IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) NO. 20/2019
CIV/APN/320/2018

In the matter between:

MINISTER OF SMALL BUSINESS DEVELOPMENT, COOPERATIVES AND MARKETING **1ST APPLICANT**

ATTORNEY GENERAL **2ND APPLICANT**

and

LESOTHO NATIONAL WOOL AND MOHAIR GROWERS ASSOCIATION **RESPONDENT**

CORAM: **DAMASEB AJA**
CHINHENGO AJA
MTSHIYA AJA

HEARD: **23 MAY 2019**
DELIVERED: **31 MAY 2019**

SUMMARY

In an appeal concerning the vires of regulation 6 of the Agricultural Marketing (Wool and Mohair) (Amendment) Regulations No. 65 of 2018 (the regulations) made in terms of s 4 of the Agricultural Marketing Act

26 of 1967, the Minister alleges that the court a quo erred in concluding that the regulation is null and void for being ultra vires the Act; that the ultra vires penal provisions could not be severed from the regulations and further that it was vague and uncertain. Court on appeal had to determine (a) whether regulation 6 is vague and uncertain and (b) whether the ultra vires penal provisions could not be severed so as to save the remainder of the regulations.

Court on appeal unable to support the conclusion reached by the court a quo that because regulation 6 does not set 'benchmarks' for preparation, it is void for uncertainty. Appeal Court reiterating that severability is based on a principle of the separation of powers that requires courts to tailor orders of invalidity as closely as possible and that a reviewing court should seek, where possible, to carve out ultra vires provisions in subordinate legislation so as to enable the remainder of the statute or regulations to continue in operation. Accordingly, where the lawgiver is not merely advising but intending criminal sanction but does not spell out the penalty, the appropriate punishment is in the discretion of the court.

Appeal succeeds and order of High Court set aside.

JUDGMENT

DAMASEB AJA (CHINHENGO AJA and MTSHIYA AJA concurring)

Introduction

[1] This appeal is concerned with the *vires* of certain provisions of the Agricultural Marketing (Wool and Mohair) (Amendment) Regulations No. 65 of 2018 (the regulations), in particular regulations 3[1], 4[2], 6 and 11. The regulations were made pursuant to s 4 of the Agricultural Marketing Act 26 of 1967(the Act). The impugned regulations were challenged on the basis that they either exceed the limits of s 4 or that they are unreasonable or vague and uncertain.

[2] The challenge against regulations 3 and 4 has become moot in view of the High Court's unchallenged finding, as will soon become apparent, that they are compliant. However, reg. 3 remains relevant only in so far as its contravention attracts penalties under regulation 11 which is the provision which creates offences and penalties.

[3] The High Court concluded that regulations 6 and 11 are not compliant with s 4 of the Act. The appeal by the Minister of Small Business Development, Cooperatives and Marketing (the Minister) is against that finding of the court *a quo*.

The parties

[1] Requiring a non-transferable license from the Minister of Small Business to engage in a business of wool and mohair shearing shed, brokering, testing, trading and auctioning, processing and exporting.
[2] Reserving the following licences for Basotho: shearing shed, testing and trading and auctioning.

[4] The applicant in the court below was the Lesotho National Wool and Mohair Growers Association (the Association) representing the interests of farmers who own shearing sheds across the Kingdom.

[5] The respondents *a quo* are the Minister and the Attorney-General.

Minister's powers

[6] The Minister is empowered by s 4 of the Act to make regulations to carry out the purposes of the Act set out in s 3 as follows:

> ***'3. The purposes of this Act are to***-
>
> *(a) ensure that each producer is paid prices which adequately reflect the value of the quantity and quality of his product in Lesotho and on external markets; and*
>
> *(b) improve the value of each product in Lesotho and on external markets by adequate preparation, processing and marketing of products and supplies; and*
>
> *(c) ensure that products sold in Lesotho are of good quality, fairly priced and accurately represented; and*
>
> *(d) obtain adequate information to asses activities relating to the production, preparation, processing and marketing of production and supplies; and*
>
> *(e) control and improve the exportation and importation of products and supplies, and in particular to-*
>
> *(i) ensure that exportation importation of products and supplies occurs at time, in quantities and by means most beneficial to Lesotho; and*

(ii) prohibit the importation of products and suppliers which are unsafe or inappropriate for the function for which they are to be sold.'

[7] Section 4 of the Act empowers the Minister to make regulations, including to:

(a) control and improve the preparation, processing and marketing of a product and the marketing of a supply;

(b) prohibit any person from dealing in the course of trade with a product within Lesotho or within any specified geographic area in Lesotho unless he has been licensed; and in particular to provide for-

(i) procedure whereby applications for licenses shall be considered;
(ii) requirements and fees for the issue of licenses;
(iii) conditions to which licenses shall be subject;
(iv) periods of time during which licenses shall be valid; and
(v) suspension or cancellation of licenses; or

. . .

(g) prohibit the importation into or exportation from Lesotho of a product, whether processed or unprocessed, or of a supply or of an amount of that product or supply in excess of a specified quantity or percentage thereof or unless specified conditions are complied with; such condition may include a condition that the product or supply be exported or imported only-

(i) through specified ports of exit or entry:
(ii) if that product or supply meets specified standards of preparation, processing or marketing or if it is a specified quality, class or grade;
(iii) if the importer or exporter sells or purchases that product or supply in specified quantities;
(iv) if the exporter or importer purchases consigns, sells or disposes of all or any portion of that product or supply to or through a specified person, agency or market;

. . .

(J) constitute offences with regard to the contravention of or failure to comply with a provision of the following-

(i) a regulation; and
(ii) a requirement or condition of a registration, exemption, permit, or authority issued pursuant to a regulation;

. . .

(l) prescribe punishments to be imposed on a person who is found guilty by a court of law of an offence as constituted by a regulation under paragraph (j) or (k); such punishment in relation to a first conviction for any one offence, may be a fine not exceeding two hundred rands or imprisonment for a period not exceeding six months or both such fine and imprisonment and, in relation to a subsequent conviction for a similar offence, may be a fine not exceeding two thousand rands or imprisonment for a period not exceeding two years or both such fine and imprisonment; and

(m) prescribe forms to be used for carrying out a provision of a regulation.'

[8] I propose to set out in full regs. 6 and 11 and then summarise the basis on which they were attacked by the respondents.

'Prohibition of Export

'6. A holder of an export licence shall not export wool and mohair unless it is prepared brokered, and traded and auctioned in Lesotho.'

'Offences

11. (1) A person who contravenes regulation 3[3] (1) (a) and (f) commits an offence and is liable, on conviction, to a fine of M20,000.00 or to imprisonment for a period not exceeding 2 years or both.

[3] Regulation 3: **Licensing of wool and mohair business**: '3. (1): A person shall not engage in business of wool and mohair – (a) shearing shed; (b) brokering;(c) testing;(d) trading and

(2) A person who contravenes regulation 3 (1) (b), (c), (d) and (e), and (4) commits an offence and is liable, on conviction, to a fine of M50,000.00 or to imprisonment for a period not exceeding 5 years or both.

(3) A person who contravenes regulation 9 (2) commits an offence and is liable, on conviction, to a fine of M50, 000.00 or to imprisonment for a period not exceeding 5 years or both.'

The evidence

The Association

[9] The founding affidavit of the Association, as applicant *a quo,* is sworn by the chairperson Mr Mokoenehi Thejane (Mr Thejane). I will summarise Mr Thejane's evidence only in so far as it is relevant to the issues that still remain in dispute between the parties in the light of the High Court's judgment which I will refer to presently.

[10] Mr Thejane averred that the farmers affiliated to the Association who own shearing sheds sort their wool and mohair in bales and transport the produce to Maseru where it is stored at the State warehouse under the control of the Government. It is stored there pending the issuance of veterinary permits declaring the wool and mohair to be free from disease.

[11] Once the permits are issued, the Association, acting on behalf of the individual farmers, exports the wool and mohair to South

auctioning; (e) processing; and (f) exporting, unless the person has obtained a license to do so from the Minister responsible for small business development, cooperatives and marketing (in these regulations referred to as the ''the Minister") in accordance with these regulations'.

Africa, Port Elizabeth, where it is auctioned to international traders by a company known as BKB Ltd (BKB) representing the interests of the Association and its members. BKB then accounts to the individual farmers and pays the Association a commission on the sales of wool and mohair after BKB sells the produce to international traders.

[12] According to Mr Thejane, the Association owns a number of shearing sheds across Lesotho and has done so for over fourty years and during that period 'enjoyed an unfettered right' to export wool and mohair to South Africa using the services of BKB. The requirement of reg. 6 that the Association must obtain an export licence to do what it has done without a licence for fourty years is therefore unreasonable.

[13] Mr Thejane alleges that by requiring licences, the regulations are unreasonable in that they prohibit farmers or the Association from engaging in the shearing and export of wool and mohair. He maintains that the Association and its members 'legitimately expected' that they will continue to export their produce without obtaining licences.

[14] The licensing regime, it is alleged, deprives the Association and its members of their 'vested rights'. It is also alleged that reg. 3 is unreasonable by requiring licences for brokering, testing, trading and

auctioning and processing in Lesotho when, as admitted by the Minister, such facilities do not exist in the country.

[15] According to Mr Thejane, the Association is not involved in 'trading' as contemplated in the Act and that for that reason it had not been required to be licensed to export to South Africa. He asserts that no reasonable Minister would impose such a requirement based on the facts alleged. He also adds that a licencing requirement is not contemplated by s 4(g) of the Act as, according to him, the provision only allows the control of export of products provided they meet certain standards of preparation, processing or marketing.

[16] Mr Thejane states further that the regulations are vague and uncertain. He referenced regs. 4 and 6 in that regard. He then turns his attention to regulation 11. He makes the point, conceded on appeal by the Minister, that the penalty provisions of that regulation exceed the limits of s 4(l) of the Act.

[17] Mr Thejane alleged that by requiring licences under reg. 3 and requiring, under reg. 6, the holder of an export licence not to export wool and mohair unless it is prepared, brokered, traded and auctioned in Lesotho defeats the purpose of s 3(e)(i)[4] of the Act and that the requirements are not contemplated by s 4(g).

[4] Which is to 'ensure that the exportation and importation of products and supplies occurs at time, in quantities and by means most beneficial to Lesotho…'

[18] The Association then sought an order declaring the regulations null and void and of no force and effect to the extent that they are *ultra vires* the Act.

The Minister

[19] It needs to be mentioned at the outset that the Minister concedes that the penalty provisions of regulation 11 are *ultra vires* the empowering provision of s 4(l) of the Act.

[20] The Minister avers that the regulations are informed by the Lesotho Government policy that in the national interest the business of wool and mohair processing, auctioning and export should be conducted in Lesotho.

[21] The Minister denies the existence of a vested right to export wool and mohair without a licence and states that it has always been subject to the Act and regulations made thereunder. He also denies that the regulations are unreasonable or vague as alleged. The Minister further denies that the licensing regime of regulation 3 is *ultra vires* the Act.

[22] As regards the alleged vested right to export without a licence, the Minister states, without admitting the existence of such vested right, that the expectation is tantamount to suggesting that the law should forever be static and not respond to changing circumstances.

Such an expectation, the Minister asserts, is absurd and not legitimate. It is not necessary for present purposes to decide whether or not the Association or its members enjoy or have acquired any vested right. The real issue as raised by the Minister is whether or not there is justification for interfering with the alleged right, whether vested or not. Besides, the Act empowers the Minister to regulate the exportation of products and the enabling provisions of the Act are no under challenge on appeal.

The judgment of the High Court

[23] Mokhesi J considered if regs. 3 and 6 are unreasonable applying the *Kruse v Johnson*[5] test, restated by Lord Diplock in *Mixnam's Properties Limited v Chertsey Urban District Council.*[6] The principle is that subordinate legislation is unreasonable if it meets four criteria: (a) if it is partial and unequal in its operation, (b) if it constitutes a manifest injustice, (c) if it constitutes an oppressive or gratuitous interference with rights and (d) if it is actuated by bad faith.

[24] Dealing with the licensing regime the learned judge *a quo* concluded as follows:

[5] [1895-1899] ALL ER 105 at 110G-I.
[6] [1964] 1 QB 214 at 237.

> *'My considered view is that, although licensing is not provided under s 4(g) it is reasonably required to carry out the objects of the regulations promulgated in terms of the provision. Licensing is one of the methods which is regularly utilized in regulating, and therefore, I do not find anything wrong with the [Minister] employing it in this instance as it is reasonably ancillary to the powers conferred on the [Minister] to make regulations.'*

[25] The learned judge proceeded to consider the unreasonableness complaint as regards regs. 3 and 6 against the backdrop of the Association's reliance on a vested right. He concluded that:

> *'I do not find that regulating exportation of wool and mohair [in the manner that the Minister has done] involve such oppressive or gratuitous interference with the rights of the [Association] as could not find justification in the minds of reasonable men. The matters which are the subject of regulation 3 and 6 are matters which the Minister is empowered . . . to provide for in a regulation in terms of s. 4(g)(ii) and (iv) of the Act. It is further my considered view that manifest injustice of these regulations has not been established as a fact.'*

[26] The learned judge *a quo* then moved on to discuss the complaint of vagueness of regs. 3 and 4. Mokhesi J rejected the argument that regs. 3 and 4 are vague and uncertain and proceeded to consider if reg. 6 is vague. The learned judge concluded that re.6 is vague and uncertain and thus bad in law, reasoning that:

> *'In my opinion, it is not certain what is meant by the requirements that a holder of an export licence shall not export wool and mohair unless it is 'prepared' in Lesotho. The level of preparation of the product expected of the holder of an export licence is conspicuous by its absence.'*

[27] The judge reasoned that s 4(g) required of the Minister to impose conditions on the export of wool and mohair regarding preparation, processing or marketing and that placed a 'corresponding duty' on the Minister to 'specify the standards' in terms of which those processes are to be 'benchmarked, and not to simply make a vague prohibition which does not delineate the enforcement discretion. In these general terms, the holder of an export licence will not be able to comply with regulation 6 absent benchmarks.'

[28] The next issue the court *a quo* had to consider was reg. 11. Regulation 11(1) prescribes a fine of M50,000 or imprisonment not exceeding two years or both[7] and 11(2) prescribes a fine of M50, 000 or imprisonment of five years or both[8] and reg.11(3) prescribes a fine of M50,000 or a fine of five years or both.[9]

[29] The enabling provision of s 4(l) contemplates a fine of not exceeding M200 or imprisonment for a period not exceeding six months for a first offence and or both, and in respect of a second conviction, a fine not exceeding M2000 or imprisonment for a period not exceeding two years or both. That shows that the penalties prescribed by the Minister exceed those prescribed by the Act.

[30] Proceeding from the common cause premise that the penal provisions of reg.11 are *ultra vires*, the court *a quo* held that the rest

[7] For a contravention of reg. 3(1)(a) and (f).
[8] For a contravention of reg.3 (1) (b), (c), (d) and (e).
[9] For a contravention of reg. 9(2).

of regulations without the penal provisions cannot stand on their own as they would in that event be directory only. In effect, the court a quo held that the bad could not be severed from the good so as to save the regulatory scheme.

[31] Mokhesi J made the following order:

> *'It is declared that the [regulations] are null and void and of no force and effect to the extent that they are ultra vires the [Act].'*

[32] Since only reg.11 was found to be *ultra vires* the Act, we must accept that the declaration of nullity of the regulations is attributable to that finding.

Grounds of appeal

[33] Only the Minister appealed against the judgment and order of Mokhesi J. To the extent that in the appeal the respondent sought to place reliance on alleged vices in the regulations validated by the High Court, other arguments relating to regs. 3 and 4 were not available to them in the absence of a cross appeal.

[34] On appeal the Minister attacks the High Court's conclusion that the regulations are null and void for being *ultra vires*. The Minister also states that the court *a quo* misdirected itself in concluding that the *ultra vires* penal provisions could not be severed from the *intra vires* regulations creating offences and in that way to save the

regulations. The further ground of appeal is that the High Court misdirected itself in holding that reg. 6 is vague and uncertain.

Analysis

[35] In light of Mokhesi J's unequivocal rejection of the respondent's reliance on unreasonableness in relation to regulation 3 and 4, the only issues that require resolution in the appeal is the learned judge's conclusions (a) that regulation 6 is vague and uncertain and (b) that the *ultra vires* penal provisions do not save the remainder of the regulations.

Is regulation 6 vague and uncertain?

[36] My understanding of the reasoning of the learned judge is that the Minister should have specified a particular formula for the processes covered by the regulation. That implies that there are such formulae according to which the processes in question are to be conducted. It bears mention that the Association does not in its papers suggest what those are.

[37] The concern I have about this reasoning is that it postulates that what the Minister should have done was to set out detailed criteria and standards specifying what is allowed and what is not. That is a dangerous trap in public administration because over-

elaboration can be a vice in ways that the court and the respondent do not appreciate. It brings with it the likelihood of imprecise language which can itself result in uncertainty. As Baxter points out:

> *'Inappropriate terminology and even bad grammar might create fatal uncertainty'.*[10]

[38] The true test, as Broome J put it, is whether from the terms of the regulation 'a reasonably precise meaning is ascertainable'.[11] In that process the courts do not require 'perfect lucidity'.[12] Citing Lon Fuller, Baxter correctly opines that 'a specious clarity can be more damaging than an honest open-minded vagueness.'[13]

[39] That said, if possible the courts have a duty to avoid the conclusion that legislation is vague and uncertain.[14] I will proceed to consider reg. 6 with that in mind.

[40] The High Court took the view that the word 'prepared' in reg. 6 is vague. The learned judge did not have a problem with the terminology 'brokered, and traded and auctioned in Lesotho' prior to export. Therefore, it is not the High Court's finding that reg. 6, in prohibiting export unless the associated activities are performed in

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[10] Baxter, 1984.Administrative Law, Cape Town: JUTA &Co, at 530.
[11] R v Jopp 1949 (4) SA 11(N) at 14D-E.
[12] Baxter supra at 530.
[13] Ibid. Lon Fuller, The Morality of Law (rev ed) (1969) at 64. An approach that seems to find support in the common law: R v Pretoria Timber Co (Pty) Ltd 1950 (3) SA 163 (A) at 176.
[14] R v Pretoria Timber Co (Pty) Ltd supra at 170C-D; S v Motsalane 1967 (1) SA 657(O),659B-D.

Lesotho, goes beyond what s 4(g) authorises. The *vires* of the regulation is therefore not in issue.

[41] According to the learned judge *a quo*, the regulation should have set 'benchmarks' for what constitutes 'preparation' prior to export. It is not immediately apparent to me why that must be so. The word 'prepared' in the regulation must be read with the definitions section of the Act which defines preparation to include 'classing, grading, testing, packing, marking, labelling, storing and transporting and grammatical variations thereof shall be construed accordingly'.

[42] As Crabbe[15] observes, where in a definitions clause 'means' or 'includes' are used:

'Means restricts. It is explanatory. Includes, on the other hand, expands. It is extensive. It is exhaustive. It indicates that the word or expression defined bears its ordinary meaning and also a meaning which the word or expression does not ordinarily mean.'[16]

[43] In its ordinary meaning the verb 'prepare' and therefore its grammatical derivatives, means 'to make ready for use or consideration' or to 'make or get ready to do or deal with something'.[17]

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[15] VCRAC Crabbe, Crabbe on Legislative Drafting 2 ed at 94.
[16] This approach was approved by the Namibian Supreme Court in Egerer and Others NO v Executrust (Pty) Ltd and Others 2018 (1) NR 230 (SC) para 42.
[17] Pearsall J (ed). 2002. Concise Oxford English Dictionary p. 1129.

[44] What the regulation conveys to the public is that one can only export wool and mohair sourced in Lesotho if you have in relation thereto prepared it or 'classed, graded, tested, packaged, marked, labelled, stored and transported' it in Lesotho. The respondent might well take the view that the Act does not tell it just how that is to be done, but that cannot be placed at the doorstep of the Minister. It is to the Act that the criticism must be directed. In any event, the Minister chose, as he was entitled to do, not to regulate standards of preparation.

[45] What is reasonably ascertainable from the regulation is that in order to export wool and mohair produced in Lesotho it must have been prepared in Lesotho. That is to be understood against the policy imperative of contributing to the local economy as stated by the Minister in his opposing affidavit.

[46] The certainty is further enhanced by the fact that the export licence is to be applied for on the application Form[18] appearing at Schedule 2[19] and 3.[20] It is very clear from the Form what information an applicant for an export licence must furnish and the message the regulation sends out is that once that information is furnished the Minister must consider an application for an export licence.

[18] Authorised by reg. 8.
[19] Applicable in the case of an 'individual'.
[20] Applicable in the case of a 'corporate body'.

[47] We are therefore unable to support the conclusion reached by the court *a quo* that because reg. 6 does not set 'benchmarks' for preparation etc., it is void for uncertainty.

Severability

[48] The principle of severance is an important one in a constitutional democracy. It is based on the principle of separation of powers which requires courts to tailor orders of invalidity as closely as possible. A reviewing court should seek where possible to carve out *ultra vires* provisions in subordinate legislation so as to enable the remainder of the legislative measure to continue in operation.

[49] A court may only sever provisions from a legislative measure if, after severance, what remains is workable and consistent with the legitimate objectives of the legislation.

[50] In the case before us, the respondent has argued that severance is inappropriate in subsidiary legislation, whilst the appellant suggests otherwise. The learned judge *a quo* came to the conclusion that the bad could not be severed from the good.

[51] According to Mr Letsika for the respondent, the doctrine of severance only applies to primary legislation in so far as it might be inconsistent with the constitution and that there is, at least

according to him, no reported case in which such a jurisdiction was exercised in relation to subordinate legislation.

[52] Mr Letsika's submission is not correct. The Roman-Dutch courts (and indeed the courts of England and Wales) assumed that jurisdiction in respect of secondary legislation even in the pre-constitutional era when, because of the doctrine of parliamentary sovereignty, the courts had no jurisdiction to strike down Acts of the legislature. For example, severance was considered an appropriate remedy in respect of an Ordinance in *Johannesburg City Council v Chesterfield House (Pty) Ltd.*[21] As the court put it (at 822D-E):

> *'The rule, that I deduce from Reloomah's case is that where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute.'*

[53] The court cited with approval the following dictum from *Kneen v Minister of Labour and Another*:[22]

> *'If after deleting that portion of a subordinate legislative enactment held to be invalid, we can reasonably presume that the remainder would have been passed (in its mutilated form) by that body had it correctly appreciated its powers, then on such assumption, we should declare the purified remainder a valid enactment. If we cannot make that assumption then the whole is bad if part is bad'.* (My underling for emphasis)

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[21] 1952 (3) SA 809 (AD).
[22] 1945 (AD) 400 at 407.

[54] As a fall-back position, Mr Letsika submitted that the portions of regulation 11 which create offences are meaningless if the bad parts providing for penalties are struck out because if breaches are not penalised it would defeat the object of the regulation.

[55] Mr Thejane for the Minister took the view that the two parts are independent of each other and that if the bad is severed, which it must, the courts retain the power to mete out condign punishment for the offences which must be saved. He maintains, correctly in my view, that reg. 11 serves two purposes: to create offences and to prescribe penalties.

[56] It was held in *R v Forlee*[23] that were identified conduct is prohibited in unambiguous terms denoting that the lawgiver is not merely advising but intending criminal sanction but does not spell out the penalty, the appropriate punishment is in the discretion of the court.

[57] The complete answer in my view is that in terms of s 297(4) of Lesotho's Criminal Procedure and Evidence Act 1981 (as amended) the court retains the discretion to impose a penalty where no provision is made therefor in legislation.[24] It provides as follows:

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[23] 1971 TPD 52, See also S v Boois Review No. 14/2010 (unreported) and S v Mchunu CC: 168/2011P, KZN HC (unreported).

[24] That approach found support with the SA Supreme Court of Appeal in DPP, Western Cape v Prins [2012] 3 All SA 245 in respect of s 276(1) of the SA Criminal Procedure Act 51 of 1977.

'Subject to this Act or any other law the following sentences may be imposed upon a person convicted of any offence –

(a) imprisonment with or without solitary confinement and spare diet where it is specifically provided by law in respect of the offence charged;

(b) declaration as a habitual criminal

(c) fine;

(d) detention in juvenile training centre;

(e) whipping;

(f) putting the accused under recognizance with conditions;

(g) community service as an option to a custodial sentence'.

[58] The very fact that there is a debate about the legality of the penal provision in reg. 11 makes clear that the Minister clearly intended that penalties must attach to the offences he created. The provisions could therefore not be 'directory' as suggested by the court *a quo*.

[59] Another angle from which to consider the attack on reg.11 is that it is invalid only to the extent that it prescribes penalties greater than the maximum penalties provided in the Act and not that it does not provide for penalties at all. In place of the amounts of the amounts prescribed as fines and the periods of imprisonment all that is necessary is to replace them with the maximum prescribed in the Act. Such an approach supports the contention that reg. 11 is invalid only to the extent that it imposes maximum penalties that exceed those in the principal Act. It is therefore valid in two respects – creating offences and providing for penalties; and invalid only to the extent that the penalties provided therein exceed the maximum

prescribed by the Act. Reg. 11 cannot therefore be condemned as a whole for the reason that it prescribes penalties in excess of those prescribed in the Act.

[60] We are therefore satisfied that the existing law caters for the situation where there is a failure in the regulation to provide for legally valid penalties. The bad parts must therefore be struck and the good parts be saved and appropriate penalties be meted out by the courts within the limits set by s 4 (l) of the Act.

[61] The appeal must therefore succeed and the order of the High Court be set aside and be replaced with an appropriate order. I see no reason why costs must not follow the result, both *a quo* and in the appeal.

Order

[62] I therefore make the following order:

1. The appeal succeeds and the order of the High Court is hereby set aside and substituted for the following order:

> '(i) The application succeeds in part only.
>
> (ii) The parts of Regulation 11 which create penalties in excess of what is authorised by s 4(l) of the Act are hereby struck out and severed from the remainder of the regulation which create offences.

(iii) The courts having jurisdiction in respect of the offences created by regulation 11 shall impose appropriate sentences in their discretion according to law and subject to the sentences prescribed by s 4(l) of the Act.

(iv) The applicant shall pay the Minister's costs for opposing the application.'

2. The Association shall pay the Minster's costs in the appeal.

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P.T DAMASEB

ACTING JUSTICE OF APPEAL

I agree:

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M CHINHENGO

ACTING JUSTICE OF APPEAL

I agree:

M MTSHIYA

ACTING JUSTICE OF APPEAL

For the Appellant: Adv. T. Thejane

For the Respondents: Adv. Q.Letsika