



CONSTITUTIONAL COURT OF SOUTH AFRICA

Patrick Lorenz Martin Gaertner and Others v Minister of Finance and Others

CCT 56/13

Date of hearing: 12 September 2013

Date of judgment: 14 November 2013

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court confirmed a declaration of invalidity made by the Western Cape High Court, Cape Town (High Court) declaring provisions of section 4 of the Customs and Excise Act (Act) unconstitutional.

The first and second applicants (Mr Gaertner and Mr Klemp) are directors of the third applicant, Orion Cold Storage (OCS), an importer and distributor of bulk frozen foodstuffs. Officials of the South African Revenue Service (SARS) conducted a search in terms of section 4 of the Act at OCS's premises and at Mr Gaertner's home. The Act does not require SARS officials to obtain a warrant before a search is conducted. The applicants launched proceedings in the High Court in which they sought, and were granted, orders declaring parts of section 4 unconstitutional to the extent that they permit targeted non-routine searches without judicial warrant. This declaration was not retrospective and was suspended for a period of 18 months in order to allow the Legislature to make remedial changes to the Act. In order not to create a lacuna in the legislative scheme in the interim, the High Court read certain provisions into the Act.

Before the Constitutional Court, all the parties agreed that section 4 is inconsistent with the Constitution and should be declared invalid as it infringes the right to privacy. However the parties disagreed on the extent of the invalidity and on how the reading-in should be formulated. The applicants argued that the section is overbroad in that it allows for non-routine or targeted searches by SARS without judicial warrant. The SARS respondents argued that, in the light of the extensive control SARS exercises over registered or licensed premises in terms of the Act, there can be no reasonable expectation of privacy in relation to those premises or business

records. The SARS respondents argue that the construction of the section by the High Court is impractical, confusing and overly constraining.

In a unanimous judgment written by Madlanga J, the Constitutional Court held that section 4 infringes the right to privacy unjustifiably. The section is overbroad as it does not define the premises that can be searched without a warrant, nor does it give guidance to the inspectors on the manner in which the searches are to be conducted. The Court suspended the declaration of invalidity for six months to allow Parliament time to remedy the constitutional deficiency in the Act. As an interim measure, and to allow SARS to ensure compliance with the Act, the Court read in a warrant requirement when SARS officials wish to search private residences for purposes of the Act.