

## Achuko summary

The Applicant sought to declare unconstitutional the conduct of two bank, ABSA Limited ("ABSA") and FirstRand Bank Limited ("FirstRand"). The Banks made prearranged non-competitive futures trades in corn and soybeans on the Chicago Board of Trade ("CBOT"). Their conduct was found to be in violation of the law of the United States by the Commodity Futures Trading Commission ("the Commission"). The Banks settled with the Commission which imposed remedies upon the Banks.

The Applicant contended that the prearranged trades were non-competitive and had the effect of putting at risk the price of maize in South Africa. Maize is the staple food of poor people in South Africa. The conduct of the Banks comprised the food security of poor people, such as the Applicant, and this gave rise to an infringement of section 27(1)(b) of the Constitution in that the right of access to sufficient food was compromised.

Three issues arose for determination. First, did the court enjoy jurisdiction to entertain the matter, given that the conduct challenged concerned took place in the United States and involved a violation of the law of the United States? Second, did the Applicant prove a causal link between the conduct of the Banks in the United States and the price of maize in South Africa ("the causal issue")? Third, was the conduct of the Banks unlawful in terms of section 80 of the Financial Markets Act 19 of 2012 ("FMA")? And if not, is section 80 of the FMA inconsistent with section 27(1)(b) of the Constitution ?

As to jurisdiction, the territorial principle of jurisdiction has a subjective and objective aspect. The court found that it enjoyed jurisdiction to consider a violation of the Bill of Rights in respect of conduct that took place outside the territory of South Africa that has had effects within its borders. This is so for the following reasons.

If the effects of conduct undertaken abroad occur in South Africa and those effects give rise to an infringement of the rights guaranteed in the Bill of Rights, the infringement is no less significant because the effects have their origin abroad. This is not circular reasoning. If it was proven, for example, that actions taken by South Africans abroad gave rise to the wholesale infringement of the privacy of communications of persons within the country, the right to privacy has been compromised. That the surveillance originates abroad matters not at all to the privacy persons are entitled to enjoy and the actual diminution of their privacy rights. It is the effects that matter and their impact upon what it is that the right secures.

As to the causal issue, in motion proceedings, the court was bound to proceed on the evidence of the Banks that there was no causal link between the trades of the Banks on CBOT and the price of maize in South Africa. Absent a showing of such effects, the Applicant could not make out his cause of action that poor people in South Africa had suffered an infringement of their right of access to sufficient food. The court dismissed accordingly dismissed the relief sought that the conduct of the Banks was unlawful and unconstitutional.

As to whether the conduct of the Banks was prohibited by section 80 of the FMA, and, if not, whether section 80 was inconsistent with section 27(1)(b) of the Constitution, the court held that the FMA had not passed into law at the time the prearranged trades took place. Section 80 was of no application to the trades, nor could it be given retroactive force. Accordingly, there was no reason to determine issues that raised no live controversy, and this aspect of the application was dismissed on this basis.

The Applicant was found to have lost the protection of the qualified immunity from costs of the *Biowatch* principle from the time when he persisted with the litigation when it was clear that the prospects of success were vanishingly small and the Applicant neither set the matter down nor withdrew it.