



CONSTITUTIONAL COURT OF SOUTH AFRICA

South African Reserve Bank and Another v Shuttleworth and Another

CCT 194/14 and CCT 199/14

Date of hearing: 3 March 2015

Date of judgment: 18 June 2015

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 handed down judgment in a matter concerning the constitutional validity of an exit charge imposed on capital exported out of South Africa (main appeal) and of certain legislative provisions regulating South Africa's exchange control system (cross-appeal).

In a budget speech delivered in 2003, the Minister of Finance (Minister) imposed a 10% exit charge on capital exceeding R750 000 as a condition to the export of that capital. In 2009, Mr Shuttleworth applied to the South African Reserve Bank for permission to transfer capital (approximately R2.5 billion) out of South Africa. The Reserve Bank granted Mr Shuttleworth permission to transfer this amount on condition that he paid the exit charge. Mr Shuttleworth challenged the imposition of this charge in the North Gauteng High Court, Pretoria, contending that the exit charge, as well as various legislative and regulatory provisions underpinning the exchange control system, were constitutionally invalid.

The High Court did not find the imposition of the exit charge to be unlawful. However, it declared a number of the Exchange Control Regulations unconstitutional. The High Court also held a provision of the Currency and Exchanges Act to be unlawful because it grants the President overly broad powers that allow him to suspend any legislation connected with exchange control.

Mr Shuttleworth appealed to the Supreme Court of Appeal. The Reserve Bank and the Minister cross-appealed, arguing that the High Court was wrong to find certain provisions of the Act and Regulations constitutionally invalid. The Supreme Court of

Appeal held that the exit charge was unlawful because it was calculated to raise revenue and therefore certain procedures in the Act, and the money Bill provisions of the Constitution, should have been followed. The Supreme Court of Appeal thus ordered the refund of the charge but overturned the High Court's decision that certain provisions of the Regulations and Act were invalid.

In this Court, the Reserve Bank and the Minister sought to appeal against the order to refund the exit charge. Mr Shuttleworth sought to cross-appeal against the finding that that the Regulations, and certain provisions of the Act, were constitutionally valid.

In the majority judgment written by Moseneke DCJ, (Mogoeng CJ, Cameron J, Jappie AJ, Khampepe J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ concurring) the Court granted leave to appeal in the main appeal, finding that even though the exit charge is no longer imposed, the matter is not moot because the state could be exposed to approximately R2.9 billion in potential claims if it is found that the imposition was unlawful. The Court further found that the exit charge was not inconsistent with the Constitution. The dominant purpose of the exit charge was not to raise revenue but rather to regulate conduct by discouraging the export of capital to protect the domestic economy.

The Court also granted leave to appeal in the cross-appeal but only in respect of the attack on the constitutional validity of the section of the Act that enables the making of Regulations and the provision in the Regulations prohibiting the export of capital without authorisation under certain conditions. These provisions were found to be constitutionally valid as the broad discretionary powers granted to the Minister ensure a speedy and flexible approach to our exchange control system and are reasonably necessary to stem the outflow of capital, protect the local currency and safeguard the domestic economy. Therefore, the main appeal was upheld and the cross-appeal dismissed. The Court made no order as to costs.

In a dissenting judgment, Froneman J held that national revenue of any sort, tax or not, must be raised by way of original legislation passed in Parliament. Only the manner of its implementation, not the decision to raise it, may be regulated in delegated legislation. This is because Parliament may only delegate subordinate regulatory authority to the Executive and not assign plenary legislative power. The regulation-making power granted to the President in the Act effectively assigns plenary legislative power to the President, which is constitutionally impermissible. Even if this power could be delegated, and even sub-delegated, there was no sub-delegation to the Minister in this case. However, if there was a valid sub-delegation, the Minister in any event had to impose the charge by way of legislation. Therefore, the imposition of the exit charge by way of announcement was constitutionally invalid. Froneman J would have dismissed the appeal with costs and granted the cross-appeal with costs.