CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 194/14 and CCT 199/14

In the matter between:

SOUTH AFRICAN RESERVE BANK	First Applicant
MINISTER OF FINANCE	Second Applicant
and	
MARK RICHARD SHUTTLEWORTH	First Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Second Respondent

Neutral citation:	*South African Reserve Bank and Another v Shuttleworth and Another* [2015] ZACC 17
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jappie AJ, Khampepe J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ
Judgments:	Moseneke DCJ (majority): [1] to [83] Froneman J (dissenting): [84] to [124]
Heard on:	3 March 2015
Decided on:	18 June 2015
Summary:	Sections 75 and 77 of the Constitution — money Bills — difference between taxes and regulatory charges — dominant purpose test Exchange control system — whether exit charge imposed under regulation 10(1)(c) of Exchange Control Regulations a tax or regulatory charge — exit charge a regulatory charge

Exchange control system — section 9(4) of the Currency and Exchanges Act 9 of 1933 — definition of "calculated to raise revenue" — "calculated" does not mean "likely"

Exchange control system — broad discretionary powers of Minister — necessary for flexible, speedy and expert approach to exchange control

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ORDER

The following order is made:

1. Leave to appeal is granted against the decision of the Supreme Court of Appeal.
2. Leave to cross-appeal is granted in relation to whether section 9(1) of the Currency and Exchanges Act 9 of 1933, and regulation 10(1)(c) of the Exchange Control Regulations, are constitutionally valid.
3. Leave to cross-appeal against the decision of the Supreme Court of Appeal is otherwise refused.
4. The main appeal is upheld.
5. The order of the Supreme Court of Appeal in paragraphs 2(i)-(iii) is set aside.
6. Mr Shuttleworth's application before the North Gauteng High Court, Pretoria is dismissed.
7. The cross-appeal is dismissed.
8. There is no order as to costs.

JUDGMENT

MOSENEKE DCJ (Mogoeng CJ, Cameron J, Jappie AJ, Khampepe J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ concurring):

Introduction

[1] This dispute is about taxation. Not many people relish paying taxes. Of taxes, none less than Thomas Jefferson[1] observed:

> "To compel a man [or woman] to furnish contributions of money for the propagation of opinions which he [or she] disbelieves . . . is sinful and tyrannical."[2]

Perhaps a less cynical and more felicitous posture on the subject is that of Justice Oliver Wendell Holmes Jr:[3] "I like to pay taxes; with them, I buy civilization."[4] Whatever one's temperament on them may be, taxes seem certain and inconvenient.

[1] Thomas Jefferson (1743-1826) was the third President of the United States of America from 1801 to 1809. One of the first acts of his administration was the reduction of taxes, in particular whiskey excises and federal internal taxes. See for example Wood *Empire of Liberty: A History of the Early Republic, 1789-1815* (Oxford University Press, Oxford 2009).

[2] Jefferson "A Bill for Establishing Religious Freedom" (1779) in Kurland and Lerner (eds) *The Founders' Constitution* (University of Chicago Press, Chicago 1987) at 77. As to the quote's potency, no fewer than ten United States Supreme Court decisions cite this quote, the earliest being *Everson v Board of Education* 330 US 1 (1947) at 13 and 28, and most recently *Johanns v Livestock Marketing Association* 544 US 550 (2005) at 572.

[3] Justice Holmes (1841-1935) was, to say the least, a remarkable man: wounded in war, lecturer at Harvard University, Supreme Court Justice in 1902, and prolific protector of America's First Amendment right to free speech. See for example Novick *Honourable Justice: The Life of Oliver Wendell Holmes* (Little, Brown and Company, Boston 1989) and Frankfurter "Mr. Justice Holmes and the Constitution: A Review of His Twenty-Five Years on the Supreme Court" (1927) 41 *Harvard Law Review* 121.

[4] The origins of this oft-quoted remark are elusive. See for example Bittker "Pervasive Judicial Doctrines in the Construction of the Internal Revenue Code" (1978) 21 *Howard Law Journal* 693 at 697. That being said, the quote does appear to at least accurately reflect Justice Holmes' sentiments, if not his precise diction. See for example *Compania General De Tabacos De Filipinas v Collector of Internal Revenue* 275 US 87 (1927) at 100, in which he held that "[t]axes are what we pay for civilized society".

Indeed, in *Gone with the Wind*, Margaret Mitchell tersely warned: "Death and taxes and childbirth! There's never any convenient time for any of them!"[5]

[2] Mr Shuttleworth, a prominent South African entrepreneur, feels that he has fallen victim to an invalid tax and wants it set aside by the courts. In 2001 he emigrated to the Isle of Man. He says he left the country in order to free up his funds for investment outside South Africa. He thought that the exchange control system of the time was severely restrictive and rendered cross-border investments prohibitive. The Exchange Control Regulations blocked the transfer of Mr Shuttleworth's assets from the Republic. The capital amount could not be transferred without authorisation of the South African Reserve Bank (Reserve Bank). He applied to the Reserve Bank to transfer out of the Republic approximately R2.5 billion blocked under the exchange control system. The Reserve Bank, seemingly acting on a determination by the Minister of Finance (Minister), imposed an exit charge of 10% on the capital he wanted exported. Mr Shuttleworth paid the charge of approximately R250 million. He was later advised that the exit charge was a tax and had been imposed in a manner not permitted by the Constitution or the applicable statute. Mr Shuttleworth also wanted the exit charge set aside for another reason. He argued that the entire exchange control system, or its specified parts, was at odds with the Constitution and invalid.

[3] Before coming to this Court, this contest had been to the North Gauteng High Court, Pretoria (High Court) and the Supreme Court of Appeal. The High Court held for the Reserve Bank and the Minister that the exit charge was not a revenue-raising tax and had been lawfully imposed. It did, however, hold a few and discrete exchange control legislative provisions to be unconstitutional. The Supreme Court of Appeal then held, in the main, for Mr Shuttleworth. It set aside the order of the High Court in its entirety. It concluded that the imposition of a charge on Mr Shuttleworth's transfer of his blocked assets out of the Republic was unlawful because it had not been passed in accordance with the procedure the Constitution prescribed for a money Bill. It

[5] Mitchell *Gone with the Wind* (Macmillan Publishers, 1936) at 471.

directed the Reserve Bank to repay the amount paid by him, with interest. In contrast, that Court refused to decide whether any of the exchange control provisions were inconsistent with the Constitution and invalid.

[4] The Reserve Bank and the Minister felt hard done by the order of the Supreme Court of Appeal and now seek leave to appeal against it (main appeal). Should this Court grant leave, Mr Shuttleworth, in turn, has asked for leave to cross-appeal against the decision of the Supreme Court of Appeal on the discrete question of the constitutional validity of the exchange control legislative scheme.

[5] In this Court too, the decisive question is whether the exit charge, as Mr Shuttleworth contends, was a tax imposed for the purpose of raising revenue for the State or, as the Reserve Bank and Minister submit, a regulatory charge whose main object was to disincentivise the export of capital. If the charge was a tax – a revenue-raising mechanism – then the regulation that authorised the exit charge would be invalid. This would be so because the exit charge had not been enacted in accordance with prescribed constitutional and statutory strictures.

[6] Before I wrestle with this core question on the merits, it may be expedient to narrate background facts, a résumé of the litigation thus far and then decide whether leave to appeal should be granted.

Background

[7] The Great Depression is said to have lasted a decade, from 1929 to 1939.[6] It was reputed to be the deepest and longest-lasting economic downturn in the history of industrialised economies. Although South Africa was then a developing country, which it still is, it was not shielded from a deep recession. Its currency and economic conditions, much like those of other countries, were on a downward slope at the time. Amidst the depression, South African authorities were fearful of diminished direct

[6] See for example Kindleberger *The World in Depression, 1929-1939* (University of California Press, Berkley 1986) at 2.

investment and capital flight. They put measures in place to prevent the total economic collapse of the country.

[8] In 1933, Parliament passed the Currency and Exchanges Act.[7] Section 9(1) empowered the President to make regulations on any matter affecting or related to currency, banking or exchanges.[8] The threat of economic recession and related capital flight reared its head again after the Sharpeville shootings of 1960.[9] Relying on section 9(1), the President introduced the Exchange Control Regulations (Regulations).[10] Their core provision, amongst others, is regulation 10(1)(c). It provides:

> "No person shall, except with permission granted by the Treasury or by an authorised dealer and in accordance with such conditions as the Treasury or the authorised dealer may impose—
>
> . . .
>
> (c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic."

The Regulations define "Treasury" as the Minister of Finance.[11] In this way, serve to prohibit the export of capital from the Republic unless certain conditions imposed by the Minister are complied with.

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[7] 9 of 1933 (Act).

[8] Section 9(1) of the Act provides that the President—

> "may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges."

This case concerns solely the power to make regulations bearing on currency. It does not concern banking or exchanges.

[9] De Swardt *Exchange Control in the South African Criminal Law* (LLD dissertation, University of Pretoria, 1996) (*De Swardt*) at 18-9.

[10] Exchange Control Regulations, GN R1111 *GG* Extraordinary 123, 1 December 1961.

[11] Regulation 1 of the Regulations provides:

> "'Treasury', in relation to any matter contemplated in these regulations, means the Minister of Finance".

[9] Following our first democratic elections in 1994, a process of the relaxation of exchange controls commenced. Ordinarily, during his annual budget speech before the National Assembly, the Minister announced, as authorised by regulation 10(1)(c), the conditions he had imposed in relation to the export of capital from the Republic. The Reserve Bank then reduced the Minister's announcement of the conditions into public circulars.[12]

[10] In 2003, the Minister took the view that our economy had become more resilient, enabling it to withstand capital outflows. As part of the progressive relaxation of exchange controls, he permitted emigrants to unwind and export blocked assets subject to specified conditions.[13] To this end, the Minister announced:

> "The following dispensation will apply with immediate effect:
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> . . .
>
> Holders of blocked assets wishing to exit more than R750 000 (inclusive of amounts already exited) must apply to the Exchange Control Department of the SA Reserve Bank to do so. Approval will be subject to an exiting schedule and an exit charge of 10% of that amount."[14]

[11] In practice this meant the Regulations blocked the expatriation of Mr Shuttleworth's assets from South Africa. The aggregate value of his blocked loan account was just over R4.2 billion. The Reserve Bank permitted Mr Shuttleworth to remit the interest on the blocked loan account at the prime lending rate plus 2%.

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[12] This is common practice. As but a few examples over the last twenty years, these circulars have: prohibited authorised dealers from allowing the transfer of funds to any private or public entity in Iraq (Exchange Control Circular No. D.7 of 6 April 1995); permitted authorised dealers to allow transfers of up to R10 000 to missionaries outside of South Africa (Exchange Control Circular D.213 of 1 April 1998); provided special arrangements for the payment of study costs incurred by parishioners of the Church of Scientology (Exchange Control Circular No 3 of 2005); and prohibited authorised dealers from allowing a South African resident to purchase foreign exchange for the purpose of participating in a lottery organised abroad (Exchange Control Circular No 11 of 2010).

[13] See Exchange Control Circular No. D.375 of 26 February 2003 at [15] below.

[14] Id. See also the Minister's Answering Affidavit in the High Court at para 61.

[12] On 5 March 2008, Mr Shuttleworth applied to the Reserve Bank for permission to transfer around R1.5 billion from the blocked loan account out of South Africa. The Reserve Bank policy required that an application to export capital could not be made directly to it but rather had to be made through an authorised dealer. Mr Shuttleworth instructed Standard Bank, an authorised dealer, to make the application in his stead. The Reserve Bank granted the application subject to the payment of an exit charge amounting to approximately R165 million. However, there was an error in the calculation of the exit charge, which ought to have been 10% of roughly R1.5 billion. Later, Mr Shuttleworth was informed that the amount that could be transferred out of South Africa was around R1.485 billion.

[13] Mr Shuttleworth paid the exit charge. He explained that he paid the charge in the belief that it was lawfully due. In addition to this payment and the transfer of the funds out of South Africa, Mr Shuttleworth made donations to several South African entities out of the blocked loan account. By 26 June 2009 the amount in that account had been whittled down to about R2.5 billion.

[14] During June 2009, Mr Shuttleworth decided to transfer his remaining capital out of South Africa. Ahead of applying to the Reserve Bank for permission to do so, he sought advice on the lawfulness of the exit charge. He was advised that it was unlawful. He framed his application to the Reserve Bank in a manner that reserved his right to challenge the lawfulness of the imposition of the charge. He complains that his authorised dealer, Standard Bank, submitted the application without reserving his rights as he had instructed. He only became aware of this omission when the Reserve Bank approved the application subject to the payment of the 10% exit charge, which Standard Bank had, contrary to Mr Shuttleworth's instructions, tendered to pay.

[15] When Mr Shuttleworth came to know of the Reserve Bank's approval of the application, he requested that it reconsider its decision to impose the charge. He paid the levied amount of just over R250 million under protest pending the reconsideration of the decision. The Reserve Bank refused to reconsider its decision, stating only that

it was bound by the Regulations. When invited to disclose the basis for its decision, the Reserve Bank relied on the Minister's decision – made known in his budget speech of 26 February 2003 and Exchange Control Circular No. D.375 of the same date – which embodied the details of the conditions laid down in the budget speech. The relevant part of Circular D.375 read:

> "Emigrant blocked assets are to be unwound. Amounts up to R750 000 (inclusive of amounts already exited) will be eligible for exiting without charge. Holders of blocked assets wishing to exit more than R750 000 (inclusive of amounts already exited) must apply to the Exchange Control Department of the . . . Reserve Bank to do so. Approval will be subject to an exiting schedule and an exit charge of 10 per cent of the amount."[15]

High Court

[16] Mr Shuttleworth was unhappy with the Reserve Bank's refusal to reconsider its decision to impose the exit charge. He approached the High Court for relief.[16] He argued that the imposition of the exit charge was unconstitutional. He further attacked various provisions underpinning the exchange control system. The High Court (per Legodi J) decided in favour of the state parties (the Reserve Bank, the Minister and the President) on the validity of the exit charge. But it declared certain provisions of the Act invalid and suspended the declaration of invalidity. It made no order as to costs.

[17] In a comprehensive judgment, the High Court made a number of crucial holdings that bear repetition because many of them are revisited in the cross-appeal. The High Court held that the charge was not "calculated to raise revenue" and therefore regulation 10(1)(c) was not invalid for failing to comply with section 9(4) of the Act.[17] It analysed the regulation starting with its heading, "Restriction on Export

[15] Exchange Control Circular No. D.375 of 26 February 2003.

[16] *Shuttleworth v South African Reserve Bank and Others* [2013] ZAGPPHC 200; [2013] 3 All SA 625 (GNP) (High Court judgment).

[17] Section 9(4) of the Act provides:

of Capital", considered its purpose of limiting the adverse consequences of money leaving the country, and concluded that the charge was a "disincentive".[18]

[18] The High Court then proceeded to evaluate the constitutional attacks. It refused to hold all of section 9 or section 9(1) unconstitutional.[19] It did, however, find section 9(3) to be invalid because it granted seemingly unfettered discretion to the President to suspend legislation.[20] Furthermore, the Court declared regulations 3(1), 3(3), 3(5), 10(1)(b), 19(1) and certain words in regulation 22 inconsistent with the Constitution and invalid. The Court suspended these declarations of invalidity, with the exception of the affected part of regulation 22, so that Parliament might remedy the defects.[21]

[19] Mr Shuttleworth had mounted an attack against regulation 10(1)(c) on the pointed ground that it was open-ended and lacked guidelines on its proper implementation and thus offended the authority of *Dawood*.[22] The High Court noted that the "exchange control system requires a flexible, speedy, and expert approach to ensure that proper financial governance prevails".[23] The Court found that an effective

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> "The Minister of Finance shall cause a copy of every regulation made under this section to be laid upon the Table of both Houses of Parliament within fourteen days after the first publication thereof in the *Gazette* . . . and if any such regulation is calculated to raise any revenue, he shall cause to be attached to the copy so laid upon the Table a statement of the revenue which he estimates will be raised thereby during the period of twelve months after the coming into operation thereof. Every such regulation calculated to raise revenue shall cease to have the force of law from a date one month after it has been laid on the Table unless before that date it has been approved by resolution of both Houses of Parliament."

[18] High Court judgment at paras 64-9.

[19] Id at para 168.

[20] Id at para 164. Section 9(3) of the Act provides that the President—

> "may . . . suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with any such regulation shall be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation."

[21] High Court judgment at para 175.

[22] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at paras 52-6, where this Court held that it is necessary for Parliament to provide guidelines where discretionary powers limit fundamental rights.

[23] High Court judgment at para 81.

exchange control was in a constant state of flux and demanded the respective expertise of authorised dealers and the Reserve Bank in these specialised areas. It concluded that it was unsurprising that there would be no, and could be no, guidance on the application of regulation 10(1)(c). Regulation 10(1)(c) was therefore valid.

[20] In another argument Mr Shuttleworth criticised the decision to impose the exit charge on the ground that the Reserve Bank was entitled to depart from the condition set by the Minister, and its failure to do so rendered the decision inflexible and invalid. The High Court disagreed. It took the view that the Reserve Bank only acted with the authority delegated to it by the Minister. It was not open to the Reserve Bank to "exercise discretion and deviate from policy guideline[s] that required . . . impos[ition of] a 10% levy".[24] To do otherwise would be to act contrary to the powers conferred upon it. The Court found that because Mr Shuttleworth had only challenged the decision of the Reserve Bank, and had not challenged the decision of the Minister, Mr Shuttleworth could not succeed in the argument that he should be repaid his 10% exit charge.

[21] Lastly, Mr Shuttleworth impugned the decision on the ground that it was arrived at through a "closed door policy". Under that policy the Reserve Bank required applications to externalise capital to be made through authorised dealers. The requirement is found in rule 10(a) of the Orders and Rules under the Exchange Control Regulations.[25] The High Court rejected the contention that the "middle man" approach to the exchange control system was unconstitutional. It found that authorised dealers were reasonably necessary for their expertise and capacity to handle the bulk of the more-than-10-million foreign transactions each year. It found

[24] Id at para 96.

[25] Rule 10(a) of the Orders and Rules under the Exchange Control Regulations, GN R1112, 1 December 1961, as amended up to GN R577 *GG* 30051, 13 July 2007, provides:

> "Persons who desire information or advice on exchange or currency matters governed by the regulations or who require approval or permission in respect of exchange, currency or gold transactions so governed, should apply to the Exchange Control through their bankers in the Republic or, if they have no such bankers, through one of the banks referred to in [these Orders and Rules]."

that banks were well-placed to handle the millions of applications for exporting capital and it would have been untenable for the Reserve Bank to deal with each and every one.[26]

Supreme Court of Appeal

[22] With leave of the High Court, Mr Shuttleworth approached the Supreme Court of Appeal on the constitutional validity of the exit charge. The state parties were also granted leave to cross-appeal against the suspended declarations of invalidity of the regulations.[27]

[23] The Supreme Court of Appeal held that the exit charge was a revenue-raising mechanism. The amount raised by the exit levy, approximately R2.9 billion, was paid into the National Revenue Fund. The imposition of the exit levy was of general application imposed on every amount exported that exceeded R750 000. The exit levy fell within "taxes, levies or duties" as contemplated in sections 75[28] and 77(1)[29] of the

[26] High Court judgment at para 49.

[27] *Shuttleworth v South African Reserve Bank and Others* [2014] ZASCA 157; 2015 (1) SA 586 (SCA) (Supreme Court of Appeal judgment).

[28] Section 75 of the Constitution provides:

> "(1) When the National Assembly passes a Bill other than a Bill to which the procedure set out in section 74 and 76 applies, the Bill must be referred to the National Council of Provinces and dealt with in accordance with the following procedure:
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> (a) The Council must—
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> (i) pass the Bill;
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> (ii) pass the Bill subject to amendments proposed by it; or
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> (iii) reject the Bill.
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> (b) If the Council passes the Bill without proposing amendments, the Bill must be submitted to the President for assent.
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> (c) If the Council rejects the Bill or passes it subject to amendments, the Assembly must reconsider the Bill, taking into account any amendment proposed by the Council, and may—
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> (i) pass the Bill again, either with or without amendments; or
>
> (ii) decide not to proceed with the Bill.
>
> (d) A Bill passed by the Assembly in terms of paragraph (c) must be submitted to the President for assent.
>
> (2) When the National Council of Provinces votes on a question in terms of this section, section 65 does not apply; instead—

Constitution and was void for failing to comply with these provisions.[30] The Court also found that the charge was beyond the power permitted by (*ultra vires*) regulation 10(1)(c). That regulation, it reasoned, did not allow the raising of revenue. And even if it did, the Minister and the Reserve Bank did not follow the procedure that section 9(4) of the Act prescribes for the promulgation of regulations that raise revenue.[31]

[24] That Court also noted that the Reserve Bank's reliance on regulation 10(1)(c) as authority for the imposition of the exit charge was contrived given its previous reliance on the budget speech delivered by the Minister in Parliament.[32] The Court ordered the Reserve Bank to repay Mr Shuttleworth the exit charge, with interest.

[25] In overturning the High Court's decision in its entirety, the Supreme Court of Appeal criticised the High Court's order because it seemed contradictory in validating the exit charge whilst also ruling that several regulations are invalid. In another observation, the Supreme Court of Appeal held that the High Court declared the regulations invalid in the abstract without any proper consideration of the effect of the invalidity on the exchange control regime and the economy as a whole.[33]

(a) each delegate in a provincial delegation has one vote;

(b) at least one third of the delegates must be present before a vote may be taken on the question; and

(c) the question is decided by a majority of the votes cast, but if there is an equal number of votes on each side of the question, the delegate presiding must cast a deciding vote."

[29] Section 77(1) of the Constitution provides:

"A Bill is a money Bill if it—

(a) appropriates money;

(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges."

[30] Supreme Court of Appeal judgment at para 31.

[31] Id at para 29.

[32] Id at para 32.

[33] Id at para 36.

Leave to appeal

[26] It is in the interests of justice to grant the Reserve Bank and the Minister leave to appeal the decision of the Supreme Court of Appeal. The dispute before us engages constitutional guarantees related to property,[34] administrative justice,[35] and the procedure for the passing of a money Bill.[36] The regulatory framework authorising the exit charge was repealed five years ago. I am nonetheless persuaded that the dispute before us is not moot because it raises a live controversy with practical effect. This is why: Mr Shuttleworth claims the return of a substantial amount of money. The Minister and the Reserve Bank want to keep the money. The outcome of the dispute is likely to have consequences for other potential claimants who may be similarly situated. And depending on the outcome of this dispute, potential claims against the State may run into billions of rands.

[27] Put simply, there is nothing moot about R2.9 billion which, we are told, would be the approximate extent of the State's exposure to potential claims. And to the extent that it may be argued that this dispute is moot, that would relate only to the fact that the conditions imposed by the Minister under regulation 10(1)(c) are no longer applicable. Even if that argument were good, this Court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this Court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear the matter.[37]

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[34] Section 25(1) of the Constitution provides that—

> "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[35] Section 33(1) of the Constitution provides that—

> "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair."

[36] See section 75 of the Constitution above n 28. See also section 77(1)(b) of the Constitution above n 29.

[37] See *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11, in which this Court held that we have "a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require."

[28] The outcome of the appeal is a matter of considerable public interest. Importantly, the main appeal on the merits carries reasonable prospects of success.

Merits of the main appeal

[29] The resolution of the main appeal hinges on three questions. First, was the imposition of the exit charge a decision of the Minister or the Reserve Bank? Second, was the exit charge a national tax, levy, duty or surcharge under sections 75 and 77(1)(b) of the Constitution? And third, was the exit charge "calculated to raise revenue" as envisaged in regulation 10(1)(c)[38] and section 9(4)[39] of the Act?

Was the exit charge a decision of the Minister or the Reserve Bank?

[30] The Reserve Bank and the Minister argued that the imposition of the exit charge was a decision made by the Minister in terms of section 9(1)[40] of the Act and regulation 10(1)(c) of the Regulations. This he did in the course of a budget speech on 26 February 2003. That budget speech was shortly thereafter tabled in Parliament and referred to the relevant Portfolio Committee for consideration and approval. In 2009, the Reserve Bank mechanically implemented the Minister's decision, which pre-dated Mr Shuttleworth's application to export currency. The Reserve Bank had no discretion whether to impose the exit charge or what its quantum should be.

[31] It was accepted by all parties that since 2003 the Reserve Bank has never exercised any discretion by deviating from the Minister's decision. It consistently imposed the 10% exit charge on every applicant, without variation. Therefore, the Reserve Bank and the Minister argued, it was the decision of the Minister, and not of the Reserve Bank, that had to be impugned. Mr Shuttleworth had not challenged the Minister's decision, which put paid to his claim for a refund.

[38] See [8] above.

[39] See above n 17.

[40] See above n 8.

[32] It is correct that on the authority of *Oudekraal*[41] and *Kirland*[42] the unchallenged decision of the Minister remained intact and valid. The Reserve Bank and the Minister further argued that the Supreme Court of Appeal ordered the Reserve Bank to repay the exit charge because it wrongly held that the Reserve Bank imposed the exit charge. Its order was not a patent error as Mr Shuttleworth now argues in this Court.

[33] For his part Mr Shuttleworth contended that the Reserve Bank made the decision to impose the exit charge. Its correspondence to him repeatedly used the language of "our decision". He also argued that the budget speech did not amount to a reviewable decision under the Regulations but rather a policy decision that was a mere guideline to the Reserve Bank. He conceded that it is true that the Reserve Bank had acted consistently and mechanically in appraising applications for exporting capital. But the Reserve Bank, he submitted, was wrong in law because the conduct offended the tenets of administrative justice and *Dawood*.[43] It had a discretion which it did not exercise.

[34] In the face of these arguments, the High Court held that the decision was of the Minister and that the Reserve Bank had no discretion or mandate to refuse to impose or vary the charge. Somewhat obliquely, the Supreme Court of Appeal held differently: the decision was that of the Reserve Bank. It stated that "[i]t is now necessary to consider whether the 10 per cent levy unlawfully imposed by the Reserve Bank has to be repaid to Shuttleworth".[44] In all fairness, this remark was *en passant* and is not supported by any reasoning why that Court thought the decision was that of the Reserve Bank and not of the Minister. It is plain from its reasoning that the

[41] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (*Oudekraal*).

[42] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

[43] *Dawood* above n 22.

[44] Supreme Court of Appeal judgment at para 33.

Supreme Court of Appeal decided this dispute solely on the constitutional question whether the exit charge had been passed as a money Bill.

[35] I have concluded that the decision to impose a 10% exit charge on everyone who desired to export more that R750 000 was made by the Minister. It took the form of a narrow policy formulation directed at implementing legislation and was, unlike a broad or political policy formulation, subject to administrative review. This distinction was made lucidly by this Court in *Ed-U-College*:[45]

> "It should be noted that the distinction drawn in this passage is between the implementation of legislation, on the one hand, and the formulation of policy on the other. Policy may be formulated by the executive outside of a legislative framework. For example, the executive may determine a policy on road and rail transportation, or on tertiary education. The formulation of such policy involves a political decision *and will generally not constitute administrative action* [and is therefore not reviewable]. However, policy may also be formulated in a narrower sense where a member of the executive is implementing legislation. The formulation of policy in the exercise of such powers *may often constitute administrative action* [and therefore be reviewable]."[46] (Emphasis added.)

[36] The Minister exercised his powers in terms of regulation 10(1)(c) and imposed two conditions: a 10% exit charge on the export of all capital that exceeded R750 000;

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[45] *Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE) (Section 21) Inc* [2000] ZACC 23; 2001 (2) SA 1 (CC); 2001 (2) BCLR 118 (CC).

[46] Id at para 18. This accords with what this Court similarly said in relation to the difference between formulation of policy, and implementation of policy, the latter of which does not improperly venture into the territory of policy creation. In particular, this Court in *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at paras 37-8 held that—

> "[e]xecutive powers are, in essence, high-policy or broad direction-giving powers. The formulation of policy is a paradigm case of a function that is executive in nature. . . . By contrast, '[a]dministrative action is . . . the conduct of the bureaucracy . . . in carrying out the daily functions of the state'. . . . Administrative powers are in this sense generally lower-level powers, occurring after the formulation of policy. . . . Put differently, the exercise of administrative powers is policy brought into effect, rather than its creation.
>
> In determining the nature of a power, it is helpful to have regard to how closely the decision is related to the formulation of policy, on the one hand, or its application, on the other. A power that is more closely related to the formulation of policy is likely to be executive in nature and, conversely, one closely related to its application is likely to be administrative." (Footnotes omitted.)

and that capital exporters be subjected to an exit schedule. He gave a general permission that was subject to fixed conditions. He then delegated the power of implementation and administration to the Reserve Bank in terms of regulation 22E.[47]

[37] Seen this way, the Reserve Bank was only responsible for mechanically applying the policy decision of the Minister and had no discretion when implementing the decision. The Reserve Bank derived its delegated powers from the wording of the budget speech of 26 February 2003, as reflected in Exchange Control Circulars D.375 and D.380, both of which were circulated that same day. The budget speech and the circulars do not offer any wiggle room for interpretation – the 10% exit charge was to be charged on all persons exiting South Africa with capital exceeding R750 000. The Reserve Bank could not lawfully depart from these narrow and set conditions without dishonouring their mandate given to them by the Minister under regulation 22E.

[38] The Minister and the Reserve Bank thought that if the decision was that of the Minister and not of the Reserve Bank, that finding alone would be fatal to Mr Shuttleworth's case and dispose of the main appeal in their favour. This would be so because the Minister's decision would stand as if it was never challenged. It is true that, on good authority, the decision of the Minister or of any public functionary must remain valid and be adhered to for as long as it has not been successfully impugned.[48]

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[47] Regulation 22E of the Regulations provides:

> "(1) The Minister of Finance may delegate to any person any power or function conferred upon the Treasury by any provision of these regulations or assign to any such person a duty imposed thereunder to the Treasury.
>
> (2) The Treasury shall not be divested of any power or function or duty delegated to any person under subregulation (1) and may at any time withdraw or amend any decision taken by any such person in the exercise or performance of the power or function or duty in question."

[48] As was held in *Oudekraal* above n 41 at para 26:

> "Until the Administrator's approval (and thus the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences *for so long as the unlawful act is not set aside*." (Emphasis added.)

[39] Even so, I don't think that a finding favourable to the Minister and the Reserve Bank on this point is wholly dispositive of the appeal. For present purposes it matters little who made the decision to impose the exit charge. Put simply, the decision of the Minister was impugned also on another ground and thus remains open to constitutional scrutiny. The core issues remain. They are two and interrelated. The first is whether the charge, levy or tax was of a kind that may be imposed only after due adherence to the money Bill strictures imposed by the Constitution. The second is whether the charge, levy or tax was calculated to raise revenue within the meaning of section 9(4) of the Act. I now peer closely at each.

Was the exit charge a "money Bill"?

[40] A Bill before the National Assembly is a money Bill if it imposes "national taxes, levies, duties or surcharges".[49] However, the term "money Bill" covers more than just the raising of taxes, levies, duties or surcharges. It includes a Bill that appropriates money,[50] or that abolishes, reduces or grants exemptions from taxes,[51] or that authorises direct charges against the National Revenue Fund.[52] A money Bill must be passed by the National Assembly, and only in the manner required by section 75 of the Constitution.[53] The National Assembly may not initiate or prepare a money Bill.[54] Only the Minister of Finance may.[55] And a money Bill must not deal with any other matter except the prescribed subject matters of a money Bill.[56]

This approach was then endorsed by this Court in *Kirland* above n 42 at para 101:

> "The essential basis of *Oudekraal* was that invalid administrative action may not simply be ignored, but may be valid and effectual, and may continue to have legal consequences, until set aside by proper process."

[49] Section 77(1)(b) of the Constitution above n 29.

[50] Section 77(1)(a) of the Constitution above n 29.

[51] Section 77(1)(c) of the Constitution above n 29.

[52] Section 77(1)(d) of the Constitution above n 29.

[53] See above n 28.

[54] Section 55(1)(b) of the Constitution provides:

> "In exercising its legislative power, the National Assembly may . . . initiate or prepare legislation, *except money Bills*." (Emphasis added.)

[55] Section 73(2)(a) of the Constitution provides, in relevant part, that—

[41] The High Court neglected to consider whether the money Bill provisions should have been complied with in implementing the exit charge. It simply found that the exit charge was not "calculated to raise revenue" and thus echoed the requirement of section 9(4) of the Act. The Supreme Court of Appeal, on the other hand, held that the money Bill provisions should have been complied with. Its reasoning was not expansive. It was limited to seeing the primary purpose of the exit charge as raising revenue for the State. In its words:

> "[T]he levy raised revenue for the State. It brought ten per cent of the value of any capital in excess of R750 000 exported out of the country, into the National Revenue Fund. Whilst in force, it raised approximately R2.9 billion. The levy thus fell within the category of 'taxes, levies or duties' contemplated by sections 75 and 77 of the Constitution."[57]

[42] A blissful starting point would be to affirm that the power to tax residents is an incident of, and subservient to, representative democracy. The manner and the extent to which national taxes are raised and appropriated must yield to the democratic will as expressed in law. It is the people, through their duly elected representatives, who decide on the taxes that residents must bear. An executive government may not impose a tax burden or appropriate public money without due and express consent of elected public representatives. That authority, and indeed duty, is solely within the remit of the Legislature. This accords with this Court's decision in *Fedsure*,[58] as well

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> "only the Cabinet member responsible for national financial matters may introduce . . . a money Bill".

[56] Section 77(2) of the Constitution provides:

> "A money Bill may not deal with any other matter except—
>
> (a) a subordinate matter incidental to the appropriation of money;
>
> (b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;
>
> (c) the granting of exemption from national taxes, levies, duties or surcharges; or
>
> (d) the authorisation of direct charges against the National Revenue Fund."

[57] Supreme Court of Appeal judgment at para 31.

[58] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC), particularly paras 44-5.

as the Canadian Supreme Court decision in *Eurig Estate*.[59] Both cases hold that the primary object of the limits on how to raise national taxes or appropriate revenue, as our Constitution does in relation to a money Bill, is to ensure that there is "no taxation without representation". It is plain that in our jurisdiction a decision or law that purports to impose a tax will be invalid to the extent of its inconsistency with the limits imposed by the Constitution or other law.

[43] Our first chore must be to assign meaning to the undefined words in section 77 of the Constitution: "national taxes, levies, duties [and] surcharges". Their scope is plainly limited to charges at the national level. But the use of all four terms must betray a design to cover a wide field of charges. However a trawling of our national legislative instruments using the terms tax, levy, duty, or surcharge, suggests that the terms are of wide import and are often used synonymously and interchangeably.[60] The only minor exception is perhaps the term "surcharge" which seems to be, at least sometimes, reserved for a charge in *excess* of a base tariff.[61] This means that a literal meaning of any of the terms is less than useful. The mere label of a charge as a tax or levy or duty or surcharge tells us little about whether it is hit by the requirements of section 77(1)(b). We must resort to the context within which the term is used and the purpose for which the tax, levy, duty or surcharge has been imposed.

[44] There is a paucity of domestic judicial guidance on how one identifies charges that must be laid down only through a money Bill. Three cases refer to a money Bill but none are on point. In the *First Certification* case,[62] an argument was raised that a

[59] *Re Eurig Estate* [1998] 2 SCR 565, particularly para 30.

[60] For a brief spattering of examples, see: Tax Administration Act 28 of 2011 (section 1 defines a "tax" as any "tax, duty, levy, royalty, fee, contribution, penalty, interest and any other moneys imposed under a tax Act"); Municipal Fiscal Powers and Functions Act 12 of 2007 (section 1 defines a "municipal tax" as "a tax, levy or duty"); Customs and Excise Act 91 of 1964 (section 1 defines a "customs duty" as any duty leviable under that Act, and "surcharge" as "any duty leviable under Part 4 of Schedule 1"); and Estate Duty Act 45 of 1955 (section 2(1) provides that an estate duty shall be "charged, levied and collected" on the estate of every deceased person).

[61] Section 1 of the Municipal Fiscal Powers and Functions Act defines a "surcharge" as a "charge in excess of the . . . base tariff".

[62] *Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC).

Bill that apportions due monies under the Constitution to provinces could qualify as a money Bill. This Court disagreed and held that "bills determining a Province's equitable share are not money Bills and are subject to the [non-money Bill] procedure".[63]

[45] In *Paper Manufacturers*,[64] the National Assembly was alleged to have failed to pass money Bill amendment legislation as required by section 77(3) of the Constitution.[65] The Minister of Finance had introduced legislation to lower rates of duties and rebates on paper and paperboard products. The Paper Manufacturers Association attacked the legislation on the ground that it had not been passed lawfully. This was because it, having been a money Bill, had not been passed in accordance with an envisaged money Bill amendment law which in fact had not been enacted.[66] The Supreme Court of Appeal, in *obiter*, stated that although Parliament had failed to adopt the procedure for amending money Bills, this did not mean that all money Bills amended without the requisite procedure were inconsistent with the Constitution and invalid.[67] Lastly, the High Court in *Cross-Border*[68] gave short shrift to the argument that legislation that permitted the imposition of permit tariffs on transport haulers amounted to a money Bill. The High Court held that "permit tariffs [were] neither akin to a money Bill or a tax".[69]

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[63] Id at para 421.

[64] *Minister of Finance and Another v Paper Manufacturers Association of South Africa* [2008] ZASCA 86; 2008 (6) SA 540 (SCA) (*Paper Manufacturers*).

[65] Section 77(3) of the Constitution provides:

> "All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament."

[66] Soon after the *Paper Manufacturers* decision, the Legislature enacted the Money Bills Amendment Procedure and Related Matters Act 9 of 2009, complying with this constitutional imperative.

[67] *Paper Manufacturers* above n 64 at para 17.

[68] *Central African Services (Pty) Ltd and Another v Minister of Transport and Another* [2013] ZAGPPHC 549 (*Cross-Border*). This High Court decision, on a separate point, was appealed to this Court and the decision was handed down with the citation *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd and Another* [2015] ZACC 12. This is why the High Court decision has been referred to as *Cross-Border*.

[69] *Cross-Border* id at para 45.

[46] The parties before us were in agreement, and correctly so, that a law, other than a money Bill, may authorise the executive arm of government to impose regulatory charges in order to pursue a legitimate government purpose. There is a raft of pre- and post-Constitution legislation that routinely authorises the Executive to impose fees, tariffs, levies, duties, charges and surcharges.[70] Section 77(1)(a) of the Constitution, which provides that a money Bill is any Bill that "appropriates money", cannot be understood to refer to any instance where revenue is incidentally raised. This would be an overbroad and unworkable meaning. "Appropriates money" must be understood to refer to the allocation of revenue raised as tax and not as a regulatory charge.

[47] So the recurring question is: how does one distinguish a regulatory charge from a tax that may be procured only through a money Bill? I look first to foreign jurisprudence. In the Canadian Supreme Court decisions of *Lawson*[71] and *Westbank*[72], the Zimbabwean Supreme Court case of *Nyambirai*,[73] the Australian case of *Collector of Customs (NSW)*,[74] as well as several cases from the United States,[75] courts have

[70] See for example Municipal Fiscal Powers and Functions Act 12 of 2007 (the purpose of which is, in part, "to provide for the authorisation of taxes, levies and duties that municipalities may impose under section 229(1)(b) of the Constitution"); Diamond Export Levy Act 15 of 2007 (which in section 2 imposes a levy, to be paid into the National Revenue Fund, when anyone delivers a bill of entry for export of an unpolished diamond); Skills Development Levies Act 9 of 1999 (which in section 3 requires employers to pay a levy to the Commissioner for the South African Revenue Service in certain circumstances); Customs and Excise Act 91 of 1964 (which allows the Commissioner for the South African Revenue Service to levy various customs and excise duties and surcharges); Estate Duty Act 45 of 1955 (which imposes "an estate duty upon the estates of deceased persons", calculated in accordance with section 4A); and Transfer Duty Act 40 of 1949 (which permits, in section 2, a levy to be imposed for the benefit of the National Revenue Fund when property valued above R600 000 is acquired by way of a transaction).

[71] *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357 at 362-3.

[72] *Westbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 SCR 134 (*Westbank*) at paras 24-8.

[73] *Nyambirai v National Social Security and Another* 1996 (1) SA 636 (ZS); 1995 (9) BCLR 1221 (ZS) at 642C-J and 643A-C.

[74] *Attorney-General (NSW) v Collector of Customs (NSW)* (1908) 5 CLR 818, in which the High Court of Australia held, at 848-9, that—

> "the word 'tax' and its plural 'taxes' are not words of invariable signification indicating any exercise whatever of the power of taxation; they are not infrequently used to denote a particular species of imposition, in contra-distinction to duties, and to duties of various kinds. . . . The word must be looked at in relation to its surroundings, it must be considered with respect to the object of the clause in which it stands, and the results which would flow from one construction or the other".

warned that the use of the words fees, tariffs, levies, duties, charges, or surcharges in a particular statute is not conclusive of whether the statute imposes a regulatory charge or a tax. Most recently, in *Sebelius*,[76] the Supreme Court of the United States considered whether part of the national health care legislation colloquially known as *ObamaCare*[77] constituted a tax. It said:

> "In passing on the constitutionality of a tax law, [a court] is concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it".[78]

[48] So, aside from mere labels, the seminal test is whether the primary or dominant purpose of a statute is to raise revenue or to regulate conduct.[79] If regulation is the primary purpose of the revenue raised under the statute, it would be considered a fee or a charge rather than a tax. The opposite is also true. If the dominant purpose is to raise revenue then the charge would ordinarily be a tax. There are no bright lines between the two. Of course, all regulatory charges raise revenue. Similarly, "every tax is in some measure regulatory".[80] That explains the need to consider carefully the dominant purpose of a statute imposing a fee or a charge or a tax. In support of this basic distinguishing device, judicial authorities have listed non-exhaustive factors that will tend to illustrate what the primary purpose is.

[49] Since the 1950s, in a small trickle, our courts have pronounced on whether certain statutes authorised a tax or regulatory charge. None of the cases is on all fours.

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[75] *Rodgers v United States* 138 F 2d 992 (6th Cir 1943) at 994; *United States v Stangland* 242 F 2d 843 (7th Cir 1957) at 848; *South Carolina ex rel. Tindal v Block* 717 F 2d 874 (4th Cir 1983) at 887; and *Emerson College v Boston* 391 Mass 415 (1983) at 424-5.

[76] *National Federation of Independent Businesses v Sebelius* 132 S Ct 2566 (2012) (*Sebelius*) at 2595.

[77] The legislation is properly called the Patient Protection and Affordable Care Act of 2010.

[78] *Sebelius* above n 76 at 2595, citing *Nelson v Sears, Roebuck & Co.* 312 US 359 (1941) at 363.

[79] The Canadian Supreme Court, for example, in *Westbank* above n 72 held, at para 30, that:

> "[a]lthough in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax . . . (2) to finance or constitute a regulatory scheme . . . or (3) to charge for services directly rendered".

[80] *Sebelius* above n 76 at 2596, citing *Sonzinsky v United States* 300 US 506 (1937) at 513.

Most of the decisions plainly shy away from defining the word "tax" because it defies precise description outside the context of a specific statute and its purpose. For example, Ramsbottom J in *Permanent Estate and Finance*[81] declined to define the term "tax" and rather listed features that would make a tax easily identifiable: (i) when the money is paid into a general revenue fund for general purposes; and (ii) when no specific service is given in return for payment. In that case he found the money paid by a township developer not to be a tax because it would be re-invested in the infrastructure of the township, and the power to impose the charge was reasonably required to carry out the object of that statute.[82]

[50] In *Israelsohn v CIR*,[83] a taxpayer complained that a punitive super tax was not a tax because its purpose was not to raise revenue but to punish. The Appellate Division held the measure to be a tax because it was subject to the general machineries of tax assessment and collection.[84] In *The Master v I L Back*[85] the Appellate Division had to decide whether a charge was a tax or a fee. It decided that it was a fee because of the use of the word "fee" throughout the statute and because the "obvious and necessary purpose" was to empower the Minister to impose a fee for services and facilities he had to provide.[86]

[51] In *Maize Board*,[87] the Court held a levy not to be a tax, in part because it was not imposed on the public as a whole or on a substantial part of it. The revenues were not utilised for public benefit as only a few would benefit and a large portion of the revenue was used to defray administrative costs.[88] More recently, in *Gaertner*,[89] this

[81] *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W).

[82] Id at 259.

[83] *Israelsohn v Commissioner for Inland Revenu*e 1952 (3) SA 529 (A).

[84] Id at 539F-G.

[85] *The Master v I L Back and Co Ltd and Others* 1983 (1) SA 986 (A).

[86] Id at 1002-3.

[87] *Maize Board v Epol (Pty) Ltd* [2008] ZAKZHC 99; 2009 (3) SA 110 (D).

[88] Id at para 27.

[89] *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) (*Gaertner*).

Court examined the primary and secondary purposes of custom and excise duties, concluding that their primary function is "to ensure a constant stream of revenue for the State, with a secondary function of discouraging consumption of certain products".[90] The Court concluded that although the regulatory aspect of customs and excise legislation served an important public purpose, the statute was "essentially a fiscal piece of legislation".[91]

[52] None of our cases disavow the obvious need to identify the dominant object of a statute in order to typify it as fiscal or regulatory. Madlanga J says as much in *Gaertner*.[92] And earlier cases demonstrate that we must avoid attaching a fiscal meaning to words like tax or duty or levy outside of a contextual and purposive understanding. There are open-ended but helpful guidelines on how to determine the dominant purpose of legislation that tends to raise revenue for the State. In each case the factors must be weighed carefully in order to reach a correct outcome. In the end it boils down to whether the dominant object of the enactment was to raise revenue to fund the State and its public operations or to regulate public conduct by charging a fee or levy.

[53] Here we are dealing with exchange control legislation. Its avowed purpose was to curb or regulate the export of capital from the country.[93] The very historic origins of the Act, in 1933, were in the midst of the 1929 Great Depression, pointing to a necessity to curb outflows of capital. The Regulations were then passed in the aftermath of the economic crises following the Sharpeville shootings in 1960. The domestic economy had to be shielded from capital flight. Regulation 10's very heading is "Restriction on Export of Capital". The measures were introduced and kept to shore up the country's balance of payments position. The plain dominant purpose

[90] Id at para 54.

[91] Id at para 55.

[92] Id at paras 54-5.

[93] *De Swardt* above n 9 at 480-1.

of the measure was to regulate and discourage the export of capital and to protect the domestic economy.

[54] This dominant purpose may also be gleaned from the uncontested evidence of the then Director-General of Treasury, Mr Kganyago. He explained that the exchange control system is designed to regulate capital outflows from the country. The fickle nature of the international financial environment required the exchange control system to allow for swift responses to economic changes. Exchange control provided a framework for the repatriation of foreign currency acquired by South African residents into the South African banking system. The controls protected the South African economy against the ebb and flow of capital. One of these controls, which we are here dealing with specifically, served to prohibit the export of capital from the Republic (unless certain conditions were complied with).

[55] The exit charge was not directed at raising revenue. The uncontested evidence of the Minister is that the exit charge was part of the regulation directed at easing in the dismantling of exchange controls. The economy was on a better footing and could afford the export of some capital provided it was not wholesale. The charge or levy was expected to slow down the extent and the frequency of capital externalisation.

[56] There are other factors that also point away from revenue-raising. The charge was imposed on a discrete portion of the population.[94] Only those who had capital to externalise in excess of R750 000 were to be affected. Lesser amounts were shielded from the exit charge. And, like an ordinary tax, the payment was not voluntary. Whilst there was no evidence of the actual or properly estimated costs of the regulatory scheme related to the revenue raised, there was a close relationship between the regulatory charge and the persons being regulated.[95] The permission was

[94] See for example the Australian decision of *Leake v Commissioner of Taxation (State)* (1934) 36 WALR 66 at 67, in which it was said that it is a "distinguishing feature of a tax . . . that it is a compulsory contribution, imposed by [government] on, and required from, *the general body of subjects or citizens*, as distinguished from isolated levies on individuals". (Emphasis added.)

[95] See *Westbank* above n 72 at para 24, in which the Supreme Court of Canada held that—

granted against the payment of a pre-set fee or charge. It may be added that the exit fee was not collected through the normal machinery of collecting taxes.

[57] The Supreme Court of Appeal was in error when it concluded that the dominant purpose of the exit charge was to raise revenue and it had to be subjected to the requirements of section 75 of the Constitution.

Was the exit charge "calculated to raise revenue"?

[58] Section 9(4) of the Act prescribes preconditions for the validity of every regulation that was made under this section that is "calculated to raise revenue". In its very words it provides:

> "The Minister of Finance shall cause a copy of every regulation made under this section to be laid upon the Table of both Houses of Parliament within fourteen days after the first publication thereof in the *Gazette* . . . and if any such regulation is *calculated to raise any revenue*, he shall cause to be attached to the copy so laid upon the Table a statement of the revenue which he estimates will be raised thereby during the period of twelve months after the coming into operation thereof. Every such regulation calculated to raise any revenue shall cease to have the force of law from a date one month after it has been laid on the Table unless before that date it has been approved by resolution of both Houses of Parliament." (Emphasis added.)

[59] Mr Shuttleworth argues that the exit charge was calculated to raise revenue and since it did not comply with the set procedural pre-conditions of being tabled before Parliament with estimated earnings attached, it was invalid. To bolster this argument he sought to persuade us that "calculated" must be read as "likely". On this argument,

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> "[t]he factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) *a relationship between the regulation and the person being regulated*, where the person being regulated either causes the need for the regulation, or benefits from it." (Emphasis added.)

See also *620 Connaught Ltd v Canada (Attorney General)* [2008] 1 SCR 131 at 24-36 (for a discussion of the four factors outlined in *Westbank* in distinguishing between regulatory charges and taxes), and particularly paras 34-6 (for a discussion of the "fourth criterion . . . a relationship between the regulation and the person being regulated").

a regulation under section 9(4) need not be aimed at raising revenue. It would be sufficient if it were only *likely* to raise revenue. Unsurprisingly, the Reserve Bank and the Minister were adamant that the regulation which authorised the imposition of the exit charge was not calculated to raise revenue. They urged us to give "calculated" a meaning that points to a deliberate object or purpose to raise revenue. They argued that they could not have ascertained or known beforehand how many individuals in any one year would apply to take their capital out of the country, or how much capital would in fact be exported.

[60] I have already found that the exit charge did not have revenue-raising as its primary object. It was not calculated to raise revenue. It was directed at curbing or discouraging export of capital.[96] I am not persuaded by the submission that the wider import of the word "likely" is to be preferred in this instance over the ordinary meanings of "calculated", which include "intended", "designed", "planned", or "considered".[97] Section 9(4) of the Act is directed at allowing Parliament to scrutinise fiscal measures that are planned or designed to gather income for the fiscus. The section is not directed at every administrative or regulatory levy, charge, fee, or surcharge found in ample legislation.

[61] It is true that during its subsistence the exit charge generated revenue of approximately R2.9 billion. In my view, that garnering of income by the Treasury was incidental to the dominant object of regulating and discouraging capital flight. In other words, the Minister was not required to follow the procedure set out in section 9(4) of the Act before imposing an exit charge as a condition authorised by regulation 10(1)(c).

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[96] See above at [53].

[97] In support of this interpretation of "calculated" meaning "likely", Mr Shuttleworth cites *American Chewing Products Corporation v American Chicle Company* 1948 (2) SA 736 (A) at 741; *The State v Nokwe and Others* 1962 (3) SA 71 (T) at 74; and *Amoils v Johannesburg City Council* 1943 TPD 386 at 389. However, this is not the ordinary meaning. The Supreme Court of Appeal recently said in *AM Moolla Group Ltd and Others v The Gap Inc and Others* [2004] ZASCA 112; [2005] 3 All SA 101 (SCA) at para 7 that this unusual interpretation of "calculated" is "especially confusing . . . because *it has a special meaning in trademark law*" only. (Emphasis added.)

[62] I merely point out that with the advent of the Constitution, the procedural requirements of section 9(4) have become anachronistic. They have been superseded by the Constitution. If the exit charge was directed at raising revenue and therefore was a national tax, it would be hit by the formalities for adopting a money Bill. On the other hand, if the exit charge was not calculated to raise revenue and thus was not akin to a money Bill, it would not have to comply with section 9(4). Let it suffice to note that sections 75 and 77 of the Constitution have superseded the provisions of section 9(4) of the Act. This means that a Bill that is "calculated to raise revenue" by imposing a national tax must comply with the constitutional requirements for a money Bill.

Must "every national revenue of whatever kind, tax or not", be raised only by original legislation?

[63] The starting point of the dissenting judgment by my colleague Froneman J is that national revenue of whatever kind, tax or not, may be raised only by original legislation passed by Parliament.[98] Only the manner of its implementation, not the decision to raise it, may be regulated in delegated legislation.[99] On this premise he concludes that the exit charge of 10% is unconstitutional and invalid because it has raised revenue for the national government and yet it was not directly imposed by Parliament.

[64] This point of departure is overbroad. It is not consistent with the money Bills scheme of the Constitution nor with domestic and comparative judicial authority on imposition of taxes. Not every duty, levy, charge or surcharge that raises national revenue is a national tax. Not every law that permits the raising of national revenue is a money Bill. That is plain from the Constitution. It sets money Bills apart from other laws and imposes a distinct procedure for their passage. This is because there are indeed many other laws that themselves impose, or authorise the Executive to impose, a myriad of charges outside the strictures of money Bill requirements. In

[98] Dissenting judgment at [85].

[99] Id.

each case, as our and other courts have often held, the primal question is: what is the dominant purpose of the revenue-raising law concerned? To raise revenue in order to fund the operations of the State, or to regulate behaviour or defray costs or advance another legitimate purpose? I have earlier sought to show that here the charge or levy was expected to slow down the extent and the frequency of capital externalisation. Revenue-raising was a mere by-product of the exit charge's true purpose: regulation of the export of capital. The exit charge was therefore not one which attracts the definition of "money Bill".

[65] The second main plank of the dissent is about delegation of legislative power.[100] It is that Parliament may only delegate subordinate regulatory authority to the Executive and may not assign plenary legislative power to another body. The regulation-making power granted to the President in section 9(1) of the Act effectively assigns plenary legislative power to the President. That is constitutionally impermissible.

[66] I do not agree that the legislative scheme here assigns plenary legislative power to the President. Even though the Act predates our constitutional modernism by more than 60 years it does not fall into that pitfall. Section 9(1), in its very words, provides that the President "may make *regulations* in regard to any matter . . . relating to . . . currency, banking or exchanges".[101] There can hardly be argument that Parliament is entitled to delegate subordinate legislation, and does so routinely, in the form of regulation-making to the Executive. The President made regulations and in regulation 10(1)(c) prohibited the exportation of capital except "in accordance with such conditions as the [Minister] . . . may impose".

[67] The President has not delegated legislative power. His power is to regulate by imposing conditions for export of capital. To that end, the Minister set, amongst other

[100] Id. See also [99] to [101].

[101] Emphasis added.

conditions, an exit charge. The trail from the legislation to the regulations and to implementation is there.

[68] But even if Parliament's delegation of regulatory authority to the President here is conspicuously abundant, I consider that its exceptional nature is warranted in the field in which it occurs. This case requires us to consider the constitutional validity of a statute vesting authority on the President to regulate specifically the export of currency. We are not concerned with the competence of an exercise of that power in relation to banking or exchanges. The authority at issue here was exercised by the promulgation of regulation 10(1)(c) which prohibited, except subject to the Minister's conditions, the export of capital from the Republic.

[69] Capital exports have the capacity to drain an economy of its lifeblood, and so to impact catastrophically on the country's economic welfare. The debate about how best to regulate capital movement, whether by exchange controls, or their absence, is not before us. For present purposes, capital exports are of such singular concern to the country's wellbeing that the Constitution vests special powers in the Reserve Bank. It stipulates that the "Reserve Bank is the central bank of the Republic",[102] whose primary object is to "protect the value of the currency in the interest of balanced and sustainable economic growth in the Republic".[103] The Constitution requires the Reserve Bank, in pursuit of this primary object, to perform its functions independently and without fear, favour and prejudice, though there must be regular consultation between the bank and the Executive.[104]

[70] That the Constitution affords an express mandate for protecting the value of the currency demonstrates the exceptional significance of the issue. Currency moves with lightning speed. Money has long ceased to be a hand-held commodity or physical article of trade for exchange purposes. The internet and electronic communications

[102] Section 223 of the Constitution.

[103] Section 224(1) of the Constitution.

[104] Section 224(2) of the Constitution.

enable it to be moved from and between locations and jurisdictions almost instantly. Hence the need for special regulation. Hence also the need for special amplitude of regulatory power. The nature of the power the Act confers on the President to make regulations in regard to currency is unusually wide, but its unusual width meets the unusual circumstance of the subject matter.

[71] Implicit in the dissent is also that the power of the Minister to implement the Regulations is impermissibly wide. Later, I deal with this contention in relation to the *dicta* in *Dawood*.[105] It bears repetition that the Executive bears a responsibility to secure a stable currency within a good and prospering economy. This duty is sufficiently exceptional, and paramount, to warrant a broad power that allows the Executive to respond to the uniquely dynamic field of exchange control. The global financial crisis of 2007 is still fresh in many of our memories, a testament to the need for the ability to respond rapidly, and guard against the potential negative impact of drastic market or economic changes. This is particularly true for vulnerable economies such as ours. It is on this basis that we recognise the importance, indeed the public interest, in permitting the Executive to impose a limited charge on the export of capital. To regard the exit charge as routine national revenue raising that must count for tax is to miss a vital feature of this case.

[72] The main appeal against the decision of the Supreme Court of Appeal must succeed.

Leave to cross-appeal

[73] Mr Shuttleworth asks for leave to cross-appeal in order to impugn the constitutional validity of all or some of the statutory scheme that makes up the exchange control system. He asserts that he enjoys own and public interest standing to mount the constitutional attack. The state parties contest the claim that Mr Shuttleworth has standing in the cross-appeal. The High Court held that he had

[105] See discussion of *Dawood* below at [79].

sufficient personal and public interest standing.[106] It reasoned that Mr Shuttleworth grew up in Cape Town, accumulated the bulk of his wealth in South Africa and he may perhaps desire to return to South Africa.

Own interest standing

[74] I think that Mr Shuttleworth has own interest standing in the cross-appeal, or at least those parts that directly affect him, for much the same reason that he is entitled to resist the main appeal directed at upsetting an earlier judgment in his favour. The interest extends to attacking the constitutional validity of section 9(1) read together with regulation 10(1)(c). The Minister drew the power to impose the exit conditions from these provisions. If they were found to be constitutionally offensive, the exit charge would fall by the wayside with them. The Supreme Court of Appeal refused to entertain even this limited constitutional attack. In the view I take, Mr Shuttleworth has the requisite own interest standing and should be granted leave to appeal against the constitutional validity of section 9(1) and regulation 10(1)(c). Even though the merit of the attack may be open to some doubt, it is arguable.

Public interest standing

[75] Mr Shuttleworth also seeks leave to mount a challenge to the constitutional validity of regulations 3(1), 3(3), 3(5), 10(1)(b), 18, 19(1) and 22. The Supreme Court of Appeal refused to entertain the challenge on the ground that it would not be in the interests of justice to do so. It held that if it were to make an order of invalidity, it would be in the abstract and without regard to its implications on people other than Mr Shuttleworth and other considerations beyond the facts of the present case. That Court warned that its order would be without a proper consideration of its effect on the exchange control regime and on the economy as a whole.

[106] High Court judgment at para 127-8, citing *Ferreira v Levin NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (*Ferreira*).

[76] I agree with the Supreme Court of Appeal that the challenge against the specified regulations would be academic, hypothetical and speculative.[107] Mr Shuttleworth has not demonstrated how the claim of constitutional infringements would have a material bearing on him and others similarly situated. He has not pointed to any practical usefulness of the outcome he contends for. He has not placed before the Supreme Court of Appeal or this Court any factual context within which to evaluate the constitutional challenge. This, I should note, is fatal to both aspects of Mr Shuttleworth's cross-appeal: the attempt to impugn specific provisions as well as the attempt to attack the entire exchange control system. Mr Shuttleworth has not shown that, in the cross-appeal, he was genuinely acting in the public interest or that any of the people or groups affected by the exit charge may not be able to take up the challenge themselves. It is needless to add that the group he seeks to represent, being people who are desirous of externalising their wealth, may not be vulnerable or crave for his intervention.

[77] It is not in the interests of justice to grant Mr Shuttleworth leave to cross-appeal against the decision of the Supreme Court of Appeal on the broad constitutional attack against the Regulations. This means I need not consider the substance of the constitutional attack. Let it suffice to remark that the specific provisions targeted by Mr Shuttleworth are well and truly archaic and may very well be at odds with the tenets of our Constitution. The state parties are nudged to take appropriate steps to review the provisions in issue.

Merits of the cross-appeal

[78] Mr Shuttleworth seeks to impugn section 9(1) of the Act and regulation 10(1)(c). Section 9(1) empowers the President to make regulations on any matter affecting or related to currency, banking or exchanges. Relying on section 9(1), in 1961, the President made, amongst others, regulation 10(1)(c), which although extracted above warrants repetition here. It provides that:

[107] See *Ferreira* id at paras 163-5, and in particular para 199 in which this Court said that it "deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones".

> "[n]o person shall, except with permission granted by the Treasury or by an authorised dealer and in accordance with such conditions as the Treasury or the authorised dealer may impose—
>
> . . .
>
> (c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic."

[79] The thrust of the attack is that the section and regulation give the Minister broad discretionary powers of the same kind that this Court criticised in *Dawood.*[108] That decision warned against broad discretionary powers that may prejudice those who may be entitled to seek relief from an adverse decision arising from an open-ended discretion. We must however recognise that this Court's treatment in *Dawood* of broad discretionary powers conferred by legislation was measured and nuanced. It did not hold all wide legislative discretion to be inconsistent with the constitutional norm and invalid. Let the judgment speak for itself:

> "Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. *At times, they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the legislature to identify them in advance*. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made."[109] (Emphasis added and footnote omitted.)

[80] The High Court dismissed the contention and held, correctly in my view, that South Africa's "exchange control system requires a flexible, speedy and expert approach to ensure that proper financial governance prevails".[110] That Court stated

[108] *Dawood* above n 22.

[109] Id at para 53.

[110] High Court judgment at para 81.

that the exchange control system may require a specific set of rules to be in place in specific circumstances.[111] These circumstances can change at any time, requiring an adaptation of the rules in place. It stated that it would be impossible to lay down rules or set out factors in advance, and held that regulation 10(1)(c) was valid. It found support in the dissertation of Dr Anthon de Swardt, which stressed the need for agility and speed in decision-making in order to respond to domestic and global currency trends and markets.[112]

[81] It would be difficult to find fault with the reasoning of the High Court. This is particularly so in light of the history and the purpose of the Act, and its exceptional design in protecting the national currency. It would be trying to strike a balance between providing guidelines while still ensuring that flexibility and speedy governance are maintained. The complexity of the exchange control system should not be understated. I am not persuaded that the broad discretion under section 9(1) and regulation 10(1)(c) offends *Dawood* or the Constitution.

[82] The cross-appeal must fail.

Order

[83] The following order is made:

1. Leave to appeal is granted against the decision of the Supreme Court of Appeal.
2. Leave to cross-appeal is granted in relation to whether section 9(1) of the Currency and Exchanges Act 9 of 1933, and regulation 10(1)(c) of the Exchange Control Regulations, are constitutionally valid.
3. Leave to cross-appeal against the decision of the Supreme Court of Appeal is otherwise refused.
4. The main appeal is upheld.

[111] Id at para 82.

[112] Id at paras 14-5.

5. The order of the Supreme Court of Appeal in paragraphs 2(i)-(iii) is set aside.
6. Mr Shuttleworth's application before the High Court is dismissed.
7. The cross-appeal is dismissed.
8. There is no order as to costs.

FRONEMAN J:

[84] I have had the pleasure of reading the judgment of Moseneke DCJ (main judgment). I agree that leave to appeal should be granted to the applicants (the Reserve Bank and the Minister) and that leave to cross-appeal should be granted to the first respondent (Mr Shuttleworth) in relation to the constitutional validity of section 9(1) of the Currency and Exchanges Act[113] (Exchanges Act) and regulation 10(1)(c) of the Exchange Control Regulations[114] (Regulations). There, unfortunately, our ways must part. The appeal should, in my view, be dismissed and the cross-appeal should succeed to the extent that section 9 of the Exchanges Act should be declared inconsistent with the Constitution and invalid.

[85] Briefly stated, my reasons for disagreement are these:

(a) The exit charge of 10% raised revenue for the national government.

(b) National revenue of whatever kind, tax or not, may only be raised by original legislation passed by Parliament. Only the manner of its implementation, not the decision to raise it, may be regulated in delegated legislation.

(c) Parliament may only delegate subordinate regulatory authority to the Executive and may not assign plenary legislative power to another body. The regulation-making power granted to the President in section 9(1) of

[113] 9 of 1933.

[114] GN 1111 *GG* 45, 1 December 1961.

the Exchanges Act effectively assigns plenary legislative power to the President. That is constitutionally impermissible.

(d) Even if national revenue could be validly raised by delegated legislation, the power to do so may not be further sub-delegated.

(e) If it was nevertheless possible to sub-delegate the power to raise national revenue, this power was not sub-delegated to the Minister in section 9(1) of the Exchanges Act.

(f) If there was, somehow, still a proper sub-delegation to the Minister, it could only be a sub-delegation of the same power, namely to legislate. In other words, the Minister could only impose the exit charge by way of legislation. He did not do so.

(g) For any of the reasons set out in (b) to (f), the Minister's imposition of the exit charge by announcement in Parliament was constitutionally invalid.

[86] Before dealing with each of these reasons more fully I need to state the fundamental concern underlying them all.

[87] At first glance Mr Shuttleworth's case hardly seems to fit with the more apparent transformational aspirations of the Constitution. He is a privileged person who has generated considerable wealth whilst living here. Having acquired that wealth he then chose to go and live elsewhere and attempted to take all of his money out of the country. So what, then, is wrong with asking him to leave a relatively small part of that behind in South Africa through the imposition of the exit charge?

[88] The answer is that there is nothing wrong with it, as long as it is done in accordance with the Constitution. Quite ironically, that is where Mr Shuttleworth's case meets with the transformation that the Constitution demands: the eradication of executive legislation by decree. The main judgment vividly describes the historical context that gave rise to the Exchanges Act and Regulations. However, in that

exposition, it is important not to lose sight of the less worthy aims the use of this method of regulation, namely executive legislation by decree, sought to achieve in our former legal landscape. One unfortunate example of this, described by this Court as probably the "most notorious",[115] was the provision in the Native Administration Act[116] that decreed the then Governor-General to be the "Supreme Chief" of all so-called "natives". In more recent painful memory were the emergency regulations promulgated in the 1980s that gave wide discretionary powers to the Executive to detain people without trial. Litigation about the validity of these regulations gave rise to a case that Professor Cora Hoexter describes as "representing the lowest point of our pre-democratic jurisprudence".[117]

[89] The Constitution, as discussed below, has set itself against this kind of executive rule by decree under the guise of delegated legislation. It requires plenary legislation to be passed by the Legislature, not the Executive. This ensures that the fundamental democratic values of accountability, responsiveness and openness are realised. That is part of the Constitution's transformative aim.

[90] The essential point of difference I have with the main judgment is that, in my view, only Parliament may decide to raise national revenue and may not leave that choice to the Executive, in this case the Minister. That is a protection that both Mr Shuttleworth and those less affluent than he are equally entitled to under the law.[118] The main judgment does not approach the matter from this perspective and thus does not consider this to be a transformational issue. From my perspective, however, it is. My general concern is that there should never be a reason for legislation by executive decree to be acceptable in one instance, but not in another.

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[115] *Ynuico Limited v Minister of Trade and Industry and Others* [1996] ZACC 12; 1996 (3) SA 989 (CC); 1996 (6) BCLR 798 (CC) (*Ynuico*) at para 7.

[116] 38 of 1927.

[117] Hoexter *Administrative Law* 2 ed (Juta & Co Ltd, Cape Town 2013) at 270 fn 110, referring to *Staatspresident v United Democratic Front* 1988 (4) SA 830 (A). See also Haysom and Plasket "The War Against Law: Judicial Activism and the Appellate Division" (1988) 4 *SAJHR* 303.

[118] Compare *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (1) BCLR 1014 (CC) at para 17.

The exit charge raised national revenue

[91] It is common cause that the 10% exit charge accrued to the national government and was paid into the National Revenue Fund.[119] The exit charge thus raised national revenue.

Only Parliament may decide to raise national revenue

[92] Much of the debate in argument centred on whether the exit charge amounted to a tax, levy, duty or surcharge for the purpose of qualifying as a money Bill in terms of section 77 of the Constitution. The underlying premise appeared to be that only taxes, levies, duties or surcharges were capable of raising national revenue for the government, and this could only be done by way of the money Bill procedure under section 77. The concomitant implication was that non-tax national revenue need not be legislated for by Parliament and may be raised by delegated legislation or even by a policy decision of the Minister, as the main judgment appears to find. But neither the unarticulated premise nor its apparent implication withstands scrutiny.[120]

[93] I know of no legal basis by which government may raise national revenue other than by legislation passed in Parliament. Money Bills may not deal with any other matter except a subordinate matter incidental to the appropriation of money or the imposition of taxes, levies, duties or surcharges.[121] However, there is no prohibition

[119] At [23] and Supreme Court of Appeal judgment at paras 31-3.

[120] The starting point of this judgment (i.e. that national revenue of whatever kind may only be raised by legislation) did not form the main focus of Mr Shuttleworth's attack. However, it is a point of law properly raised and causes the parties no material prejudice as it can be dealt with on the papers. In *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at para 68 this Court stated:

> "Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, *mero motu*, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality." (Footnote omitted.)

[121] Section 77 of the Constitution reads:

> "(1) A Bill is a money Bill if it—
>
> (a) appropriates money;

that regulatory legislation passed by Parliament may not include provisions raising revenue through the imposition of duties, levies, charges, registration fees or licences. There are many statutes that do that.[122] The money Bill procedure is thus only applicable to tax revenue raising legislation. Legislation that raises non-tax revenue need not follow that procedure. It does not follow that non-tax revenue may be raised by non-legislative means, thereby bypassing Parliament.

[94] The main judgment considers this departure point to be "overbroad". It does not, however, refer to any authority where the decision to raise non-tax revenue was not done in the enabling legislation itself. All of the South African cases to which it refers relate to legislation that authorised the raising of revenue of some kind.[123] The same applies to every one of the foreign cases to which reference is made.[124] And the

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(b) imposes national taxes, levies, duties or surcharges;

(c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or

(d) authorises direct charges against the National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

(2) A money Bill may not deal with any other matter except—

(a) a subordinate matter incidental to the appropriation of money;

(b) the imposition, abolition or reduction of national taxes, levies, duties or surcharges;

(c) the granting of exemption from national taxes, levies, duties or surcharges; or

(d) the authorisation of direct charges against the National Revenue Fund.

(3) All money Bills must be considered in accordance with the procedure established by section 75. An Act of Parliament must provide for a procedure to amend money Bills before Parliament."

[122] See, among others, sections 12, 13, 23 and 52 of the Companies Act 71 of 2008; section 10 of the Electricity Regulation Act 4 of 2006; section 5 of the Electronic Communications Act 36 of 2005; and section 34 of the South African Boxing Act 11 of 2001.

[123] Most recently, in *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC), this Court discussed the customs and excises imposed by the Customs and Excise Act 91 of 1964. *Permanent Estate and Finance Co Ltd v Johannesburg City Council* 1952 (4) SA 249 (W) dealt with an ordinance authorising the payment of an endowment. *Israelsohn v Commissioner for Inland Revenue* 1952 (3) SA 529 (A) involved a dispute about taxes imposed by the Income Tax Act 31 of 1941. *The Master v I L Back & Co Ltd and Others* 1983 (1) SA 986 (A) dealt with section 15(1)(g) of the Companies Act 61 of 1973, which allowed fees to be imposed. In *Maize Board v Epol (Pty) Ltd* [2008] ZAKZHC 99; 2009 (3) SA 110 (D), the Durban and Coast Local Division of the High Court dealt with the Marketing Act 59 of 1968, which allowed for the imposition of levies.

[124] *Westbank First Nation v British Columbia Hydro and Power Authority* [1999] 3 SCR 134 dealt with whether the indigenous Westbank First Nation could impose taxes in by-laws, and whether those by-laws were

"raft of pre- and post-Constitution legislation that routinely authorises the Executive to impose fees, tariffs, levies, duties, charges and surcharges"[125] all authorise the raising of the different kinds of revenue in the legislation itself and do not leave the making of that original decision to subordinate legislation.[126] A further example of

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constitutionally inapplicable to a provincial utility. In *Rodgers v United States* 138 F 2d 992 (6th Cir 1943), the Sixth Circuit Court of Appeals stated:

> "The section of the Act in question provides in substance that any farmer who markets cotton in excess of his farm quota shall be subject to penalties measured at a rate per pound."

A similar situation (i.e. a penalty imposed by legislation) was before the Seventh Circuit Court of Appeals in *United States v Stangland* 242 F 2d 843 (7th Cir 1957).

Under examination in *South Carolina ex rel. Tindal v Block* 717 F 2d 874 (4th Cir 1983) was a congressional amendment to the Agriculture Act of 1949 which allowed the Secretary of the United States Department of Agriculture a discretion to deduct 50 cents from the proceeds of commercial milk sales. In *Emerson College v Boston* 391 Mass 415 (1983) the city of Boston was authorised to impose a charge for fire protection in terms of section 30 of chapter 190 of the Massachusetts General Laws (1982).

More recently, in *National Federation of Independent Businesses v Sebelius* 132 S Ct 2566 (2012), the Supreme Court of the United States of America considered a "shared responsibility payment" imposed by the Patient Protection and Affordable Care Act of 2010 (commonly known as *ObamaCare*).

In *Lawson v Interior Tree Fruit and Vegetable Committee of Direction* [1931] SCR 357 the Supreme Court of Canada considered a legislative provision which authorised a Committee of Direction to impose levies on products for the purpose of defraying operation expenses (section 10(k) of the Produce Marketing Act of British Columbia (1926-27)).

Closer to home, in *Nyambirai v National Social Security and Another* 1996 (1) SA 636 (ZS); 1995 (9) BCLR 1221 (ZS) the Supreme Court of Zimbabwe considered a constitutional validity challenge to the imposition of a pension fund contribution by legislation.

[125] At [46].

[126] The purpose of the Municipality Fiscal Powers and Functions Act 12 of 2007 referred to in the main judgment is "[t]o regulate the exercise by municipalities of their power to impose surcharges on fees for services provided under section 229(1)(a) of the Constitution; to provide for the authorisation of taxes, levies and duties that municipalities may impose under section 229(1)(b) of the Constitution; and to provide for matters connected therewith". Clearly the power to impose these charges is derived from the Constitution itself, and this Act merely serves to regulate the exercise of that power.

The Diamond Export Levy Act 15 of 2007 does not grant a power to impose a levy but, rather, imposes the levy itself under section 2. Section 3 then sets out the rate of the levy (which is used in the calculation of the levy imposed in each case according to the formula set out in section 2). Similarly, section 3 of the Skills Development Levies Act 9 of 1999 imposes a levy on employers. There is no power conferred on a functionary. Section 2(1) of the Estate Duty Act 45 of 1955 imposes the estate duty, and the manner in which such duty is to be calculated is dealt with in section 4A of that Act.

The purpose of the Customs and Excise Act is "[t]o provide for the levying of customs and excise duties and a surcharge; for a fuel levy, for a Road Accident Fund levy, for an air passenger tax and an environmental levy; the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto". Again we see the Act authorising the imposition of the levy by the Commissioner (in section 2(1), where the Commissioner is tasked with the administration of the Act).

Lastly, section 2(1) of the Transfer Duty Act 40 of 1949 imposes a levy on the transfer of property over a certain value. Here, again, the levy is imposed by the Act itself. Interestingly, however, section 2(2) provides:

> "The Minister of Finance may announce that, with effect from a date mentioned in that announcement—

the clear distinction made between the decision to authorise the raising of non-tax revenue in the original legislation and the imposition of other conditions is the section that formed the subject-matter for the decision of this Court in *Affordable Medicines*.[127]

[95] So perhaps there is a simpler explanation than over-broadness for the principle that the decision to raise revenue of whatever kind, tax or not, may only be done in original legislation passed by Parliament. Judging from past practice, the principle appears to have been regarded as obvious.

[96] In *Fedsure* this Court stated that when a legislature exercises the power to raise taxes or rates, "it is exercising a power that under our Constitution is a power peculiar to elected legislative bodies".[128] The *Fedsure* statement should, however, be wider: namely that all revenue raised for the State must be done under a power "peculiar to elected bodies".

(a) the rate of transfer duty contemplated in subsection (1) will be reduced to the extent mentioned in the announcement; or

(b) there will be a change in the provision of this Act that will have the effect that the acquisition of or the renunciation of any interest in or restriction upon a certain class of property will no longer be subject to transfer duty."

The Act therefore provides for changes to take effect by an announcement by the Minister; however, this is restricted to reductions in the levy, and does not include the actual imposition thereof (which is authorised by the Act) or an increase.

What is lacking in the current case, in particular in regulation 10(1)(c), is the direct imposition of the exit charge (such as we see in the Diamond Levy Export Act, for example) or the explicit authority to impose the charge (such as in section 229 of the Constitution, read with the Municipality Fiscal Powers and Functions Act).

[127] *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*). Section 22C(1)(a) of the Medicines and Related Substances Act 101 of 1965, at issue in that case, reads:

"Subject to the provisions of this section—

(a) the Director-General may on application in the prescribed manner and on payment of the prescribed fee issue to a medical practitioner, dentist, nurse or other person registered under the Health Professions Act, 1974, a licence to compound and dispense medicines, on the prescribed conditions".

[128] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) (*Fedsure*) at para 45.

[97] *Fedsure* was not concerned with what is at issue here, namely whether the exit charge amounts to taxation, but there are sound reasons for holding that whenever revenue is raised for the State, be it a tax or not, it should be done by the Legislature. In the case of national revenue, this means that it must be done by Parliament.

[98] The first reason is that the Constitution requires that all money received by the national government must be paid into the National Revenue Fund, except money reasonably excluded by an Act of Parliament.[129] No distinction is made between revenue raised as a tax and revenue that does not amount to taxation. And, as we have seen, the money Bill procedure does not preclude the raising of other revenue by regulatory parliamentary legislation.

[99] The second is that the principle of "no taxation without representation" is not premised on a technical legal meaning of "taxation". The rationale for the principle is accountability to the people when the government seeks to exact money from them to raise income or revenue for the State. It matters little to citizens whether the money the State takes from them is technically a "tax" or "duty" or "exit charge". What does matter is that they should have their democratic say, through elected representatives in Parliament, in approving the decision to raise revenue that will accrue to the State in an open, transparent and accountable way. The eloquent words in paragraph 42 of the main judgment are as applicable to raising non-tax revenue as they are to tax revenue. We are talking about an estimated R2.9 billion raised as revenue for the State by the exit charge. And if it is accepted that this charge of 10% was constitutionally valid, that implies that it would also have been valid if it was double, treble or even more than that, all without parliamentary accountability. That cannot be.

[100] If the main judgment is correct that section 9(4) of the Exchanges Act does not authorise the raising of non-tax revenue, then the Act contains no authorisation at all

[129] Section 213(1).

to do so.[130] Without that authorisation, there is no constitutionally valid basis for raising the revenue through subordinate legislation made by the Executive.

[101] If, however, section 9(4) does authorise raising non-tax revenue, its provisions were not complied with and the appeal must fail for that reason. The main judgment finds that the procedure envisaged in the section cannot co-exist with the money Bill procedure in the Constitution.[131] I do not agree. Regulatory legislation that authorises the raising of non-tax revenue does not fit the strictures of a pure money Bill. It is salutary and necessary for the purposes of accountability and open and responsive government that our democratically elected representatives should know to what extent money is to be taken from the people who voted for them. The main judgment may make similar provisions in other existing laws constitutionally invalid.

Subordinate regulatory authority or plenary legislative power?

[102] The Constitution vests national legislative authority in Parliament.[132] The National Assembly may assign any of its legislative powers, except the power to amend the Constitution, to any other legislative body in another sphere of government.[133] The Minister is part of the executive arm of government.

[130] Section 9(4) of the Exchanges Act reads:

> "The Minister of Finance shall cause a copy of every regulation made under this section to be laid upon the Table of both Houses of Parliament within fourteen days after the first publication thereof in the *Gazette*, if Parliament is in ordinary session during the whole of that period, and if Parliament is not in ordinary session during the whole of that period, then within fourteen days after the beginning of the next ordinary session of Parliament; and if any such regulation is calculated to raise any revenue, he shall cause to be attached to the copy so laid upon the Table a statement of the revenue which he estimates will be raised thereby during the period of twelve months after the coming into operation thereof. Every such regulation calculated to raise any revenue shall cease to have the force of law from a date one month after it has been laid on the Table unless before that date it has been approved by resolution of both Houses of Parliament."

[131] At [62].

[132] Sections 43 and 44. Parliament is comprised of the National Assembly and the National Council of Provinces.

[133] Section 44(1)(a)(iii) of the Constitution.

[103] In *Ynuico* an argument was raised that these constitutional provisions precluded the delegation of legislative powers to the Executive, but the argument was not accepted because the location and source of the exercise of the legislative power in that case was delegated and exercised before the Constitution came into the picture. *Ynuico* left open the issue of what the case would be when the power was delegated before the Constitution came into power "but wielded later than that date".[134] That is the kind of situation now before us.

[104] In respect of the relevant statutory provision before the Court in *Ynuico*, Didcott J commented:

> "Section 2(1)(b) and the ensuing notice were products of an era when the reign of Parliament was subject substantively to no constitutional discipline or control. In exercising the sovereignty which it thus enjoyed Parliament could competently confer on a Minister or somebody else whatever legislative powers it chose to assign to him, including plenary ones, and it did so not infrequently. Of the instances that spring to mind the most notorious was probably the occasion when the Native Administration Act 38 of 1927 appointed the Governor-General as the 'Supreme Chief' of those whom it called 'natives' and equipped him with a power to legislate for them which was virtually absolute. That provision has become a dead letter by now and will no doubt be removed from the statute book in due course. Still active there, however, are plenty of others less anachronistic which authorised the delegation of legislative power in terms quite as broad as and no less consequential than the ones of section 2(1)(b)."[135]

[105] In *Executive Council, Western Cape Legislature*[136] this Court (per Chaskalson P) held that Parliament may delegate subordinate regulatory authority to other bodies:

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[134] *Ynuico* above n 115 at para 5.

[135] Id at para 7.

[136] *Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) (*Executive Council, Western Cape Legislature*).

> "In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. *There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body*".[137] (Emphasis added.)

[106] Section 9(1) of the Exchanges Act provides:

> "The [President] may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchanges."

[107] The rest of section 9 extends the President's powers. In terms of section 9(2)(a), regulations may provide the President with the power to "apply any sanctions . . . which he thinks fit to impose, whether civil or criminal". In plain language, that means that the President may, within his discretion, create law which may include civil penalties and criminal offences.

[108] In terms of section 9(3) the President may by regulation—

> "suspend in whole or in part this Act or any other Act of Parliament or any other law relating to or affecting or having any bearing upon currency, banking or exchanges, and any such Act or law which is in conflict or inconsistent with any such regulation shall be deemed to be suspended in so far as it is in conflict or inconsistent with any such regulation".

[137] Id at para 51.

Simply put, that means that the President may make regulations that suspend not only the Exchanges Act itself, but any other law that has anything to do with currency, banking or exchanges.

[109] If section 9(4) meant that the President's powers to make regulations that raised any revenue were subject to parliamentary oversight, it might have allowed for an argument that his power to do so was regulatory, not plenary. But the main judgment finds that this section applies only to revenue raised as a tax. Revenue raised otherwise is thus not subject to parliamentary oversight. The effect of this is that it may be raised without any national legislative framework as its guide. It amounts to the assignment of a plenary legislative power to raise national revenue as long as the revenue raised does not amount to taxation.

[110] The Regulations may, in terms of section 9(5)(a), provide powers to other persons "to make orders and rules" for any of the purposes for which the President may make regulations under section 9(1). Section 9(6) sets out the National Treasury's powers to deal with foreign currency applications by way of electronic devices or documents and has no bearing on the President's power to make regulations under section 9(1).

[111] It is difficult to conceive of a more comprehensive divesting of legislative power from Parliament to the Executive than what is contained in section 9 of the Exchanges Act.[138] Take it away and what remains of the Exchanges Act is a hollow shell. If the interpretation given to section 9(4) in the main judgment is accepted, it means that the President may, except for raising taxes, in his discretion legislate by

[138] A comparable example is section 3(1) of Public Safety Act 3 of 1953, now mercifully repealed:

> "The Governor-General may in any area in which the existence of a state of emergency has been declared under section *two*, and for as long as the proclamation declaring the existence of such emergency remains in force, by proclamation in the *Gazette*, make such regulations as appear to him to be necessary or expedient for providing for the safety of the public, or the maintenance of public order and for making adequate provision for terminating such emergency or for dealing with any circumstances which in his opinion have arisen or are likely to arise as a result of such emergency."

Do we really want to countenance this kind of executive rule by decree again?

way of regulation about anything relating to currency, banking or exchanges without constraint. That amounts to assigning plenary legislative power to him. The Constitution does not allow that, no matter how important the regulation of international finance may be.[139]

[112] It is clear that the Exchanges Act provides no substantive framework within which the President must exercise these extraordinary powers. The only substantive provision in the Act, apart from section 9, is section 2: it deals with the repayment of contractual loans by payment in South Africa's legal tender.

[113] The main judgment refers to a general statement in *Dawood* that not all wide legislative discretion is inconsistent with the constitutional norm and invalid.[140] It must be remembered, however, that this general statement did not save the relevant legislation from constitutional invalidity in *Dawood*. Of particular relevance here is this paragraph:

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[139] At [68] to [71] the main judgment carves out the delegation in issue here on the basis of the exceptional nature of the power vested in the President to regulate the export of currency and the need to protect the economy. In this context, the legislative framework in which the Reserve Bank was created and operates is relevant. Section 223 of the Constitution provides that the central bank of South Africa is the Reserve Bank and that it will be governed by an Act of Parliament. Section 225 then provides:

> "The powers and functions of the [Reserve Bank] are those customarily exercised and performed by central banks, which powers and functions must be determined by an Act of Parliament and must be exercised or performed subject to the conditions prescribed in terms of that Act."

The Act of Parliament envisioned in these sections is the South African Reserve Bank Act 90 of 1989. The long title provides that the purpose of the Act is to consolidate all laws relating to the Reserve Bank and the monetary system of South Africa. Section 3 of the Act sets out its primary objective:

> "The primary objective of the [Reserve] Bank shall be to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic."

What is evident in this exposition is that although the Constitution explicitly recognises the importance of protecting the value of the currency, in order to fulfil its crucial function in the South African economy, the Reserve Bank must exercise its powers in terms of an Act of Parliament. Therefore, if there is a policy decision to be made in this case, it is one that ought to be made at the level of the Reserve Bank (to whom this duty of protection was entrusted in the Constitution) and in terms of empowering legislation. Therefore, a carve-out in respect of the Executive does not assist the applicants. A policy decision of the sort envisioned in the main judgment must still be authorised in an Act of Parliament.

[140] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 53, referred to at [71] and [79].

> "We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. *Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.*"[141] (Emphasis added.)

And earlier:

> "The foregoing discussion assists in determining the interpretation of the relevant provisions that would best 'promote the spirit, purport and objects of the Bill of Rights'. In the case of the statutory discretion at hand, there is no provision in the text providing guidance as to the circumstances relevant to a refusal to grant or extend a temporary permit. I am satisfied that, in the absence of such provisions, it would not promote the spirit, purport and objects of the Bill of Rights for this Court to try to identify the circumstances in which the refusal of a temporary permit to a foreign spouse would be justifiable. *Nor can we hold in the present case that it is enough to leave it to an official to determine when it will be justifiable to limit the right in the democratic society contemplated by section 36. Such an interpretation, of which there is no suggestion in the Act, would place an improperly onerous burden on officials, which in the constitutional scheme should properly be borne by a competent legislative authority. Its effect is almost inevitably that constitutional rights . . . will be unjustifiably limited in some cases.*"[142] (Emphasis added.)

[114] In these statements by this Court, lies a complete answer to the exceptionalism claimed for the legality of the executive power to legislate without legal constraint by

[141] *Dawood* id at para 54.

[142] Id at para 50.

way of regulations under section 9(1). This applies even more strongly for sub-delegating the power to the Minister to exercise it by way of policy.

In any event, no sub-delegation

[115] If it is assumed, for the purposes of this part of the judgment, that section 9(1) of the Exchanges Act allows the President to decide by way of subordinate legislation that revenue should be paid into state coffers,[143] one then has to find something in the Act, not the Regulations, that gives the Minister the power to do the same. There is nothing.

[116] There is a common law presumption against sub-delegation, expressed in the Latin maxim *delegatus delegare non potest*.[144] This maxim is based on the assumption that where the Legislature has delegated powers and functions to a subordinate authority, it intended *that* authority to exercise those powers and functions, not someone else.[145] That presumption is strengthened where "[p]owers that have far-reaching consequences" like "lawmaking or 'legislative'" powers are at stake.[146] To make legislation that would normally fall within the domain of Parliament is certainly far-reaching.

[117] There is nothing in the Exchanges Act that authorises sub-delegation of the President's powers under section 9(1) to make legislation by way of regulations. The closest it comes to this is in section 9(5)(a), which provides that—

[143] It is common cause that the proceeds of the exit charge had to be paid into the National Revenue Fund as "money received by the national government" under section 213(1) of the Constitution.

[144] Literally translated, this means that a delegate cannot delegate.

[145] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) (judgment of Langa CJ) at para 81; *Minister of Home Affairs and Others v Watchenuka and Another* [2003] ZASCA 142; 2004 (4) SA 326 (SCA) at para 34; *Rudolph and Another v Commissioner for Inland Revenue and Others* [1997] ZASCA 23; 1997 (4) SA 391 (SCA) at 396B; *Chairman, Board on Tariffs and Trade, and Others v Teltron (Pty) Ltd* [1996] ZASCA 142; 1997 (2) SA 25 (A) at 34E-F; and *Attorney-General, O.F.S. v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639C-D.

[146] Hoexter above n 117 at 270 fns 108-13, in particular the cases cited therein.

> "[a]ny regulations made under this section may provide for the empowering of such persons as may be specified therein to make orders and rules for any of the purposes for which the [President] is by this section authorized to make regulations."

[118] Whatever "orders and rules" may entail, they can only be subordinate to the already subordinate legislative powers granted to the President in terms of section 9(1). The power to make orders and rules is in addition to and is circumscribed under the power to make regulations. They cannot be in substitution of or as an alternative to the President's powers under that section.

[119] The applicants did not rely on any provision of the Exchanges Act in support of the Minister's sub-delegated power to legislate for the exit charge. For that they relied on the Regulations made under the authority of section 9(1) of the Act, more particularly regulation 10(1)(c):

> "No person shall, except with permission granted by the Treasury . . . and in accordance with such conditions as the Treasury . . . may impose—
>
> . . .
>
> (c) enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic."

[120] But jumping to the regulation itself begs the question whether the Exchanges Act authorises the sub-delegation of the kind of legislative powers granted to the President under section 9(1) to the Minister. Before even getting to the question whether revenue-generating powers may be granted by a subordinate delegation in the form of imposing "such conditions as the Treasury may impose", one must ask whether the sub-delegation is authorised by the provisions of the Act. And, as we have seen, it is not.

Sub-delegation of legislative power into non-legislative power?

[121] Finally, on the assumption that the President's legislative power under section 9(1) could be validly sub-delegated to the Minister, did the Minister exercise

that legislative power properly? The answer, again, is no. The Minister exercised no legislative power and, on the authority of *Dawood*, that is the only kind of power that he could legitimately have exercised.[147]

[122] Legislation must be contained in a legislative instrument that must be promulgated before the law commences its operation.[148] No legal instrument containing the details of the exit charge was ever promulgated or gazetted.

Raising revenue by policy determination?

[123] The main judgment finds that the Minister's decision took the form of a narrow policy formulation directed at implementing legislation and was, unlike a broad or political policy formulation, subject to administrative review.[149] It should be obvious that I do not agree that revenue may be raised by way of policy formulation, wide or narrow. And if it was policy, it was rigid, which makes it susceptible to review for fettering discretion.[150]

Conclusion

[124] For these reasons I would dismiss the appeal with costs and grant the cross-appeal declaring section 9 of the Exchanges Act constitutionally invalid, with costs, including the costs of two counsel.

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[147] See [113] and [114].

[148] See section 13(1) of the Interpretation Act 33 of 1957 and *Foodcorp (Pty) Ltd v Deputy Director General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others* [2004] ZASCA 100; 2006 (2) SA 191 (SCA) at para 9.

[149] At [35].

[150] *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC) at paras 54-6 and *National Lotteries Board and Others v South African Education and Environment Project* [2011] ZASCA 154; 2012 (4) SA 504 (SCA) at para 9.

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