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FINANCE AND BANKING ALERT

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SHUTTLEWORTH V THE SOUTH AFRICAN RESERVE BANK

Mr Shuttleworth famously sold his shares in Thawte, which earned him a substantial amount of money. He subsequently decided to emigrate from the Republic and to transfer all of his remaining assets out of the country. The South African Reserve Bank imposed a 10% levy on his South African assets as a condition for permission under the Exchange Control Regulations to transfer his assets out of the country. He subsequently approached the North Gauteng High Court to set aside the decision of the Reserve Bank to impose the 10% levy.

Essentially he argued for four broad grounds of review –

- The levy itself was unconstitutional and invalid and that the decision to impose it was unlawful. This ground of review is a constitutional challenge to the Exchange Control Circulars D.375 and D.380 of 2003 and sB.5(E)(iii)(e) of the Exchange Control Rulings which were the instruments which created the levy.

- Even if the levy was unconstitutional and invalid, the levy decision was taken by the Reserve Bank through the rigid application of the policy and in the mistaken belief that the Reserve Bank had no discretion to depart from the application of the 10% exit levy. This meant that the Reserve Bank had misconstrued the nature of the body's powers and failed to apply its mind properly to that decision.

- The levy decision was taken without affording Mr Shuttleworth a fair hearing in regard to this decision and so the Reserve Bank did not approach the question of whether or not to impose the levy with an open mind, believing that their function was purely mechanical.

- That the entire existing system of exchange control is unconstitutional and invalid and accordingly there was no legal authority for the levy decision. This last challenge goes to the heart of the constitutional validity of s9 of the Currency and Exchanges Act, No 9 of 1933 (Act), the Exchange Control Regulations of 1961 (regulations) and the Orders and Rules.

Judgment in this case was handed down by Legodi J on 18 July 2013. Legodi J dealt with the arguments raised by Mr Shuttleworth's counsel, Gilbert Marcus SC in a different order. The first legal issue that he dealt with was whether the Reserve Bank's closed door policy, whereby a citizen cannot approach the Reserve Bank other than through the offices of an authorised dealer in terms of the regulations was unlawful and unconstitutional. This is contained in the Exchange Control Regulations rule 10(a). The learned judge's finding on this was that the making of the orders, rules and rulings needed to be seen in the context of the regulations and in particular the delegated authority conferred in terms of the regulations. His finding was that when these roles are assigned to the banks as the authorised dealers, it cannot be said that there is no empowering authority brought about by the regulations.

Mr Shuttleworth had not been able to discuss this application directly with the Reserve Bank. He had prepared an application and set out his contentions regarding the unlawfulness of the 10% levy, but when Standard Bank had submitted their own application for his permission to export his remaining blocked assets out of the country, they made no reference to the unlawfulness of the 10% exit levy and without any authority from Mr Shuttleworth had framed the application as being subject to the 10% exit levy.

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Accordingly the Reserve Bank had granted approval. But this permission had been given on the basis of an incorrect application and so Mr Shuttleworth instructed the Standard Bank to correct their error and forward his original application to the Reserve Bank. He requested that they reconsider their decision but instructed the bank to pay the 10% exit levy under protest for the reasons set out in the original application. He had been compelled to give this instruction because he could not deal directly with the Reserve Bank.

Legodi J found that the authorised dealers by the nature of their business have the necessary skills, expertise and the capacity to give an advice or opinion on currency, banking and exchange control and also to consider certain applications. Because of the volume of applications, it was deemed necessary that authorised dealers should deal with these, and that only those that fall outside the scope of the rulings are referred to the Financial Surveillance Department of the Reserve Bank for adjudication. The judge found that Mr Shuttleworth had not shown facts upon which he alleged his constitutional rights to a lawful, reasonable and procedurally fair administrative action had been infringed. The learned judge said that there was no suggestion that authorised dealers were not conducting themselves in an impartial way when dealing with clients with regard to exchange control and he was not satisfied that the closed door policy was unlawful and unconstitutionally unfair.

The next question the judge dealt with was whether the Reserve Bank had a choice not to impose the 10% levy on Mr Shuttleworth's assets. This is the issue concerning the application of a rigid and inflexible policy. The question here was the application of regulation 10(1)(c), which prohibits entering into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic. When the Financial Surveillance Department considers these applications it does so on the delegated authority of the Minister of Finance. But did it have a discretion not to impose the 10% levy? The judge looked at the policy decision announced by the Minister on the 26 February 2003. The Minister had announced that persons wishing to exit more than R750 000, must apply to the Exchange Control Department and that approval would be subject to an exiting schedule and an exit charge of 10% of the amount to be transferred. Could this then be subject to a discretion which deviated from the policy guideline? The judge did not think it could. The Exchange Control Department only had a delegated authority. This did not involve a discretion not to impose the 10% levy. The judge's perception of this issue was that to attack the constitutional validity of Circular Number D.375 and Circular D.380, without directly seeking to review the decision of the Minister on 26 February 2006 posed the problem. It was no good attacking the circulars or rulings, because these were only based on the decision of the Minister. The decision of the Minister would need to be brought into the argument as to its alleged unlawfulness or unconstitutionality. On the papers before the judge this had not been done so. Because the decision to impose a levy had been derived from s9(1) of the Currency and Exchanges Act and Regulation 10(1)(c), there was nothing left to attack on the unconstitutionality of the rules. The nature of the delegated legislation meant they did not need to follow the process of a Bill or the promulgation of regulations considering the volatility of the exchange control matters.

The applicant had said that the power to impose the levy was contained in the two exchange control circulars. However the Reserve Bank saw the source of their power in s9(1) of the Act and Regulation 10(1)(c). Section 9(4) provides that the Minister must make copies of every regulation and set them before the Houses of Parliament and if the regulation is calculated to raise any revenue, he needs to give a statement of the revenue which he estimates will be raised. The learned judge's view was that Regulation 10(1)(c) provided that if you wanted to export capital you needed to apply for permission to do so. Counsel for the President of the Republic had argued that this was not raising revenue and said it was similar to being fined for speeding. If you offend against the speeding laws you pay a fine. Even though the money went to the State revenue account, you could not say that the speeding laws were calculated to raise revenue. Regulation 10(1)(c) is a prohibition on the export of capital. If you wanted to expatriate blocked assets, a condition of such was to pay the 10% levy. It was a disincentive to take a large amount of capital out of the Republic. The object here was to limit the adverse consequences of an outflow of funds on the balance of payments.

In this context Judge Legodi referred to the judgment of O'Regan J in the Constitutional Court's judgment in the *Dawood* matter (*Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC)) which dealt with the effect of a discretionary power conferred on a functionary without legislative guidance as to how that discretionary power should be exercised. In the context of Regulation 10(1)(c) he felt this was justified because it was necessary for the authorised dealers to act in a flexible and speedy fashion, utilising their expertise.

The judge then considered Mr Shuttleworth's contention that a whole host of the regulations promulgated under s9 of the Act were constitutionally invalid. In particular, his contention was that the regulations made no provision for the power to grant permissions and exceptions to be exercised in accordance with

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the requirements of procedural fairness. The regulations simply vested the Treasury or the Minister with an unfettered discretion to grant an exemption from the blanket prohibitions. Regulation 3(1)(c) prohibits the making of any payment to or in favour or on behalf of a person resident outside the Republic or to place any such sum to the credit of such person.

The applicant's argument around Regulation 3(1)(c) was that in this technological age you needed to pay for information from overseas and you accessed that information through the Internet. This is happening on a daily basis. Accordingly the judge found that this Regulation was offensive to the spirit of the Constitution and would have to be expunged.

The judge also found Regulation 3(1)(c) offended against s14(a) of the Constitution which is the right not to have the privacy of your communications infringed. The judge also considered the aspects of Regulation 3(1)(a) and (b), in the context of s21(2) of the Constitution – namely that everyone has the right to leave the country. Regulation 10(1)(b) limits anyone taking money out of the country in excess of R600. The judge thought this was a serious impediment to one's right to freedom of movement, and accordingly could not be protected under s21(2) of the Constitution.

On the question of the application of Regulation 3(3) and (5), this is the question of assets being seized without the procedural protections that are required by s9(2)(d) of the Act. The judge did not see a constitutional problem with this because any person who needed to make such forfeiture had been empowered by the delegations contained in Regulation 22E. However he did find that Regulation 3(3) needed to expressly provide for the relief mechanism which was set out in s9(2)(d)(i). In other words, the way that the Regulations are simply put in the current structure of the Regulations, they lack legality and conflict with the Bill of Rights, but this could be remedied by express reference to the review mechanisms contained in s9(2) of the Act.

With regard to the constitutionality of Regulation 18, which permits any person authorised thereto without the prior intervention of a court to requisition assets as security for compliance with the Regulations. The learned judge did not believe this was unconstitutional because any forfeiture of property as contemplated by this Regulation would be subject to the normal challenges provided for in the Promotion of Administration Justice Act 2002.

Regulation 19 provides the Minister or any person authorised by him to enter into private premises with a view to gathering information to enforce the Regulations. Mr Shuttleworth contended that it gave the Minister extensive intrusive powers which might include private information from persons on the pain of criminal conviction for refusal to provide the information. The learned judge found that this was inconsistent with the right to privacy contained in s14 of the Constitution.

The next issue was the penalty provisions of Regulation 22, which placed the onus on the accused to prove that he or she did not know and could not by the exercise of a reasonable degree of care have ascertained that any statement was incorrect. This offends against the presumption of innocence and the right to remain silent. The judge found that Regulation 22 was in conflict with s35(1)(a) and s35(3)(h) of the Constitution.

With regard to s9(3) of the Act, this granted the Governor General (now the President), to in terms of the Regulations to suspend in whole or in part the Act or any other Act of Parliament having any bearing upon currency, banking or exchange and any such act or law which is in conflict with any such Regulation would be deemed to be suspended insofar as it was in conflict or inconsistent with any such Exchange Control Regulation. The judge correctly pointed out that this could no longer happen in a constitutional and democratic South Africa. This was clearly found to be inconsistent with the Constitution. The provisions which the learned judge declared constitutionally invalid were suspended for 12 months to give the Minister of Finance time to effect the necessary legislative changes.

While the applicant had sought to have the whole of s9 of the Act struck down, as effectively it was granting the President the powers which were contained in s37 of the Constitution dealing with the State of Emergency, the judge did not approve of this line of thinking. The judge saw the position as the President could only exercise the power in s9 if in terms of an Act of Parliament envisaged by s37(1) of the Constitution he was in fact granted such power.

The most important finding was, in the writer's opinion, that the Reserve Bank had no discretion not to impose the 10% levy once it had taken the decision to permit the repatriation of Shuttleworth's remaining blocked assets. That decision had already been taken by the Minister, and the Reserve Bank was bound by that decision. Mr Shuttleworth had specifically not challenged the decision of the Minister.

The judgment is a difficult and complicated one, and Mr Shuttleworth must have felt like he had enjoyed something of a Pyrrhic victory inasmuch as a number of constitutional points he had raised were upheld, but they did not impact the decision to impose the levy on his assets.

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