cf eg *Choonara v Minister of Law and Order* 1992 (2) SACR 239 (W) at 246a-d and Hiemstra, *Suid-Afrikaanse Strafprosesreg*, 6 ed (by Kriegler and Kruger) at 54).

[14] The conclusion I have come to on the first issue renders it unnecessary to consider the second issue as formulated by the parties, namely, whether Volcano can lawfully possess the Aldicarb in this country, even for purposes of export. Suffice it to say that, because the option afforded to an illegal importer by s 16(6)(a) is available to Volcano, it can lawfully do whatever is necessary to exercise that option. Conversely, the Department and the registrar are obliged to do what they normally do to enable an illegal importer to exercise that option.

[15] It is therefore ordered that:

- (a) The appeal is upheld with costs, including those consequent upon the employment of two counsel.
- (b) The order of the court *a quo* is set aside and in its stead the following order is made:

- '(i) The respondents are directed to do all things necessary to enable the applicant to export the two consignments of Aldicarb pesticide in terms of s 16(6)(a)(i) of the Act.
- (ii) The first respondent is ordered to pay the applicant's costs, including those consequent upon the employment of two counsel.'

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F D J BRAND
JUDGE OF APPEAL

Concur:

HARMS ADP
PONNAN JA
MAYA JA
KGOMO AJA