IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

CASE NO. 30709/2010

DELETE WHICHEVER IS NOT APPLICABLE

1 REPORTABLE YES / ~~NO~~
2 OF IMPORTANCE TO OTHER JUDGES YES/~~NO~~
3 REVISED

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DATE SIGNATURE

18/7/2013

In the matter between:

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

JUDGMENT

Heard on: 10-12 June 2013

Judgment handed down: 18 July 2013

LEGODI J

[1] The decisions of the first respondent namely, the South African Reserve Bank taken on the 13 October 2009 and 1 December 2009 to impose 10%

[1] The decisions of the first respondent namely, the South African Reserve Bank taken on the 13 October 2009 and 1 December 2009 to impose 10% levy on the applicant's last remaining blocked loan account assets to the value of amount of R2 504 748 935 became the subject of a dispute before me. The total amount of the 10% levy was calculated by the first respondent as R250 474 893.50.

[2] The applicant, a South African who in 2001 emigrated from South Africa to England (British Isles), submitted an application on the 29 August 2009 to the first respondent through Standard Bank of South Africa to take his remaining blocked loan assets out of the Republic of South Africa.

[3] It was not the first time that the applicant had to pay 10% levy for wanting to take his assets out of the Republic of South Africa. However, in 2009 he paid the sum of R250 474 893.50 out of protest, the applicant having been advised that the levy of 10% exit on his blocked assets was unlawful and unconstitutional.

[4] Because of a rule to submit an application to transfer blocked assets out of the Republic of South Africa via authorized dealers, mainly banks, the applicant submitted his application via Standard Bank of South Africa. When he did so, he also instructed Standard Bank to place before the first respondent a document that he had prepared containing certain representations regarding his application.

5. Standard Bank of South Africa however, omitted to place before the first respondent's written representations prepared by the applicant. On the 13 October 2009, the first respondent having approved the application to transfer out of South Africa the remaining applicant's blocked assets it further imposed a 10% levy as indicated in paragraph 1 above.

[6] When the applicant discovered that his representations were not laid before the first respondent, he instructed the Standard Bank South Africa Ltd to place them before the first respondent and to ask the first respondent to reconsider its decision regarding the imposition of 10% levy. The first respondent having considered the representations, it reaffirmed its earlier decision taken on the 13 October 2009. In other words, it refused to uplift the 10% levy in the sum of R250 474 893.50. This second decision was apparently conveyed to the applicant on the 1 December 2009.

[7] Subsequent thereto, the applicant requested the reasons for the decision to impose the 10% levy. The first respondent amongst others responded to the request by stating that according to the Minister's budget speech of the 26 February 2009 emigrant's blocked assets were to be unwound and also that 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 South African Reserve Bank to do so. Approval will be subject to the exiting schedule and an exit charge of 10 per cent of the amount.

[8] The first respondent in its letter of the 8 February 2010 indicated that for its decision of the 13 October 2009 and refusal to review it, it was relying on the Minister's decision and public announcement of the 26 February 2003 and that the applicant's application was dealt with in accordance with the Minister's decision as embodied in Circular No.380 of 26 February 2003.

[9] At the risk of repeating myself, the public announcement read as follows:

"Emigrant blocked assets are to be unwounded. Amounts up to R750 000 (inclusive of amounts already exited) will be eligible for exiting without change. 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 South African Reserve Bank to do so. Approval will be subject to an existing schedule and an exit charge of 10 per cent of the amount".

[10] Based on all of the above, and in particular the decisions to impose the 10% levy on his remaining 'blocked loan account assets,' as it is referred to, the applicant instituted the present proceedings during 2010 in terms of which a relief is sought as follows:

"*1.* *Reviewing and setting aside the decisions of the first respondent taken on or about 16 October 2009 and 1 December 2009 to impose a 10% levy payment into the first respondent's Blocked Rand Levy Account as a condition on the applicant's transfer of his remaining blocked assets out of the Republic,*

1A *Substituting the decisions of the first respondent on or about 16 October 2009 and 1 December 2009 with an unconditional decision to authorize the applicant to transfer 90% of his remaining blocked assets out of the Republic.*

1B *Directing the first respondent, alternatively the second respondent to repay the applicant the amount of R250, 474,893.50.*

1C *Directing the first respondent, alternatively the second respondent to pay the applicant interest on the amount of R250, 474, 893.50 at the prescribed rate from date of demand to date of payment.*

1D *To the extent necessary, condoning the applicant's failure to have served a notice on the respondents in terms of section 3(2)(a) of the Legal Proceedings against Certain Organs of State Act 40 of 2002.*

2. *Declaring that the words "and an exit charge of 10% of the amount" in*

2.1 *Exchange Control Circular No D.375 of 26 February 2003,*

2.2 *Exchange Control Circular No D.380 of 26 February 2003,*

and

2.3 *Section B.2€(iii)€ of the Exchange Control Rulings were at all material times inconsistent with the Constitution and invalid.*

3. *Declaring that section 9 of the Currency and Exchanges Act 9 of 1933 ("the Act") is inconsistent with the Constitution and invalid.*

4. *In the alternative to prayer 3 above,*

4.1 *declaring that paragraphs (a), (c) and (f) of subsection (2) of section 9 of the Act are inconsistent with the Constitution and invalid,*

4.2 *declaring that subsection (3) of section 9 of the Act is inconsistent with the Constitution and invalid, and*

4.3 *declaring that subsection (5) of section 9 of the Act is inconsistent with the Constitution and invalid.*

5. *Declaring that the Exchange Control Regulations are inconsistent with the Constitution and invalid.*

6. *In the alternative to prayer 5 above,*

6.1 *declaring that paragraph (a) to (c) of Regulation 3(1) of the Exchange Control Regulations are inconsistent with the Constitution and invalid,*

6.2 *declaring that Regulation 3(3) of the Exchange Control Regulations is inconsistent with the Constitution and invalid,*

6.3 *declaring that the words "(3) or" in Regulation 3(5) of the Exchange Control Regulations are inconsistent with the Constitution and invalid,*

6.4 declaring that Regulation 10(1)(b) of the Exchange Control Regulations is inconsistent with the Constitution and invalid,

6.5 declaring that Regulation 18 of the Exchange Control Regulations is inconsistent with the Constitution and invalid,

6.6 declaring that Regulation 19(1) of the Exchange Control Regulations is inconsistent with the Constitution and invalid,

6.7 declaring that the words "unless he proves that he did not know, and could not by the exercise of a reasonable degree of care have ascertained that the statement was incorrect" in Regulation 22 of the Exchange Control Regulations and the omission in that regulation of the words "intentionally or negligently" immediately after the words "every person who" are inconsistent with the Constitution and invalid.

7. Declaring that the Orders and Rules under the Exchange and Control Regulations are inconsistent with the Constitution and invalid,

8. In the alternative to prayer y above, declaring that Order and Rule (10)(a) of the Orders and Rules under the Exchange Control Regulations is inconsistent with the Constitution and invalid.

9. Declaring that the policy of the first respondent of refusing to deal directly with members of the public in relation to the exercise of its delegated powers under the Exchange Control Regulations and insisting that members of the public communicate with it through the intermediation of authorized dealer banks, is inconsistent with the Constitution and invalid."

[11] The issues to be determined in this case were at the commencement of the hearing, identified by counsel on behalf of the applicant as follows:

11.1 Was the decision to impose a 10% levy on the applicant a lawful decision?

11.2 Is the system of Exchange Control constitutionally compliant?

11.3 Are the respondents obliged to repay the applicant the levy amount including interest?

11.4 Is the appropriate remedy for the unconstitutionality of section 9 of the Act and the Regulations immediate striking down or an order of suspension?

11.5 Is what is referred to as a 'CLOSED DOOR POLICY' procedurally right and fair?

[12] All parties seemed to have agreed that what were identified as above, were the main issues to be determined in these proceedings, although not limited thereto. The first respondent in his answering affidavit raised another issue that was not pursued strongly by his counsel. The issue can be categorized in the form of a question as follows:

"Are the present proceedings academic or moot seen in the light of the decision by the Minister to do away with the 10% levy on the blocked assets or funds?"

FOREWORD ON MERITS AND HISTORICAL BACKGROUND TO EXCHANGE CONTROL SYSTEM

[13] The Act and its Regulations which have survived decades of years is the subject of the constitutional challenge before me. The Act was assented to on the 7 March1933. The Act is called Currency and Exchanges Act no. 9 of 1933 (hereinafter referred to as the Act). It has its original as the Principal Act from the Currency and Banking act no. 31 of 1920, which was amended by the Currency and Banking Act no. 22 of 1923 and amended by Further Amendment Act no. 26 of 1930.

[14] The Act was introduced to amend the South African law relating to legal tenders, currency, exchange and banking. It also deals with the system of exchange control. It is said that other people are wrongly of the view that the system of Exchange Control had its origin from the aftermath of the Sharpeville Massacre in 1961. However, Dr Anthon de Swardt in his dissertation dealing with the historical background expressed himself as follows:

"Since 1939 the legislation has followed the approach that the legislations forming the basis of the exchange control system must be of such a nature that it can be amended quickly and easily. As a result thereof, and in imitation of the United Kingdom, a principal Act has been used as well as regulations that have been issued in terms thereof. The principle that was therefore applied and is still applied in South Africa, is to make provision in a principal Act for authorization that is granted to a specific person to issue regulations. The effect hereof is that the regulations can be issued during the course of the years while the Parliament is not in ordinary session"

[15] Assuming that Dr de Swardt is correct, his statement should therefore set the scene for the approach in dealing with the system of exchange control and the subject of the dispute before me. For this reason, I want to believe that the deponent to the first respondent's answering affidavit takes it a step further as articulated in paragraphs 12, 13, 14, 15 and 16 of the answering affidavit. They read as follows:

"*12. The exchange control system is designed in such a way as to be flexible in order to deal expeditiously with the often fast-changing exigencies of the international monetary system. The legislative component does not contain any substantive rules regarding exchange control, but rather contains an empowering provision authorizing an official to issue regulations which contain the applicable substantive rules relating to exchange control from time to time.*

13. The ability of the system to react quickly and without delay to changes in the International monetary system, which is achieved via the above structure of empowering an official to issue regulations, has been the central feature of the system in South Africa, since its inception in 1933. This feature is of the essence of the system and is key to its effective functioning.

14. *The nature of the factors which exchange control is intended to govern, and as a matter of national importance, must succeed in governing as such that swift action is absolutely necessary regardless of whether parliament is in session or not. The very stability and sustainability of the financial system and economy of the Republic may be, and indeed has often in the past been, at stake. Only swift imposition of appropriate and of necessity ad hoc, exchange control rules can adequately cater for and deal with this risk, ensuring maximum stability and protection for the South African economy. This flexibility, and ability to change the applicable exchange control regime very quickly, are necessary in this particular sphere. I submit that this constitutes an important means whereby our country can adequately safeguard itself, its economy and the public against the vicissitudes of the dynamic world market.*

15. *The exchange control system is often misunderstood as having its origins in the Sharpeville crisis of 1961. De Swardt, op cit, notes that "it is conspicuous that writers often remark erroneously that exchange control has been applied since 1961, or sometimes since another incorrect date" when in fact it had been applied since 1933. This is not to say that the Sharpeville crisis did not play an important part in the formation of the Regulations.*

16. *The exchange control system, requiring, as it does, a flexible, speedy and expert approach to these matters is in my respectful submission a sui generic area of financial governance. The current legislative and administrative structure is well-suited to the requirements of the current South African economy. Indeed, it is widely acknowledged that the current system of exchange controls played a significant role in shielding our economy from the full effects of the recent global financial crisis".*

[16] Living up to what is stated above, the first respondent established what is referred to as, The Financial Surveillance Department in pursuance of protecting the value of the Rand in the interest of a balanced and sustainable economic growth in South Africa. The Financial Survillance department replaced the Exchange Control Department.

[17] The Financial Surveillance Department within the Reserve Bank is meant to regulate the inflow and outflow of capital in terms of the power granted to it. The Financial Surveillance Department serves to:

17.1 ensure the effective functioning of the exchange control system, thereby preventing the unauthorized outflow of capital from South Africa and ensuring that all foreign currency accruals are repatriated,

17.2 provide a reliable statistical framework of information to both policy makers and clients, and

17.3 create an understanding of the functions and goods of the exchange control.

[18] The Financial Surveillance Department is responsible for the day to day administration of exchange control in South Africa, including the investigation into alleged contraventions of such Regulations. It monitors changes to exchange control policy norms. It discusses these control policies and norms, conveys and communicates them to various stake holders. It holds regular meetings with representatives of the banks or authorized dealers where issues of common interest are discussed.

[19] Within the Financial Surveillance Department there is Investigatory Division which investigates alleged contraventions of the exchange control to recoup capital expense of the country's foreign currency reserves. It also assists in the prosecution of offenders.

[20] The authorized dealers are banks appointed by the Minister of Finance. These banks act as authorized dealers in foreign exchange which gives

the right to buy and sell foreign exchanges, subject to conditions and within the limits applied by the Exchange Control Department. The Exchange Control Department is or was a division within the first respondent (the Reserve Bank).

[21] The purpose of the exchange control is characterized as follows:

21.1 to ensure the repatriation into the South African banking system of all foreign currency acquired by residents of South Africa, whether through transactions of a current or capital nature,

21.2 to prevent the loss of such foreign currency resources through the transfer abroad of real or financial capital assets held in South Africa within the receipt of a commensurate consideration for the transfer of such assets, and

21.3 to control and monitor in an effective manner the movement into and out of South Africa of financial and real assets/money and or goods while at the same time not interfering unduly with the efficient operation of the commercial industrial financial systems of the country.

[22] The first comprehensive exchange control restrictions in South Africa were introduced under the Act, just before the advent of the Second World War. The events subsequent to the Sharpeville massacre are said to have put foreign currency reserves of South Africa in a very unhealthy peak. The domestic instability in the country is said to have caused non-residents to start selling their South African shares on the Stock Exchange when disinvestments without restrictions were the order of the day. This is said

to have remitted the proceeds abroad in foreign currency at the cost of this country as reserved and by May 1961 it became clear that further drastic steps had to be taken to avoid the total down fall of the South African economy.

[23] As a result, the Exchange Control Department in 1961 implemented several further circumstances of exchange facilities and most importantly the restrictions on governing securities. These prohibited the transfer from South Africa of the local sale proceeds of non-resident owned securities. The restriction is said to have given birth to the concept of the Blocked Rands which is to be distinct from the emigrants' blocked funds.

[24] Over the years, the 1961 restrictions are said to have been applied until flexibility and amended to meet the demands of the time as circumstances required. In 1976 transfer procedure out of the country is said to have been substantially simplified. For example, non-residents owned security became held by the banks in South Africa were made transferable amongst non-residents. In or about 1979, the Exchange Control Department is said to have been prepared to entertain request of non-residents for permission to utilize the Financial Rand for the purpose of taking up shares in connection with establishing new companies and purchasing shares in existing companies in the Rand Monetary Area (now known as Common Monetary Area). In 1983 the Financial Rand was abolished and in 1985 it was reintroduced. Domestic instability was at its highest level. Those were the difficult times. On the other hand sanctions took its height. It became necessary therefore to take a swift action.

Severe restrictions were imposed on the remittance of any income to emigrants.

[25] With the advent of the new South Africa that saw the ending of the sanctions, the so called Financial Rand system was abolished as from 13 March 1995. The same month, the control over the movement of capital owned by non-residents was repealed. Exchange Control on capital account transactions of residents was however retained.

[26] On a gradual approach post 1994, the Minister of Finance moved towards elimination of exchange controls to suit the prevailing economic conditions of the country. It became necessary to have a gradual process of liberalization of exchange control rules bearing in mind the accepted complexities and pitfalls inherent in capital account. The sequencing for liberalization of exchange control was categorized in six stages, the last one being to release emigrants blocked funds. These related to capital funds and or assets of an emigrant to which restrictions have been applied in that the funds were not transferrable from South Africa and were physically controlled by authorized dealers. This was in 2002 when it was announced.

[27] Subsequent thereto, during the 2003 Budget Speech, the Minister of Finance announced that emigrants wishing to export more than R750 000 would apply to the Exchange Control Department to do so, subject to the submission of an exiting schedule and subject to payment of a charge equal to 10% of the amount sought to be exported. The 10% levy was

applied in respect of the applicant and this appears to have prompted the present proceedings. Counsel for the applicant in his Notes for Argument introduces the issue as follows:

"1.4 It is important to stress at the outset that this case is not an attack on the idea of exchange control. Mr Shuttleworth accepts that exchange control serves a valid public purpose and that a system of exchange control could be validly put in place under our constitutional scheme. His challenge is to the existing system of exchange control which is contrary to the principles of our constitutional scheme."

27.1 I cannot agree more with the first and second parts of the quotation and this could be the theme in dealing with the issues identified herein. But, before that, let me just deal with some few aspects of the guidelines of the exchange control system. The Minister of Finance issues what is referred to as Orders and Rules under the regulations which contain various orders, rules, exemptions, forms and procedural arrangements. The current set is said to have been on since the 1 December 1961 and that it had been amended from time to time. As regards exchange control rulings, the Minister appoints certain banks to act as authorized dealers in foreign exchange which gives them the right to buy and sell foreign exchange transactions or currencies, subject to conditions and within the limits applied by the exchange control department. The authorized dealers are not the agents of Exchange Control Department, but, acts on behalf of their clients.in regard to exchange control issues. They also act on behalf of their clients in seeking approvals from the Exchange Control Department for such clients. The reason for this is said to be a practical one. The Exchange Control Department is said to be simply nowhere near the capacity

to handle the large number of applications. I now turn to deal with the other issues raised and not necessarily indicated as in paragraph 11 of this judgment.

ARE THE PRESENT PROCEEDINGS THE SUBJECT OF A PENDING ACTION?

[28] Subsequent to the launching of these proceedings and apparently after the amendment of the notice of motion, the applicant instituted action proceedings in terms of which he claims the amount levied on his capital or blocked loan account assets. This is said to have been adopted as a measure to take care of the applicant's interests.

[29] The parties apparently came to an arrangement that action proceedings would be stayed pending finalization of the present proceedings. At the start of the hearing of this matter, I enquired from the first respondent's counsel whether it was the intention of the first respondent to persist with the *lis pendis* point. The response was that it has not been abandoned. However, the issue was never argued. Similarly, counsel for the second respondent (the Minister of Finance), who indicated that he was new in the matter, did not strongly persist with the argument.

[30] The point of the matter is that the constitutional challenges and other issues in these proceeding, if they were to be upheld in favour of the applicant, it would in my view, render the pending action proceedings academic. For this reason, I see no prejudice if this court was to deal with

the matter on the basis that the claim for payment or refund of the amount paid as a levy is properly before me. Therefore, the *lis pendis* point ought to be dismissed.

IS WHAT IS REFERRED TO AS A 'CLOSED DOOR POLICY' UNLAWFUL AND UNCONSTITUTIONAL? PUT DIFFERENTLY IS RULE 10 (a) UNLAWFUL AND UNCONTITUTIONAL?

[31] The question should be seen in the context of the relief sought in prayer 9 of the applicant's amended notice of motion and quoted in paragraph 10 of this judgment. The words 'CLOSED DOOR POLICY' came from the applicant. They relate to a system of using authorized dealers or bankers to provide information or advice on exchange control or currency matters governed by the Regulations to those who might require such information or advice. They also relate to approval or permission process in respect of exchange, currency and gold transactions so governed, a function that is assigned to authorized dealers or bankers. This arrangement is embodied in Rule 10(a) of the first respondent.

[32] In other words, for information, advice or assistance as indicated above, one will have to approach the authorized dealers or bankers and not the first respondent directly. The rule is challenged on two grounds, firstly that it does not have force of law and secondly, that it is in conflict with section 1 and section 33 of the Constitution.

FIRST LEG OF THE ATTACK ON RULE 10 (a)

[33] The applicant in essence is saying, in introducing Rule 10(a), the respondents did not comply with the enabling legislation, in particular section 9(5)(a) of the Act which provides as follows:

> *"Any regulations made under this section may provide for the empowering of such persons as maybe specified to make orders and rules for any of the purposes for which the Governor-General is by this section authorized to make regulations".*

[34] I understand this to mean that for any person to make order and or rules, he or she must have been specifically empowered to do so by regulation(s). The basis of a challenge by the applicant appears to be this: The first respondent or second respondent had no legislative power to come up with Rule (10) (a) because neither of them is empowered by regulation to do so.

[35] In paragraph 4.1 of its answering affidavit, the first respondent through the deponent states as follows:

> ***"4.1 Orders and Rules***
>
> *The Minister of Finance issues Orders and Rules under the Regulations which contain various orders, rules, exemptions forms and procedural arrangements. The current set was published on the 1 December 1961 and has been amended from time to time. The Orders and Rules are voluminous, and in order not to burden these papers, I do not attach them, but a copy of the current set marked "AE1" will be made available to the Applicant at his request and to this Honourable court at the hearing hereof".*

[36] The underlining in the quotation is my own emphasis. The relevant part of regulation 1, dealing with definitions, defines an "authorized dealer" as meaning, "*in respect of any transaction, in respect of gold, a person*

authorized by the Treasury to deal in gold and in respect of any transaction in respect of foreign exchange, a person authorized by the Treasury to deal in foreign exchange".

[37] Regulation 22E deals with delegation of powers and it provides as follows:

"22E.(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".

[38] Regulation 4 deals with BLOCKED ACCOUNTS. Sub-regulation (7) thereof provides that no sum standing to the credit of a blocked account shall be dealt with in any way, except with permission granted by the Treasury and in accordance with such conditions as the Treasury or such authorized person may impose.

[39] The applicant refers to his assets on which the levy has been imposed as *"blocked loan account assets".* Therefore, "bankers" referred to in Rule 10(a) should be seen as "a person authorized by the Treasury" referred to in Regulation 4(7).

[40] A duty is imposed on the Minister in terms of Regulations made under section 9 of the Act. Such a duty is conferred by means of regulations made under the Act and the Minister can further delegate such duties or powers to "any person" in terms of Regulation 22E.

[41] The making of Orders, Rules and Rulings should therefore be seen in the context of the Regulations and in particular, the delegated authority conferred in terms of the Regulations. The Minister does this without being divested of any power or function or duty delegated to any person under sub-regulation (1) of regulation 22E 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.

[42] Providing information or advice on exchange control or currency matters are matters governed by the Regulations. Similarly, the approval or permission in respect of exchange, currency and gold transactions are also governed in the regulations. When these roles are assigned to the banks and Rule 10(a) is introduced to confer these roles on the "bankers," it cannot be said there is no empowering authority brought about by the Regulations. Therefore, the first attack on what is referred to as a "CLOSED DOOR POLICY," must fail. Insofar as the applicant might have wanted to suggest that section 9 (5) (a) is itself unconstitutional as suggested in prayer 4.3 of the amended notice of motion, i am unable to find the basis for this challenge. The section is quoted in paragraph 33 above.

SECOND LEG OF ATTACK ON RULE 10 (a)

[43] Counsel for the applicant in his NOTES FOR ARGUMENT, characterized the challenge as follows:

"5.5.1 First, it places a barrier between members of the public and organ of State quite contrary to the obligations imposed on the public administration by section 195 of the Constitution

and foundational values of accountability, responsiveness and openness in section 1 of the Constitution.

5.5.2 Second, it imposes on members of the public an agent, not of their choice and who is obliged to put the interests of the exchange control department of SARB above all other interest".

[44] On the other hand, the view taken is that Rule 10 (a) is in conflict with section 1 and section 33 of the Constitution. For convenience sake, sections 1, 33 and 195 of the Constitution read as follows:

"1. Republic of South Africa

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a.
b. ...
c. Supremacy of the constitution and the rule of law.
d. ...

33. Just administrative action

1. *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
2. *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
3. *National legislation must be enacted to give effect to these rights, and must*
    a. *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
    b. *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*

195. Basic values and principles governing public administration

1. *Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
    a. *A high standard of professional ethics must be promoted and maintained.*
    b. *Efficient, economic and effective use of resources must be promoted.*

c. *Public administration must be development-oriented.*

d. *Services must be provided impartially, fairly, equitably and without bias.*

e. *People's needs must be responded to, and the public must be encouraged to participate in policy-making.*

f. *Public administration must be accountable.*

g. *Transparency must be fostered by providing the public with timely, accessible and accurate information.*

h. *Good human-resource management and career-development practices, to maximize human potential, must be cultivated.*

i. *Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*

2. *The above principles apply to*

   a. *administration in every sphere of government;*

   b. *organs of state; and*

   c. *public enterprises.*

3. *National legislation must ensure the promotion of the values and principles listed in subsection (1).*

4. *The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.*

5. *Legislation regulating public administration may differentiate between different sectors, administrations or institutions".*

[45] The need and essence of using the authorized dealers in exchange control matters, and how they are used are articulated in paragraphs 4.2.1 to 5.3 of the first respondent's answering affidavit as follows:

"*4.2* ***Exchange Control Rulings***

4.2.1 The Minister of Finance appoints certain banks to act as "authorized dealers" in foreign exchange which gives them the right to buy and sell foreign exchange

subject to conditions and within the limits applied by the Exchange Control Department. The authorized dealers are not agents of the Exchange Control Department, but act on behalf of their clients in regard to exchange control issues. They also act on behalf of their clients in seeking approvals from the Exchange Control Department for such clients. As appears more fully below, the reason for this is a practical one – the Exchange Control Department simply has nowhere near the capacity to handle the large number of applications. This arrangement allows the vast majority of foreign transfers to be handled by authorized dealers. I will revert to this more fully below in relation to the Applicant's attack upon this aspect of the system which is, in fact, completely innocuous and a simple practical measure.

4.2.2 *The Exchange Control Department issues the Exchange Control Rulings (the "Rulings") to the authorized dealers. The Rulings are voluminous, and in order not to burden these papers I do not attach them here, but a copy of the current set marked "**AE2**" will be made available to the Applicant at his request and to this Honourable Court at the hearing hereof. These Rulings contain administrative measures as well as the permissions, conditions and limits applicable to transactions in foreign exchange which may be undertaken by authorized dealers. The Rulings are amended from time to time by way of exchange control circulars. The Rulings and circulars are made available to all authorized dealers and the contents thereof may be made available to the public.*

4.2.3 *Applications for permission to carry out foreign exchange transactions received by authorized dealers from their clients are dealt with by them if the applications falls within the parameters outlined in the Rulings and circulars, without reference to the Exchange Control Department. When, however, an application falls outside the ambit of the Rulings, the application must be referred to the Exchange Control Department, by the authorized dealer on behalf of its client. The application is then dealt with by the Exchange Control Department, as set out below.*

4.3 ***The Exchange control manual***

The exchange control manual was first issued in October 1990 by the Exchange Control Department to assist authorized dealers in foreign exchange, their clients and other interested parties, by providing a general understanding of the purpose, scope and operation of the exchange control system. The manual is a general guideline for the

*public and does not replace or supersede the Regulations, Orders and Rules, the Rulings or the policies applied by the Exchange Control Department. This Department continuously updates the manual to reflect current policy, guidelines and norms. The exchange control manual has been published inter alia on the South African Reserve Bank's website and is made available to all authorized parties. The Exchange Control Manual is voluminous, and in order not to burden these papers I do not attack it here, but a copy thereof marked "**AE3**" will be made available to the Applicant at his request and to this Honourable Court at the hearing hereof.*

5. ***Applications to the Exchange Control Department***

5.1 *The majority of applications for permission to carry out foreign exchange transactions fall within the scope of the Rulings and are dealt with by the authorized dealers. For example, in 2010 a total of 10 147 090 foreign exchange transactions took place of which the Exchange Control Department only received approximately 54 000 applications from all authorized dealers.*

5.2 *The majority of the applications by clients of authorized dealers which fall outside the scope of the Rulings and which are referred to Finsurv for adjudication, fall outside the scope of the Rulings as a result of some or other specific or peculiar characteristic of the transaction which merits individual consideration or for which no permission is provided.*

5.3 *Each of these applications by clients of authorized dealers which are referred to Finsurv, is therefore dealt with on its own merits, and within the parameters of the applicable exchange control policy and norms.*

5.4 *The decision of Finsurv, including any conditions applicable furnished in writing to the authorized dealer and then conveyed by it to the particular Applicant. The authorized dealer has the responsibility of ensuring that the execution of the transaction complies with any terms and conditions laid down by Finsurv. Should approval of an application be refused, re-submission is possible, whereupon a more senior official will review the application. In certain instances Finsurv will grant an interview with the Applicant and the authorized dealer where the application of the policy and norms would be explained."*

[46] True, as regards section 33 of the Constitution everyone has the right to administrative action that is lawful, reasonable and procedurally fair. The constitutional obligation that is placed on the Public Administration in terms of section 195 ought to be executed effectively and efficiently. When Public Administration does not have the capacity or the expertise, it cannot be excused from this constitutional imperative. I did not hear the applicant to be saying the authorized dealers are generally not efficient and effective, except for one incident when the authorized dealer which dealt with the applicant's case omitted or neglected to place his representations before the first respondent. The authorized dealers, that is, the banks, by the nature of their business, it must be accepted that they have the necessary skills, expertise and the capacity to give an advice or opinion on currency, banking and exchange control and also to consider certain applications.

[47] The truth of the matter and the difficulties the first respondent appears to be facing is the volume of applications for permission to carry out foreign exchange transactions. For example, in 2010, a total of 10 147 090 foreign exchange transactions are said to have taken place of which the Exchange Control Department only received approximately 54 000 applications from all authorized dealers. These were apparently applications which the authorized dealers could not deal with for whatever reasons. Those are the applications by clients of authorized dealers which fall outside the scope of the Rulings and which are referred to the Financial Surveillance Department of the first respondent for adjudication.

[48] From all of these, it does not look like the respondents have relegated their constitutional obligation in terms of section 195 of the Constitution in its entirety to the authorized dealers, neither did the applicant show the shifting of responsibilities by the respondents so as to amount to unfair administrative action. Put simply, the applicant did not show facts upon which he alleges that his constitutional rights to a lawful, reasonable and procedurally fair administration action have been infringed. The banks appear to be efficient and effective in the execution of the responsibilities and duties delegated to them.

[49] The fact that the first respondent requires the authorized dealers to put first the interests of the exchange control department of the first respondent, with no facts showing prejudice to people like the applicant, would not without more, render the decision offensive and contrary to the spirit of the Constitution as set out in section 33. The majority of applications on exchange control matters to the authorized dealers are said to be by the clients of the said authorized dealers. Therefore, one would expect of the authorized dealers to act in the best interest of their clients and at the same time, ensuring the Rules and guidelines set out by the first respondent or second respondent on exchange control matters are complied with. There is also no suggestion that the authorized dealers are not conducting themselves in an impartial way when dealing with clients regarding exchange control matters, banking and or currency. I am therefore not satisfied that the so called "CLOSED DOOR POLICY" is unlawful and unconstitutionally unfair. This finding addresses the relief sought in prayer 9 of the applicant' notice of motion; and it also disposes of the issue raised in paragraph 11.1 of this judgment. I now turn to deal with

the next question which was not specifically raised or identified in paragraph 11 of this judgment.

WERE THE DECISIONS SOUGHT TO BE REVIEWED TAKEN BY THE FIRST RESPONDENT?

[50] As I said, this was not initially one of the issues identified by the parties at the start of the hearing. The issue was raised in the course of the argument. The suggestion from the respondents' side was that when the first respondent imposed a levy on the applicant, it was not taking a decision, but, rather that it was merely implementing the decision already taken by the Minister (second respondent) on the 26 February 2003. For example, in its letter of the 8 February 2010 and in response to a request for reasons for the decision in imposing 10% levy on the applicant's last blocked loan account assets, the first respondent amongst others, expressed itself as follows: "Further, we attach hereto Exchange Control Circular NO. 375 of 2003-02-26 wherein the Minister of Finance publicly announced further steps in exchange control liberalizations with specific reference to emigrants' funds wherein it was stated that:

"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 charge of 10 per cent of the amount".

[51] As a brief background, on the 26 February 2003, the Minister of Finance during his budget speech amongst others, announced as quoted in

paragraph 50 above. That was announced to apply with immediate effect from the 26 February 2003.

[52] On the same day, that is, the 26 February 2003, two documents referred to as circulars were issued. First, the Exchange Control Circular No D.375 of 26 February 2003 and the then Exchange Control Circular No D380 of 26 February 2003. In both these circulars 10%, exit charge or levy on blocked assets was announced.

[53] In the present dispute, twice the first respondent considered the application for permission to exit the remaining blocked assets of the applicant. First, when the application for permission to take out of the country his remaining blocked assets was not accompanied by his representations. Second, when the decision to reconsider his representations was taken after having considered such representations. In both instances, the first respondent granted the permission to exit the applicant's remaining blocked assets on condition that he pays 10% levy. There can be no doubt that the first respondent took the two decisions sought to be reviewed as indicated in the notice of motion. However, what remains to be determined is whether the decision to impose the 10% levy was the decision of the first respondent. Put differently, whether the first respondent had a choice not to impose the 10% levy? I deal with the issue in paragraphs 88 to 96 of this judgment. I now turn to deal with the first issue that was identified in paragraph 11.1 of this judgment.

WAS THE DECISION TO IMPOSE A 10% LEVY ON THE APPLICANT A LAWFUL DECISION?

[54] Three legs to this issue were emphasized, first, what the applicant's counsel referred to as, **the fundamental predicament,** second**, the no law of general application**, and lastly **the rigid and inflexible application of policy.** These constitute the crux of the contention on behalf of the applicant against the imposition of the 10% levy.

FUNDAMENTAL PREDICAMENT

[55] In his Note for Argument, counsel for the applicant introduced the challenge as follows:

> *"To the extent that there is any law in the system, it is made by the President subject to none of the manner and form of provisions of the Constitution and without any public participation preceding it. To the extent that the system depends on the decision being taken by the Minister or SARB, none of the decisions meets the standard for valid administration acts. They are not attuned to the individual facts of a given case and they are made without input from those affected by the decisions".*

[56] For this, it is suggested that participative processes for law making prescribed by the Constitution were not followed. Secondly, the suggestion is that the administrative machinery to make decisions in individual cases which must comply with the demands of administrative justice was not followed. I think this leg of the contention will be properly tackled when the two other legs are considered.

NO LAW OF GENERAL APPLICATION

[57] Counsel for the applicant moved from the premise that the necessary starting point of this leg is, to determine the source of the power to impose the levy. True, this is what our law says. Correctly so, this is conceded by the respondents. The question is whether the imposition of the levy was lawful? If it was not lawful, it must be because the exit levy did not comply with a substantive provision of the law, including the relevant provisions of the Constitution. The definite and source of public power in law is either in the Constitution or in national legislation. This is fundamental to the principle of legality[1].

[58] The applicant says the respondents' purported power to impose the levy of 10% on blocked assets is founded on Exchange Control Circulars D. 375 and D. 380 issued on the 26 February 2003. I referred to circulars in paragraphs 8 and 52 of this judgment read together with paragraphs 98 to 105 hereunder.

[59] However, the respondents do not see the circulars aforesaid as their source of power to impose the levy. They see their source of power in section 9(1) of the Act and Regulation 10(1) (c). They respectively read as follows:

> *"9.* ***Regulations regarding currency, banking or the exchanges***
>
> *(1) The Governor-General may make regulations in regard to any matter directly or indirectly relating or affecting or having any bearing upon currency, banking or exchanges".*
>
> ***RESTRICTION ON EXPORT OF CAPITAL***

[1] Miniser of Justice & Constitutional Development v Chonco & Others 2010(4) SA 82 CC par 27

10. (1) *No person shall except with permission granted by the Treasury and in accordance with the conditions as the Treasury may impose -*

(a) ....

(i) ...

(ii) ...

(iii) ...

(b) ...

(c) *enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic."*

[60] In other words, the respondents are saying that Regulation 10(1) (c) is a product of section 9(1) of the Act. The 10% levy is a condition imposed for permission to expatriate the applicant's blocked assets out of the country. It is a condition imposed in terms of regulation 10 (1) (c). On the other hand, the applicant sought to attack this approach on three grounds. Firstly, that Regulation 10(1) (c) is invalid as it did not comply with the provisions of section 9(4) of the Act. Secondly, the approach is attacked on the basis of lack of guidelines in the legislation or Regulation 10(1) (c). This is said to render Regulation 10(1) (c) invalid. Lastly, as I understood counsel for the applicant to be saying, the imposition of condition to impose 10% was not followed by participative process. I deal with each of the challenges hereunder.

IS THE PROVISIONS OF SECTION 9(4) APPLICABLE TO REGULATION 10 (1) (C)?

[61] Section 9(4) read as follows:

> *"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 estimate 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 on the Table unless before that date it has been approved by resolution of both Houses of Parliament".*

[62] The underlining in the quotation is my own emphasis. One of the criticism for relying on Regulation 10(1) (c) as challengeable is that, the regulation is invalid for non- compliance with the provisions of section 9(4). Such requirements are self-explanatory in subsection (4) as quoted above.

'*And if any such regulation is calculated to raise any revenue*' in subsection (4), seems to refer to the making or promulgation of regulations that are intended to raise revenue or tax. Section 9 (1) quoted in paragraph 59 above, deals with the making of regulations regarding currency, banking or the exchange. I do not think that there is a question about what the intention of the legislature in subsection (4) is.

[63] If regulation 10(1) (c) is intended or 'calculated to raise revenue', for non-compliance with section 9(4), it would bring to an end the Respondents'

defences. The question again: Is section 9(4) applicable to regulation 10(1) (c)? One needs to examine regulation 10(1) (c) closely.

[64] The heading in regulation 10 in my view, speaks for itself. That is, RESTRICTION ON EXPORTS OF CAPITAL. Just on the heading alone, regulation 10 seems to be 'calculated to restrict export of capital', and not 'calculated to raise revenue' as envisaged in section 9(4). To interpret it otherwise, in my view, defeats one's sense of logic.

[65] The first wording of sub-regulation (1) of Regulation 10 speaks for itself as well. You want to export capital, you apply for permission to do so. This is so because 'no person shall, except with permission granted by the Treasury enter into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic'. (**See again sub-regulation 10(1)(c) quoted in paragraph 59 of this judgment**). The applicant fell under the category of Regulation 10(1) (c) insofar as it related to his application to export his remaining blocked assets,

[66] Counsel for the President put it more or less this way: "You cannot say you are raising revenue when you are fined for speeding". Put simply, when speeding is made an offence, that prohibition is not intended to raise revenue. The prohibition is intended to ensure that we do not have unnecessary fatalities on our roads. But, those who offend are punished by for example, paying fines. Despite the fact that the money might be going

into the same State revenue' account, the prohibition itself cannot be construed as having been 'calculated to raise revenue'.

[67] This is what is contemplated in Regulation 10(1) (c). It is a prohibition to export that is intended or 'calculated' to in regulation 10 (1) (c). Any contravention thereof is an offence in terms of Regulation 22. But most importantly, as a condition for the granting of permission to expatriate blocked assets, one has to look at the essence of the prohibition and the imposition of 10% levy. Using the first respondent's words: 'The 10% charge, generally speaking constituted a disincentive to the exit of large amount of capital, thus asserting to maintain the financial stability of the South African economy'.

[68] Similarly, the Minister in his answering affidavit deposed to by Mr E.L. Kganyago alluded to the fact that the policy premise of the prohibition and 10% charge on the applicant was a condition to him, an emigrant, taking his remaining assets out of the country. The object was *inter alia* to limit the adverse consequences of the outflow of funds on the external balance of payments necessary to maintain South Africa's macro-economic health and to promote financial growth and stability.

[69] This will become relevant when dealing with the reviewability of the respondents' decision and the constitutional challenges. It suffices for now to conclude that there is no basis to find that section 9(4) is applicable to Regulation 10(1) (c).

LACK OF GUIDELINES ON THE EXCHANGE CONTROL PROCESS

[70] I understood the applicant's counsel to suggest that specific guidelines regarding the conditions under Regulation 10 (1) (c) should have been specifically spelled out in the Regulations or in the enabling legislation.

[71] To come to this conclusion, one needs to ignore the volatile and inflexible nature of the currency and economic changes in all markets. One needs to ignore the fact that exchange control system must be of such a nature that it can be amended quickly and easily. To this end, what was previously quoted in paragraphs15 and 14 of this judgment become relevant.

[72] It would be difficult to predetermine guidelines in a statute or regulations especially with a system about exchange control, a market that fluctuates in almost every day. In any event, it is not like there are no guidelines in respect of exchange control. Such guidelines are often contained in the Orders and Rules, Rulings and or Circulars. For example, on the 26 February 2003 the Minister of Finance announced imposition of 10% levy on blocked assets beyond R750 000 and R1 500 000 in respect of family trusts. On the very same day, the decision was contained and conveyed in two circulars which also form the subject of the dispute before me. I am mentioning this just to illustrate the swiftness at which the guidelines by other means than in the form of Regulations or legislation could be introduced and implemented. When this happens, it cannot in the nature

of the Exchange Control System be seen as being contrary to the rule of law. Otherwise, the country will be brought to a standstill and economic nightmare.

[73] Before I conclude on the issue, I think it is necessary to mention that the applicant in raising the issue under discussion seems to have relied heavily on what Reagan J of the Constitutional Court said in the matter of Dawood, Shalabi and Thomas cited in the preceding paragraph 135 of this judgment. In that case, constitutionality or otherwise of section 25 (b) of the Aliens Control Act 96 of 1991 became the subject of a dispute. Section 25 (b) reads as follows together with paragraph (a) thereof:

> "*(a) A Regional Committee may on an application mentioned in ss (1) made by an alien who has been permitted under this Act to temporarily sojourn in the Republic in terms of a permit referred to in section 26 (1) (b) authorise the issue to him or her of a permit in terms of this section mutatis mutandis as if he or she may reside permanently in the Republic.*
>
> *(b) Notwithstanding the provisions of paragraph (a) a regional committee may authorise a permit in terms of this section to any person who has been permitted under section 26 (1) to temporarily sojourn in the Republic, if such person is a person referred to in ss 4 (b)."*

[74] Section 25 (a) and (b) refers to a person who has been permitted under section 26 (1) to temporarily sojourn in the Republic, and it also refers to a person whose temporarily residence permit is still valid and not to a person whose permit has expired. Section 25 (a) and (b) was attacked on the basis that it infringes several constitutional rights such as the right to dignity, the right of citizens, the right to remain and reside in South Africa,

the right to children, the right to family or parental care; and the right not to be subjected to unfair discrimination.

[75] The Constitutional Court in **Dawood's** matter had the opportunity to consider the effect of discretionary power conferred on a functionary without legislative guidance as to the factors to be considered in exercising such discretionary power.

[76] It is an important principle of the rule of the law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitation of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in the legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon a functionary is constrained by the provisions of the Bill of Rights and in particular what factors are relevant to the decisions to be taken. If rights are to be infringed without redress, the very purposes of the Constitution are defeated. (**See paragraph 47 in Dawood's matter supra**).

[77] The fact that an exercise of a discretionary power may subsequently be successfully challenged on administrative grounds, for example, that it was

not reasonable, does not relieve the Legislature of its Constitutional obligation to promote, protect, and fulfill rights entrenched in the Bill of Rights. The Legislature must take care when legislation is drafted to limit the risk of an unconstitutional exercise of the discretionary powers it confers. (**See paragraph 48 in Dawood's matter**). It is for the Legislature, in the first place to identify the policy considering what would render the decision of a functionary justifiable. (**See paragraph 49 in Dawood's matter**).

[78] Absence of provision in a legislative framework providing guidance as to the circumstances relevant to the exercise of discretion, would not promote the spirit, purport and objects of Bill of Rights. Referring to the assessment of factors to be considered, O'Reagan J in **Dawood's** matter further stated as follows: "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".(**See paragraph 50 in Dawood's matter**).

[79] 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 power may vary. At time, 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 the 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. Having said all of these in paragraph 53 of the judgment in Dawood's case, Q Regan J concluded by saying: "There is nothing to suggest that any of these circumstances is present here".

[80] The underlining is my own emphasis. What is stated in paragraphs 78 to 79 above makes one to come to the conclusion that the principles as set out in paragraphs 73 to 79 of this judgment, is dependent on the facts of each case. Remember, the issue of lack of guidelines regarding the exchange control process was raised as one of the ground in attacking regulation 10 (1) (c).

[81] In my view, as correctly stated by the first respondent in paragraph 16 of its answering affidavit, 'exchange control system requires a flexible, speedy, and expert approach to ensure that proper financial governance prevails'.

[82] The nature of the exchange control system is such that it requires and should permit abstract, and several set of rules to be applied to a specific and particular circumstances as such circumstances and changes prevail themselves. It is a system that would make it impossible to lay down the rules or set out factors in advance. Most importantly, the exchange control system is a system that requires expertise. It is for this reason, I want to believe, that it is the Reserve Bank that is delegated and tasked to deal with matters relating to the exchange controls, because it has the expertise

although it might be limited in terms of the capacity. It is for this reason, I want to believe, that the Reserve Bank is using the authorised dealers (the banks) to ensure that it becomes efficient and effective in matters relating to the exchange controls. This is done, as see it, to take care of the lack of capacity mentioned above. The quotations in paragraphs 14 and 15 of this judgment, in my view, make it even more clearer as to why it would not be advisable and possible to seek to set out guidelines in advance in regulation 10 (1) (c) or in section 9 of the Act. Failure to do so, in my view, cannot be seen as defeating the promotion of the spirit, purport and objects of the Bill of Rights as envisaged in Section 39 (2) of the Constitution.

[83] It must therefore be found that failure to state any guidelines with reference to conditions in terms of regulation 10 (1) (c), is justified. Having regard to the nature and importance of the right that might be limited under regulation 10 (1) (c) and the extent of limitation that is mediated by permissions, the limitations and or restrictions should be found to be justified in relation to the nature, importance and effect of the provision of regulation 10 (1) (c) regarding the imposition of certain conditions.

LACK OF PARTICIPATIVE PROCESS

[84] Counsel for the applicant in his Notes for Argument put it this way:

"The respondents in this case face predicament. Under our constitutional scheme, there are two primary mechanizing through which the state may regulate the affairs of the citizens. It may make laws through elected Parliament, which in order to be valid, must follow the participative process for the law making prescribed by the Constitution".

The issue of lack of public participative process seems to relate to the manner in which the Exchange Control Circulars D.375, D. 380 and Rulings in question came about. It looks like this point was made on the assumption that the respondents had applied and enforced what is contained in circulars D. 375 and D380 as a source of authority to impose the 10% levy on the applicant's blocked assets.

[85] The respondents never claimed that they regarded Circulars D375, D.380 and section B 2 (iii) (e) of Rulings as having force of law, but rather that, they acted in terms of Regulation 10(1) (c) and imposed levy on the applicant's blocked assets, based on the policy decision taken on the 26 February 2003 as announced by the Minister of Finance during his budget speech. The decision was embodied in the two circulars and rulings and was conveyed to the first respondent and or authorized dealers. The circulars and rulings in question are nothing else than a means of communicating the decisions on policy and guidelines, most of which, if not all, are issued under the authority of the Minister.

[86] If I understood the applicant's counsel correctly, the view expressed is that if the Circulars had followed the route of legislative or regulatory framework, the process of transparency and participation by the public would have been met. For example, comments would have been invited before the legislation and or regulations were put in place as laws. This point was put forward as I see it, on the assumption that the power to impose the 10% levy on the applicant's remaining blocked assets was founded on the Circulars and or Rulings. Of course it was not. It was

instead founded on the Minister's decision of the 26 February 2003 to impose 10% levy on the blocked assets. I deal later in paragraphs 97 to 108 with that decision when dealing with prayer 2 of the applicant. It suffices for now to mention that insofar as the applicant might have wanted to suggest that the decisions by the first respondent to impose the levy were founded on the Circulars and or Rulings, the point is misplaced. For this, the point of lack of transparency and due process regarding the Circulars and rulings in question should also fail.

[87] In any event, it is not like the two Circulars were kept secret upon having been issued on the 26 February 2003. The Circulars were made, issued and communicated pursuant to the speech by the Minister of Finance who announced imposition of 10% levy with immediate effect from the 26 February 2003. The authorized dealers or bankers were provided with these Circulars or policy guidelines to ensure that the decision by the Minister is acted upon and also to ensure that contents thereof were brought to the attention of interested parties through authorized dealers (the banks) so as to advise their clients as they interact with them. It was therefore made known to those who were to be bound by and or implement the guidelines. The applicant knew about it, complied with it in the past without reservations, and only when later he was legally advised of the challengeable grounds, did he raise an objection. This had happened when he wanted to repatriate his last assets out of the country. This then brings me to another question.

DOES REGULATION 10(1)(C) CONFER A DISCRETIONARY POWER ON THE

FIRST RESPONDENT REGARDING THE IMPOSITION OF 10% LEVY?

[88] This relates to what the applicant regards as 'the rigid and inflexible application of the policy'. I did not understand the applicant to be strongly attacking the constitutionality of Regulation 10(1) (c) save insofar as it might be relating to the issue dealt under paragraphs 61 to 69 of this judgment. What I understood the applicant's counsel to be arguing was that inasmuch as section 9(4) was not complied with in promulgating Regulation 10(1)(c), the Regulation should be found to be invalid and of no force.

[89] Therefore accepting that Regulation 10(1) (c) is properly promulgated, one needs to look at it closely. What does it provide for? How a functionary like the first respondent was expected to apply it at the time the decisions under attack were taken? In essence, the complaint by the applicant is that it was not properly applied. Simply put by the applicant's counsel, 'the rigid and inflexible application of a policy is unlawful,' so it was contended.

[90] In paragraph 2.34 of the applicant's Notes for Argument it is put as follows:

"2.34 Implicit in SARB's argument is an acceptance that if on a proper interpretation of regulation 10(1) (c) the exercise of discretion is required, then their case is fatally flawed because no discretion was exercised".

[91] Regulation 10(1) (c) introduces three things in it. First, it prohibits the entering into any transaction whereby capital or any right to capital is directly or indirectly exported from the Republic. Secondly, it allows the granting of permission to export from the Republic capital or any right

thereto. Lastly, it allows the imposition of certain conditions when permission is granted.

[92] The first respondent considers the applications for permission as envisaged in regulation 10(1) (c). It does so, on delegated authority of the Minister (the second respondent). There can be no doubt that when it does so, it exercises discretion whether or not to grant permission. If it does grant the permission, it has to decide what conditions to impose in the granting of such permission. In the instant case, it exercised its discretion by granting the permission.

[93] The sticky question however is, whether in the circumstances of the case it had discretion not to impose the 10% levy? The first respondent's stance is that it did not have such discretion. This contention must be seen in context.

[94] The context is simply this: The Minister of Finance on the 26 February 2003 took a decision that became a policy guideline. The first respondent was delegated by the Minister. The decision announced by the Minister on the 26 February 2003 was, and I do this at the risk of repetition, articulated as follows:

"The following dispensation will apply with immediate effect:

- *The distinction between the settling in allowance for emigrants and the private individual foreign investment allowance for residents is to fall away and there will now be a common foreign allowance for both residents and emigrants of R750 000 per person (or R1.5 million in respect of family units).*

- *Amounts of 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 SA Reserve Bank to do so. Approval will be subject to an exiting schedule and an exit charge of 10% of that amount. The same dispensation will apply for new emigrants".

[95] The underlining is my own emphasis. What is quoted above should now make it clearer what I said in paragraphs 91 to 93 of this judgment. Firstly, there can be no doubt about the first respondent's discretion to grant or not to grant permission to export the capital or any right thereto from the Republic. Secondly, there can be no doubt that the functions of considering the applications have specifically been delegated to the first respondent. Lastly, there can be no doubt as to how the imposition of the ten percent levy came about.

[96] The question that remains is how do you exercise discretion and deviate from policy guideline that required of the first respondent to impose a 10% levy when granting permission to expatriate the capital out of the Republic? I do not think one can. By doing so, the first respondent would have been acting without delegated authority. Put simply, the first respondent would have been acting contrary to the one that had conferred certain powers on him. Consequently, I find that the first respondent had no discretion not to impose the 10% levy on the applicant's blocked assets. This then brings me to deal with another issue which was also not specifically raised as an issue to be determined at the commencement of the hearing.

FAILURE TO BRING REVIEW PROCEEDINGS AGAINST DECISION OF THE MINISTER AND THE UNCONSTITUTIONALITY OF THE CIRCULARS AND RULINGS

[97] I earlier on in paragraphs 84 to 87 referred to Circulars and Rulings. In his notice of motion, the applicant seeks to review only the decisions taken by the first respondent on the 13 October 2009 and 1 December 2009. Clearly therefore, the applicant does not seek to review the decision of the Minister taken on the 26 February 2003.

[98] The contention however was that, the decision by the Minister should be seen as being attacked on the basis of prayer 2. This was quoted in prayer 9 of the notice of motion and for completeness sake it is repeated herein as follows:

> *"2. Declaring the words "and an exit charge of 10% of the amount in:*
>
> *2.1 Exchange Control Circular no. D.375 of 26 February 2003,*
>
> *2.2 Exchange Control Circular no. D380 of 26 February 2003,*
>
> *2.3 Section B 2(E) (iii)(e) of the Exchange Control Rulings were at all material times inconsistent with the Constitution and invalid".*

[99] When the question was raised as to whose decision(s) the applicant seeks to review, counsel for the applicant indicated that they are prepared to proceed on the basis of the prayers in the notice of motion. The contention as I understood it was that there was nothing wrong with the amended notice of motion and that prayer 2 addresses all challenges that the applicant wished to raise against the decision of the Minister.

[100] Seeking to attack constitutional validity of Circular No. D375 of 26 February 2003, Circular No. D.380 of 26 February 2003 and Section or Ruling B2 (E) (iii) (e), without directly seeking to review the decision of the Minister announced on the 26 February 2006, in my view, poses a problem for the applicant.

[101] Firstly, the second respondent was brought to court on the basis of a challenge against the decisions of the first respondent and the attack on the alleged constitutional invalidity of the two circulars and the Ruling aforesaid. The respondents' contention in these proceedings is that, they did not rely on the Circulars or Rulings when 10% levy was imposed, but rather on the decision of the Minister. The second problem is that invalidation of the circulars and rulings without invalidating the decision of the Minister, would not only be prejudicial to the first and second respondents, but will also be academic as the Minister' decision at the time and during all material times hereto will remain valid.

[102] The respondents could have come to court on the basis that, it is well and good to attack the lawfulness or validity or otherwise of the Circulars and Rulings only. But, it is another to seek to attack the decision of the Minister. Therefore, if the decision of the Minister was brought to the frail on its alleged unlawfulness, or unconstitutionality, the respondents could have reacted thereto differently. In other words, they would be prejudiced, should such a decision be allowed to enter into the frail now.

[103] As I indicated previously in this judgment, the attack on the Circulars should be considered on the basis that the imposition of the 10% levy by

the first respondent, was founded on the decision of the second respondent. Therefore, without any challenge to the decision of the Minister (the second respondent), it must be assumed that his decision was correct.

[104] Perhaps the question should be raised as follows: Is the decision of the Minister correct and lawful? And if so, on what basis can the Circulars and or Rulings founded on that decision be unconstitutional? The lawfulness, constitutionality or otherwise of the Minister's decision is not an issue before me. The applicant might want to deal with this issue fully during his action proceedings against the respondents for a refund.

[105] In any event, once it is found that the decision to impose a levy is derived from the empowering section 9(1) and Regulation 10(1) (c), there is nothing left of the attack on the unconstitutionality of the Rules, Circulars and Rulings. They did not have to follow the process of a Bill and or promulgation of regulations considering the volatility of the exchange control matters which requires swift and quick reaction.

ABSENCE OF PROCEDURAL FAIRNESS

[106] This is a topic that is specified in the applicant's Notes for Argument. The topic is introduced as follows:

"2.39 A deprivation of property must be procedurally fair. This was the position even before the advent of the Constitution.

2.40 In the present case, no procedure, fair or otherwise was adopted.

2.41 This was plainly unlawful"

[107] Section 25(1) and (2) of the Constitution reads as follows:

"***25. Property._***

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those effected or decided or approved by a court".

[108] The applicant for his contention seems to be relying on subsection (1) of section 25 of the Constitution. It is contended that the applicant was not given any form of hearing whatsoever, and, moreover, had to communicate with the first respondent only in accordance with the closed door policy.

[109] The deprivation of the applicant's property in the form of 10% levied on his blocked assets, should be seen in the context of the prohibition under Regulation 10(1)(c). Secondly, it should be seen in the context of facts relevant to the applicant's case.

[110] The applicant's wealth which he had accumulated or created in South Africa could be summed up as follows: He emigrated from the Republic on the 23 February 2001. The applicant's assets inside the Republic were blocked. The bulk of those assets comprised of two loans he had made to the HBD Investment Trust and the HBD Business Trust previously named as the MS Family Trust and SI Business Trust respectively. The aggregate value of these blocked loan accounts as at the time of his emigration was R4 276, 257, 134.00. The first permission granted to him was on the 20 November 2001. On the 5 March 2008 he again applied for permission to expatriate R1 500, 000, 000.00 of his blocked assets. The application was granted subject to the exit levy of 10%.

[111] As on the 26 June 2009 the value of his blocked loan account assets still in the Republic was R2 504, 748, 935. Secondly, by the end of June 2009 he had decided to transfer all of his blocked loan account assets out of the Republic. His application in this regard was submitted to the first respondent on the 31 August 2009. The application was approved on or about 13 October 2009 subject to payment of 10% levy. According to the first respondent' records, by the 8 February 2010, the applicant had repatriated R3 739 268 520-00 of his blocked assets out of the country.

[112] About 10 November 2009, the applicant asked the first respondent to reconsider its decision to impose the 10% exit fee on his last blocked assets. In other words, he asked that the 10% exit fee be lifted. In the meantime, the applicant paid the 10% exit levy under protest. On the 1 December 2009, the applicant was informed that his application for reconsideration for the uplifting of the 10% levy was refused.

[113] On the 4 December 2009, the applicant made a formal request to the first respondent to be furnished with reasons for the decision of the 1 December 2009. On the 8 February 2010, the first respondent responded to the request for information or reasons. The response from the first respondent consists of three pages. The two Circulars were attached to the response. The applicant was also referred to what the Minister said during his budget speech on 26 February 2003 regarding the imposition of 10% levy on blocked assets.

[114] I am mentioning all of the above, to have a better understanding of the issues raised as the 'Absence of Procedural Fairness'. Most importantly, it is clear that the imposition of 10% levy was directed at those who had accumulated so much wealth in the Republic. When they so wish to disengage investing in the Republic, they were meant to be hit with the 10% levy as a form of discouragement. The idea of such discouragement cannot be said to be bad and an unconstitutional policy. This might be one factor on point where limitation of rights might be necessary to the extent that the limitation is reasonable and justifiable as envisaged in section 36(1) of the Constitution. To come to this, the decision of the Minister ought to be attacked or changed first and therefore I should not be understood as making a final determination on the issue. But imagine what will happen to this country if the wealthiest men and women in the country were allowed to take their wealth out of the country without impunity every time when the country is in economic grief or when there is a change of government or leaders in government. It could have devastating effect on the country as a whole.

[115] Suggestion that 'he was not given any form of hearing whatsoever,' is a statement that has to be considered in context. FAI is an application document made by or on behalf of the applicant. It is a document that was meant to be laid before the first respondent before it took its decision of the 13 October 2009. It consists of five pages. It contains motivation for the permission to expatriate the remaining blocked assets of the applicant from the Republic. The document was inadvertently not laid before the first respondent when the application was submitted to the first respondent prior to the decision of the 13 October 2009.

[116] Post the decisions of the 13 October 2009, the applicant caused the document to be laid before the first respondent. When the applicant so laid the document before the first respondent, the applicant in a separate document sought to challenge the 10% levy as follows: *"I was not and am still not satisfied that the 10%(ten per cent) exit fee is a condition or payment which Exchange Control may lawfully impose and it was never my intention to volunteer payment of this 10%(ten per cent)".* The response thereto is as per a letter of 8 February 2010 in which the applicant was informed that his request for reconsideration of the imposition of the 10% levy had been declined. The latter decision is said to have been conveyed orally to the applicant on the 1 December 2009.

[117] For whatever is worth, the basis for the document referred to as FAI is articulated by the applicant in paragraph 22 of his founding affidavit as follows: "22

> *... In advance of making the application for the transfer, I sought advice on the legality of this policy and was advised that the policy and the 10% levy were unlawful for the reasons set out in this application. In the light of this advice, my legal representative and a framed the application in Annexure "FAI" so as to protect my right to challenge any imposition of a 10% exit fee by the first respondent"*

[118] However, what is interesting is that, in FA1 there is no mention at all about 10% levy. This is contrary to what is sought to be conveyed in paragraph 22 of the applicant's founding affidavit and quoted in part in paragraph 117 above. What I find even more interesting is what the applicant said in paragraphs 5 and 18 of annexure FA1. He expresses himself as follows:

> *"5. The purpose of this application is for permission, for the applicant to transfer his remaining blocked assets and of the Republic subject to whatever conditions or payments SARB may lawfully impose.*
>
> *18. The Applicant hereby applies to SARB for permission to transfer abroad the balance remaining of his blocked loan account assets after deduction of any payments which the SARB lawfully imposes in connection with the transfer of the funds ..."*

[119] The underlining in the quotation is my own emphasis. Applicant was not required for the first time to pay the 10% levy. He expected his remaining block assets to be levied before they were expatriated. Therefore, failure to give him fair hearing should be considered in the context of all of these. I am unable to find that the first respondent used what is referred to as a 'Closed Door Policy' unfairly in the circumstances of the present case. The absence of the procedural fairness on the facts of the case cannot succeed even if the other points were to be upheld in favour of the applicant. What is stated in a separate document quoted partly in paragraph 116 above is clear that the applicant sought to erase what is stated in his five page document quoted partly in paragraphs 117 and 118 of this judgment. Effectively, three documents were submitted to the first respondent before the decision of the 1 December 2009 was taken. First, it was Exchange control application on the letter-heads of Standard Bank dated the 25 August 2009. Second, the five page application document prepared by the applicant himself and annexed to his founding papers as FA1; and lastly, the document referred to in paragraph 116 above. It is not

like the respondents refused to hear the applicant. But, more importantly, the process of considering applications under the exchange control system is articulated in the quotation in paragraph 45 of this judgment under the heading: "Applications to the Exchange Control Department"

CONSTITUTIONAL INVALIDITY OF THE REGULATIONS

[120] This is a challenge on the alleged constitutional invalidity of a whole host of the Regulations made under section 9 of the Act. Just to recap, Section 9(1) provides that the Governor-General who is now (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.

[121] The following Regulations are specifically targeted as being inconsistent with the spirit of the Bill of Rights:

(i) Regulations 3(1)

(ii) Regulation 3(3)

(iii) Regulation 3(5)

(iv) Regulation 10(1)(b)

(v) Regulation 18

(vi) Regulation 19(1)

(vii) Regulation 22

LACK OF STANDING

[122] Before I deal with the essence of the attack on the constitutional invalidity of the Regulations, it is important to deal first with one preliminary issue that was raised. The respondents took the point that the applicant has no standing to seek to attack the alleged constitutional invalidity of the regulations which have no bearing on his case.

[123] The suggestion as put forward by counsel on behalf of the President (the third respondent) was that the applicant presented no facts to justify any standing to seek to invalidate the regulations on the basis of inconsistency with the spirit of the Constitution. The applicant contended that he brought the application in his own interest and in the interest of the public.

[124] Court must as a matter of logic, assume that the challenge a litigant seeks to bring is justified. This is because the question of standing is premised from the substance of the case. Accordingly, the question of standing has two implications for the own interest litigant. First, it signals that the nature of the interest that confers standing on the own interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interest or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. The interests that confer standing to bring the challenge and the impact the decision or law has on them, must be demonstrated[2].

[2] Giant Concerts CC v Rinaldo Investments (PTY) Ltd 2013 (3) BCLR 251 CC par 33

[125] One must add that the interest of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By collary, there may be cases where the interest of justice or the public interest might compel a court to scrutinize action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest. (**See Giant Concerts CC *supra* par 34**). Where a litigant acts on his or her own interest, he or she must show that the decisions he or she seeks to attack had the capacity or potential to affect his or her own legal rights or interest. (**See Giant Concerts supra par 30**).

[126] Applicant lived in South Africa for larger part of his life before he emigrated in 2001. He strived for business whilst still in the country. The bulk of his

wealth was made here. He donated a large amount of his wealth to a number of organizations and or entities. He is described in his papers as a South African entrepreneur who is now living in the Isle of Man. He is a Welkom son of the soil who grew up in Cape Town.

[127] With all of the above, and bearing in mind that the regulations under attack concern exchange control system, the applicant should be found to have succeeded in demonstrating the interests that confer standing to bring the challenge. The broader concerns of accountability and responsiveness require investigations and determination of the merits regarding the

challenged constitutionality of the regulations aforesaid. He might still want to come back into the country and still do business in this country.

[128] Similarly, and assuming that there is merit in the other challenges, not only will the applicant's interest be affected, but the public interests in all probabilities will be affected as well. What is required regarding public standing is a broad and not a narrow approach standing[3]. Matters relating to exchange control have the potential to affect the public in general.

[129] Applicant is therefore found to have standing, both in his personal interest and in the public interest to challenge the regulations in question. I now revert to deal with the constitutionality or otherwise of the regulations identified in paragraph 121 of this judgment. Unfortunately one has to deal with each regulation under attack. For this reason, and for the sake of completeness and clarity, the Regulations in question are quoted hereunder as follows:

"RESTRICTION ON EXPORT OF CURRENCY, GOLD, SECURITIES ETC, ECT AND THE IMPORT OF SOUTH AFRCAN NOTE:

3 (1) Subject to any exemption which may be granted by the Treasury or a person authorised by the Treasury, no person shall, without permission granted by the Treasury or a person authorised by the Treasury and in accordance with such conditions as the Treasury or such authorised person may impose-

(a) take or send out of the Republic any bank notes, gold, securities or foreign currency, or transfer any securities from the Republic elsewhere; or

(b) send, consign or deliver any bank notes, gold, securities or foreign currency to any person for the purpose of taking, sending or removing

[3] Ferreira V Levin NO and others 1956 (1) SA 984 CC at par 165

such bank notes, gold, securities or foreign currency out of the Republic; or

(b) bis take any South African bank notes into the Republic or send or consign any such notes to the Republic, or

(c) make any payment to, or in favour, or on behalf of a person resident outside the Republic, or place any sum to the credit of such person; or

(d) draw or negotiate any bill of exchange or promissory note, transfer any security or acknowledge any debt, so that a right (whether actual or contingent) on the part of such person or any other person to receive a payment in the Republic is created or transferred as consideration –

(i) for the receiving by such person or any other person of a payment or the acquisition by such person or any other person of property, outside the Republic; or

(ii) for a right (whether actual or contingent) on the part of such person or any other person to receive a payment or acquire property outside the Republic;

or make or receive any payment as such consideration; or

(e) grant any financial assistance to any person in the Republic, where as security for such financial assistance, the person granting the financial assistance in turn relies on any security, guarantee, undertaking or financial assistance, directly or indirectly furnished by -

(i) any person resident outside the Republic, or

(ii) an affected person;

(f) grant any financial statement assistance to any person in the Republic, where such person-

(i) is not resident in the Republic; or

(ii) is an affected person

(2) .....

(3) (a) Every person who is about to leave the Republic and every person in any port or other place recognised as a place of departure from the Republic, who is requested to do so by the appropriate officer shall-

(b) *produce any bank notes, gold, securities or foreign currency which he has with him;*

and the appropriate officer and any person acting under his directions may search such person and examine or search any article which such person has with him, for the purpose of ascertaining whether he has with him any bank notes, gold, securities or foreign currency, and may seize any ban notes, gold, securities or foreign currency produced or found upon such examination or search unless either-

(i) *the appropriate officer is satisfied that such person is, in respect of any bank notes, gold, securities or foreign currency which he has with him, exempt from the prohibition imposed by sub-regulation (1); or*

(ii) *such person produces to the appropriate officer a certificate granted by the Treasury which shows that the expropriation by such person of any bank notes, gold, securities or foreign currency which he has with him does not involve a contravention of that sub-regulations.*

No female shall be searched in pursuance of this sub-regulation except by a female.

(4) *The appropriate officer and any person acting under his directions may examine or search any goods consigned or letters or parcels sent from the Republic to a destination outside the Republic, for the purpose of ascertaining whether there are being sent therewith any bank notes, gold, securities, or foreign currency, and may seize any bank notes, gold, securities or foreign currency found upon such examination or search, unless the appropriate officer is satisfied that the Treasury has granted a certificate which shows that the sending as aforesaid of the bank notes, gold, securities or foreign currency does not involve a contravention of sub-regulation (1), and that such certificate was not granted in reliance on any incorrect statement.*

(5) *All bank notes, gold, securities and foreign currency seized under sub-regulation (3) or (4) shall be forfeited for the benefit of the National Revenue Fund: Provided that the Treasury may, in its discretion, direct that any bank notes, gold, securities of foreign currency so seized, be refunded or returned, in whole or in part, to the person from whom they were taken, or who was entitled to have the custody or possession of them at the time when they were seized.*

RESTRICTION ON EXPORT OF CAPITAL

10(1) No person shall, except with permission granted by the Treasury and in accordance with such conditions as the Treasury may impose-

(a) ...

(i) ...

(ii) ...

(iii) ...

(b) take out of the Republic goods, including personal apparel, household affects, and jewellery which have value in excess of six hundred rand or of such greater amount as the Treasury may determine;

PROVISION OF SECURITY

18. (1) The Treasury or a person authorised by the Treasury, may order any person to provide security, in such form and in such amount as the Treasury may determine, that he will comply, either generally or in respect of any particular transaction, with the provisions of any of these regulations specified by the Treasury or by a person authorised by the Treasury,

(2) Where any person who has provided security in terms of this regulation, has failed to comply with the provisions of the regulations in respect of which the security has been provided, the Treasury may direct that the said security shall be forfeited for the benefit of the National Revenue Fund.

FURNISHING OF INFORMATION

19. (1) The Treasury, or any person authorised by the Treasury, may order any person to furnish any information at such person's disposal which the Treasury or such authorised person deems necessary for the purposes of these regulations and any person generally or specifically appointed by the Treasury for the purpose may enter the residential or business premises of a person so ordered and may inspect any books or documents belonging to, or under the control of such person.

(2) If any person makes any statement in any information furnished in compliance with such an order which is in conflict with any other statement previously made by him in giving information required in connection with the subject matter of such order, he shall be deemed to have made an incorrect statement in terms of Regulation 22 and may, on an indictment, summons or charge alleging that he made the two conflicting statements, be convicted of making an incorrect statement in contravention of the said Regulation 22

upon proof of the two statements in question and without proof as to which of the said statements was incorrect, unless he proves that when he made each statement he believed it to be true.

PENALTY

22. *Every person who contravenes or fails to comply with any provision of these regulations, or contraventions or fails to comply with the terms of any notice, order, permission, exemption or condition made, conferred or imposed thereunder, or who obstructs any person in the execution of any power or function assigned to him by or under these regulations, or who makes any incorrect statement in any declaration made or return rendered for the purposes of these regulations (unless he proved that he did not know, and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect) or refuses or neglects to furnish any information which he is required to furnish under these regulations, shall be guilty of an offence and liable upon conviction to a fine not exceeding two hundred and fifty thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment; provided that where he is convicted of an offence against any of these regulations in relation to any security, foreign currency, gold, bank note, cheque, postal order, bill, note, debt, payment or goods, the fine which may be imposed on him shall fine not exceeding two hundred and fifty rand, or a sum equal to the value of the security, foreign currency, gold, bank note, postal order, bill, note, debt, payment or goods, whichever shall be greater".*

THE ESSENCE OF THE ATTACK ON THE REGULATIONS AFORESAID

[130] In his written heads of argument, the applicant contends that the regulations make no provision for the power to grant permissions and exceptions which is given to the Minister of Treasury and has been delegated to the Reserve Bank, to be exercised in accordance with the requirements of procedural fairness. (My own emphasis)

[131] On the contrary, it is said, the Regulations simply vest the Treasury or the Minister with an unfettered discretion to grant exemptions from the blanket

prohibitions on any transactions involving foreign currency, gold or other assets readily convertible into foreign currency. They do not prescribe any process of notice and comment which must be followed prior to the Reserve Bank determining that an exemption or permission should be granted. This unbridled discretion creates a system on non-participative rule making, so it is contended. This is said to be inconsistent with the right to procedurally fair administrative action and therefore inconsistent with the Constitution. Specifically the Regulations are said to be in conflict with sections 22, 25(1) and (2) of the Constitution. Section 25 was quoted earlier in paragraph 107 of this judgment. section 22 provides as follows:

"22. Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

[132] The Regulations under attack are said to infringe everyone's rights under sections 22 and 25 of the Constitution because they establish a system of exchange control which prohibits any transaction involving currency, gold or other foreign currency. The prohibition itself interferes with every member of the public's ability to deal with his or her property as he or she chooses, and to engage in free trade because, it places a limit on what transactions may be undertaken in relation to that property and in the pursuit of that trade, so it is contended.

[133] For three reasons it is said, although the Regulations make provision for the prohibitions which interfere with the rights under sections 22 and 25 of the Constitution to be mediated or minimized through the grant of

exemptions and permissions, the relaxation on the prohibitions does not save them from Constitutional inconsistency. The protection of fundamental rights cannot be made to be departed from on the exercise of a discretion[4] and.[5] In my view, only in compelling situations can the provisions of section 36 of the Constitution be brought into play.

[134] The view expressed is that the very fact that extensive system is put in place by the Rules and Circulars of the default prohibitions, illustrates the unjustifiability of the absolute prohibitions that are to be found in the Regulations. The applicant contends that, that is why despite absolute prohibitions the respondents do not see any need to prohibit.

[135] The latter contention in my view, should be seen in the light of the respondents' own programme of liberalization of exchange control which is articulated in the first respondent's heads of argument as follows:

> "38. *There has been a gradual approach to the liberalization of exchange control particularly since a new democratic government was elected in 1994. The reason for the liberalization of exchange controls is the need for South Africa to integrate competitively into global economy.*
>
> 39. *The Minister of Finance has adopted, as a matter of policy,*
>
> *an approach which favours incremental relaxation as opposed to abolishing exchange controls all at once. This was done in the belief which is still held today, that it is in the interest of sustainability long term development in South Africa that each successive step of exchange control liberalization must be taken from a position of strength, without compromising overall financial security. It is in line with the notion that exchange control reform of economic reform once macro-economic stability is in place. In essence,*

[4] See S v Zuma & Others 1995 (2) SA 642 (CC) at par 28
[5] Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC)

therefore, the position is that the democratic government inherited the system of exchange control and had to decide how best to face it out".

[136] The programme of liberalization of exchange controls as articulated above, in my view, is a sign of sensitivity by the Minister towards some provisions of the Regulations falling fowl of being inconsistent with the Constitution. For this reason, the Regulations under attack need to be examined closely.

REGULATION 3(1)

[137] It was quoted in paragraph 129 above. Regulation 3(1) as a whole is said to be contrary to the spirit and object of the Constitution under section 22. Section 22 is quoted in paragraph 131 of this judgment. This is so, because regulation 3 (1) is said to blatantly prohibits any action contemplated in sub-regulation (1) (a) to (f) as quoted in paragraph 129 above. Clearly, these prohibitions infringe on one's right to freedom of trade.

[138] One might be tempted to say that the making of regulations under section 9 of the Act should be seen as 'regulated by law' referred to in section 22 of the Constitution. Any such regulation as referred to in section 22 of the Constitution must be constitutionally compliant. The issue at hand is, whether exemptions and or permissions under Regulation 3(1) are capable of making what is not constitutional compliant, compliant by introducing an exercise of discretion in the form of exemptions and or permissions.

[139] Authorities referred to in paragraph 122 of this judgment seem to be against this approach, save in matters that could appropriately be falling

under section 36 of the Constitution. I am not satisfied that such circumstances exist insofar as regulation 3(1) is concerned. Regulation 3 (1) should therefore be found to be inconsistent with section 22 of the Constitution. Other paragraphs of regulation 3(1) are said to be inconsistent with the Constitution on other grounds as identified hereunder.

REGULATION 3(1) (C) INCONSISTENCY WITH SECTION 16 OF THE CONSTITUTION

[140] Sub-regulation (1) (c) prohibits the making of any payment to or in favour, or on behalf of a person resident outside the Republic or place any such sum to the credit of such person. The applicant contends that it is inconsistent with section 16 of the Constitution. Section 16(1) of the Constitution provides that everyone has the right to freedom of expression which includes: *(a) freedom of the press and other media, (b) freedom to receive or impart information or ideas, (c) freedom of artistic creativity, and academic freedom and freedom of science research".*

[141] A brief background might be necessary. The Regulations as we know, were first promulgated in 1961, after the Sharpeville massacre. Freedom of speech was non-existence save doing it at the risk of being locked up. Everything was done to ensure that the citizens of this country, especially Blacks do not have access of communication with the outside world.

[142] At a glance, one might say, the applicant's contention around the criticism raised, is not covered under section 16 of the Constitution. Of course it is. If you require information with the advent of the technology, you have to

pay. Some of the information that one might need for example, artistic creativity or scientific research, may not be readily available within the country. What do you do? You access the information through internet. In the process, you have to pay directly or indirectly to access the information. This is happening on a daily basis. Sub-regulation (1)(c) of Regulation 3 is offensive to the spirit of the Constitution and it has to be expunged.

REGULATION 3(1) (C) INCONSISTENCY WITH SECTION 14 OF THE CONSTITUTION

[143] Section 14(a) of the Constitution provides that everyone has the right to privacy which includes the right not to have the privacy of their communication infringed. The suggestion is that sub-regulation (1)(c) is inconsistent with section 14 of the Constitution in that it unjustifiably requires South African residents to obtain permission from the Minister before purchasing outside the country any goods, including goods which may be of a person or private nature.

[144] Underlining is my own emphasis. For this, the applicant relies on what the Constitutional Court said in **Bernstein and others v Bester and other NNO 1006 (2) SA 751 (CC) par 65**. I understand the contention around this to be that, if you require permission to buy something and make payment thereof outside the country, you might be required to disclose what the payment is all about. This might relate to personal things that you may not want to disclose to anyone. Breach of privacy could occur either by way of an unlawful intrusion upon the personal privacy of another or by

way of unlawful disclosure of private facts about a person[6]. Disclosure of what you have paid for may in certain circumstances invade one's right to privacy. Therefore, Regulation 3(1) (c) should also be found to offend against section 14(a) of the Constitution.

REGULATION 3(1) (a) and (b) INCONSISTENCY WITH SECTION 21(2) OF THE CONSTITUTION

[145] The applicant contends that sub-regulation (1) (a) and (b) quoted in paragraph 129 above, is inconsistent with section 21(2) of the Constitution, because it places an unjustifiable restriction on the fundamental right of South Africans to leave the Republic. Is it remotely raised? I do not think so. Section 21 (2) of the Constitution provides that everyone has the right to leave the Country.

[146] This should also be seen in the light of Regulation 10(1) (b) which limits the taking of money out of the country not in excess of R600-00. Put simply, such a restriction clearly impedes seriously on people's freedom of movement.

[147] This should be seen in the context of what is said earlier in this judgment regarding the taking or repatriating capital as envisaged in Regulation 10(1) (c). The taking of money out of the country as envisaged in Regulation 3(1) (a) and (b), cannot be the same as envisaged in Regulation 10(1) (c). Therefore, in addition to being inconsistent with section 22 of the Constitution, regulation 3 (1) (a) and (b) is also

[6] Financial Mail (PTY) Lt & Others v Sage Holdings Ltd & Another 1993 (2) SA 451 at 462 F

inconsistent with the provisions of section 21(2) of the Constitution. Everyone' freedom of movement is dictated by what amount of money you carry along with you. Prohibition on the taking or sending, of any bank notes out of the country has a serious potential to impede on one' right to freedom of movement, except where clearly it appears to be intended to export, like consignment of bank notes, gold, securities, or foreign currency or transfer of any securities from the Republic. Consignment referred to in paragraphs (b) and (b bis) of sub-regulation 3(1) for own use, cannot be protected under section 21(2) of the Constitution, particularly if there are no facts to justify such consignment.

REGULATION 3 (3) and (5) INCONSISTENCY WITH SECTION 21(2) OF THE CONSTITUTION?

[148] The applicant takes the view that Regulation 3(3) and 3(5) insofar as they relate to assets seized in terms of Regulation 3(3) are additionally unconstitutional and invalid. Invalid in that they are ultra *vires* section 9(2) (d) of the Act. They purport to authorize the seizure and forfeiture without procedural protections required by section 9(2) (d). For regulations 3(3) and (5) to validly confer a power to seizure or forfeiture, it must be compliant of section 9 (2) (d) of the Act, so it is contended. Before dealing with section 9(2)(d), the applicant in prayer 4.1 wants paragraphs (a), (c) and (f) of subsection (2) of the Act to be declared inconsistent with the Constitution and invalid. Paragraph (a) provides that regulations may provide that the President may apply any sanctions therein set forth which he thinks fit to impose, whether civil or criminal. There is a process for making of regulations or proclamation thereof. Therefore, paragraph (a) should be on the assumption that such a process would be followed. I am

therefore unable to see where the unconstitutionality lies. On the other hand, paragraph (c) provides that any regulations contemplated in paragraph (a) may authorise any person who is vested with any power or who shall fulfill any duty in terms of the regulation, to delegate such power or to assign such duty, as the case may be to any other person. I can see no problem with this. Such delegation is founded in regulation 22E. There is no basis to attack it on unconstitutionality. Similarly, paragraph (f) deals with delegations and Regulation 22E appears to be promulgated on the basis of paragraphs (c) and (f) of subsection (2) of section 9 of the Act.

[149] Section 9(2) (d) of the Act provides as follows:

(d) Any regulation contemplated in paragraph (a) shall provide-

(i) that any person who feels aggrieved by any decision made or action taken by any person in the exercise of his powers under a regulation referred to in paragraph (b) which has the effect of blocking, attaching or interdicting any money or goods, may lodge an application in a competent court for the revision of such decision or action or for any other relief, and the court shall not set aside such decision or action or grant such other relief unless it is satisfied-

(aa) that the person who made such decision or took action did not act in accordance with the relevant provisions of the regulations; or

(bb) that such person did not have reasonable grounds to make such decision or to take such action; or

(cc) that such grounds for the making of such decision or the taking of such action no longer exist.

(iii) that the Treasury shall cause a notice to be published in the Gazzette of any decision to forfeit and dispose of any money or goods blocked, attached or interdicted in terms of the regulations referred to in paragraph (b), and that a notice of such decision shall be sent simultaneously with publication thereof in the Gazzette by registered mail to any person who is, according to the Treasury,

affected by such decision or, if no address of such person is available, that such notice shall be so sent to the last known address of such person; and

(iii) that any person who feels aggrieved by any decision to forfeit and dispose of such money or goods may, within a period prescribed by the regulations, which shall not be less than 90 days after the date of the notice published in the Gazette and referred to in subparagraph (ii), institute legal proceedings in a competent court for the setting aside of such decision, and the court shall not set aside such decision unless it is satisfied-

(aa) that the person who made such decision did not act in accordance with the relevant provisions of the regulation, or

(bb) that such person did not have grounds to make such decision; or

(cc) that the grounds for the making of such decision no longer exist".

[150] I do not see regulation 3(3) and (5) as being inconsistent with the Constitution in limiting freedom of trade like sub-regulation (1). Neither one can say they restrict one's freedom of movement. For example, sub-regulation (3) obliges one to produce any bank notes, gold, securities, or foreign currency on request at port of departure. It also allows search at port of departure. There might well be circumstances at port of departure or entry which makes it necessary for actions to be taken as contemplated under sub-regulations (3) and (4). However, I understand the applicant to be saying that for a power to be legally conferred under regulation 3(3) and (5) above, there has to be compliance with section 9(2) (d).

[151] In other words, regulation 3 under sub-regulations (3) and (5) must provide for situations as set out under sections 9(2) (d) (i) (ii) and (iii) quoted in paragraph 149 of this judgment. Regulations 3(3) is for example, conspicuous by the absence of a provision dealing with what is provided in

section 9 (2) (d) (i) (ii) and (iii). For regulation 3(3) to be of force and effect, it must specifically provide for the mechanism for relief to those who might feel aggrieved as contemplated in section 9(2) (d)(i). In other words, it must draw the attention to the fact that any such aggrieved person may lodge an application in a competent court for the revision of such a decision or action or for any other relief. Put simply, there is no enabling legislative authority, authorizing the taking of actions as contemplated in sub- regulations (3) and (5). The two sub-regulations should therefore be found to lack legality and in conflict with section 1(c) of the Bills of Rights.

REGULATION 10 (1) (b) INCONSITENCY WITH SECTION 21 (2) OF THE CONSTITUTION

[152] I have referred to section 21(2) in paragraph 145 of this judgment. I also referred to regulation 10 (1) (b) in paragraph 146 above. Regulation 10 (1) (b) is quoted in paragraph 129. Six hundred rand restriction on what one can take with out of the country is not only inconsistent with section 21(2), but it also does not make sense. The R600.00 is inclusive of any goods, personal apparel, household effects and jewellery. One might be tempted to say that obviously, the restrictions cannot be applied or implemented on these days in time. That might be so. But, that would not be a justification to leave it in the statute book. Clearly, regulation 10 (1) (b) restricts everyone' freedom of movement and therefore contrary to the provisions of section 21(1) of the Constitution by limiting the amount of money up to R600-00 when one is getting out of the country. Six hundred rands is too little to do anything outside the country. If one is not allowed to take anything more than R600, one' movement is restricted.

INCONSISTENCY OF REGULATION 18 WITH SECTION 25(1) OF THE CONSTITUTION

[153] Regulation 18 was quoted earlier in paragraph 129 of this judgment. The applicant contended that regulation 18 vests power in the Minister, (the second respondent) or any person authorized thereto without prior intervention of a court of law to requisition assets as security for compliance with the regulations. It is said, it vests this power in terms of which it does not constrain the manner in which the Minister, or his delegate or of the delegate's delegate will be able to exercise the power. In so doing, it is said, it purports to authorise the unconstitutional deprivation of property which will take place by means of an arbitrary procedure and which may be substantially arbitrary.

[154] I am hesitant to say that regulation 18 is unconstitutional or that it makes it difficult or impossible to challenge the decision that might be taken under regulation 18 on the basis that it offends against the spirit and purpose of section 33 of the Constitution. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[155] Should any person feel aggrieved in that his or her right under section 33 has been infringed, should be able to approach the court in terms of section 6 of Promotion of Administration Justice Act. The challenge could be on a number of grounds. For example, that the action was procedurally unfair or that it was arbitrarily or capriciously taken or that the action lacks rationality. Any fear or decision of forfeiture of property as contemplated in regulation 18(2) will be guided by the facts of each case which might be challenged under section 6 of PAJA. I do not see regulation 18 as

introducing absolute prohibition contrary to any provision of the Constitution.

REGULATION 19(1) INCOSISTENCY WITH SECTION 14 OF THE CONSTITUTION

[156] Both regulation 19(1) and section 14 of the Constitution were respectively referred to earlier in paragraphs 129 and 143 of this judgment. Section 14 deals with the right to privacy. The view taken was that without any judicial oversight or other safeguard, the regulation vests in the Minister or any person authorised by him, to enter private premises with a view to gathering information for the purposes of enforcing the regulations[7].

[157] The applicant further contends that having regard to the extra-ordinary breach of the prohibitions in the Regulations, and to the criminal offence created by Regulation 22, it vests the Minister or any person authorised by him, or any person authorised by that person, with extensive intrusive powers, to demand information which may include private information from persons, on pain of criminal conviction for refusal to provide this information[8].

[158] I understand the contention around this to be that, entering private homes of individuals, demand information, and inspect any books or documents belonging to or under the control of an occupier of the premises without a

[7] Minister of Safety and Security v Van der Merwe and Others 2011 (5) SA 61 (CC) par 27
[8] Harken v Lane NO and Others 1998 (1)SA 300 (CC) pars 70-77

warrant can be subject to an abuse. But, even most importantly, it has a potential to infringement of one's right to privacy.

[159] I should be concerned about what the exercise of power under Regulation 19 might entail. Obliging people to furnish information and entering their homes with no oversight, reminds one of the past. Regulation 19(1) should therefore be found to be inconsistent with section 14 of the Constitution.

REGULATION 22 INCONSITENCY WITH SECTION 35(1)(a) AND 31(h) OF THE CONSTITUTION

[160] Regulation 22 quoted in paragraph 129 of this judgment introduces a penalty clause. It also places an onus on the accused to prove that he or she did not know, and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect. This clearly offends against presumption of innocence, and the right to remain silent.

[161] Section 35(1)(a) provides that everyone who is arrested for allegedly committing an offence has a right to remain silent. Similarly, section 35(3)(h) provides that every accused person has a right to a fair trial, which includes, the right to be presumed innocent, to remain silent and not to testify during the proceeding. Therefore, 'unless he proves that he did not know, and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect or refuses or neglects to furnish any information which he is required to furnish under these regulations shall be guilty of an offence in regulation 22, is in conflict with sections 35(1)(a) and 35(3)(h) of the Constitution.

INCONSISTENCY OF SECTION 9(3) OF THE ACT

[162] Section 9(3) of the Act provides that the Governor-General, now the President may, by any such regulations, 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 exchange and any such Act or law which is in conflict or inconsistent with any such conflict or inconsistent with any such regulation shall be deemed to be suspended insofar as it is in conflict or inconsistent with any such regulation.

[163] This provision has the potential to unravel the healed wounds of the past when laws were changed at the stroke of pen by one individual. This can never again happen in a constitutional and democratic South Africa. I do not think that one needs to have a case on point in order to remove this from the Statute book as it was suggested by counsel on behalf of the President. Clearly, no President in the living Supreme Law of the land, (the Constitution) can ever wish to act as it is envisaged in section 9(3) of the Constitution. This does not even need a programme of liberalization of the system of exchange controls as envisaged by the Minister of Finance referred to earlier in paragraph 135 of this judgment.

[164] As correctly put by the applicant in his written heads of argument, section 9(3) gives the President not only the power, through regulations to amend or suspend any part of the Act, and any other law relating to currency, banking or exchange, but also the power to amend or suspend any other Act of Parliament. This is said to be an extra ordinary wide power. It

effectively vests in the President the power to amend or suspend any Act of Parliament irrespective of whether that other piece of legislation deals with issues of currency, banking or exchange. Subsection (3) also deems any law inconsistent with the Regulations made by the President to be suspended, so it is contended. Without further ado, section 9(3) of the Act should be found to be inconsistent with the Constitution.

SECTION 9 (1) ALLEGED INCONSISTENCY WITH SECTION 37 OF THE CONSTITUTION

[165] At the risk of repeating myself, subsection (1), empowers the President to make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchange. The applicant contends that this gives the President unlimited powers to regulate upon currency, banking or exchanges. The President is also said to be given unfettered plenary legislative powers. In his answering affidavit, the first respondent deal with the criticism as follows:

"71.2 The applicant specifically takes issues with the terms of section 9 on the grounds that the separation of powers between the legislature and executive has been breached.

71.3 I am advised that the powers conferred on the President in section 9 are subordinate and not plenary legislative powers. In layman's terms, the President acts on and in terms of the instructions of Parliament when he exercised the functions conferred on him by the Act.

71.4 I am further advised that it is competent for the President to delegate legislative power to the executive.

71.5 The Regulations and amendments thereto enacted between 1966 and 2011 are framed in terms that give effect to the intention of Parliament. What the executive is prohibited from doing is to pass subordinate legislation that goes beyond what the empowering enactment conferred on it."

[166] In his notes for argument, the applicant challenges section 9 as follows: "*If the President were to purport to rely on section 9 to make new Regulations, he would be purporting to exercise legislative power which the Constitution vests in Parliament and so he would be acting in a manner inconsistent with section 37 of the Constitution*".

[167] Section 37 of the Constitution deals with the state of emergency. I do not understand why the applicant brings section 37 into play in relation to section 9. The applicant suggested that section 9 (1) is inconsistent with the Constitution, because it vests in the President, legislative powers which do not have to be exercised in accordance with any of the manner and form of provisions of the Constitution, say in case of national disaster. The contention cannot be correct, because such an exercise of power can only happen in terms of an Act of Parliament as envisaged in section 37(1) of the Constitution. I cannot see the basis on which section 9(1) can be said to be inconsistent with the Constitution on the grounds as suggested.

[168] I am therefore not convinced that there is merit in the unconstitutionality of section 9 as a whole. In particular, I do not think that there is a constitutional basis to attack section 9(1) of the Act. The underlining is my emphasis.

ARE THE RESPONDENTS OBLIGED TO REPAY THE APPLICANT WITH THE AMOUTNS OF THE LEVY INCLUDING THE INTEREST?

[169] The question is identified in paragraph 11.3 of this judgment. The question is dependent entirely on the findings regarding the imposition of the levy. The findings in paragraphs 88 to 105 of this judgment make it unnecessary to deal with this issue. The first respondent had a discretion whether to allow or not to allow the applicant to repatriate from South Africa his last blocked loan account assets. However, the imposition of the levy was not the decision of the first respondent although embodied in the Circulars and or Rulings. It was rather that of the second respondent. The first respondent had no discretion not to impose the 10% levy once it had taken the decision to permit the repatriation of the applicant's remaining blocked assets. The decision to impose the levy had already been taken by the Minister and the first respondent was bound thereby. The applicant decided not to specifically challenge the decision of the Minister. I do not find it necessary to deal with the issue save to say that the applicant's claim for refund ought to be dismissed. As I said, it might well be that the applicant wishes to continue with his claim referred to in paragraph 28 of this judgment.

IS THE APPROPRIATE REMEDY FOR UNCOSTITUTIONALITY OF SECTION 9 OF THE ACT AND REGULATIONS AN IMMEDIATE STRIKING DOWN OR AN ORDER FOR SUSPENSION?

[170] This question is relevant to my findings insofar as they might relate to the unconstitutionality of certain provisions of section 9 and some regulations placed under attack by the applicant.

[171] Section 9(3) of the Act in my view does not require suspension. It is a clear provision which should never have been allowed to stay in the statute book for so long.

[172] Similarly, regulation 22(1) insofar as it is inconsistent with section 35(1)(a) and 35(3)(h) of the Constitution, ought to be struck down. It is not a provision that can be brought back into the Statute book or regulations in whatever form. I dealt with the basis for the inconsistency thereof under paragraphs 160 to161 of this judgment.

[173] Regulations 3(1) and 3(3) read with regulation 3(5) might need some panel-beating. Immediate striking down might have undesired consequences. I say this despite the fact that the respondents do not seem to have vigorously enforced the Regulations aforesaid. Perhaps it is because of the programme of liberalization of exchange control system initiated by the Minister. Suspension of declaration of invalidity for a period of 12 months in my view would be sufficient for corrective measures if any, to be taken. Similarly, regulation 19 (1) might need to be revisited, corrected and or rectified so as to be constitutionally compliant.

COSTS

[174] Issues that were raised in these proceedings are very important and are of a constitutional importance. It was not only a matter of importance for the applicant but also for the respondents. Secondly, one can also say that all parties have substantially succeeded. For this reason, the order I intend making is that each party must pay his or her own costs.

CONCLUSION

[175] Consequently, an order is hereby made as follows:

175.1 Prayers 1, 1A, 1B, and 1C of the applicant's amended notice of motion dated 13 April 2012, are hereby dismissed,

175.2 The applicant's application for condonation as in prayer 1D of the notice of motion and insofar as it might be necessary, is hereby granted,

175.3 Prayers 2, 2.1, 2. 2 and 2.3 of the applicant's amended notice of motion, declaring that the words "and an exit charge of 10% of the amount" in Exchange Control Circulars No. D.375 of 26 February 2003, Exchange Control Circulars No. D. 380 of 26 February 2003 and section B.2 (E) (iii) (e) of the Exchange Control Rulings inconsistent with the Constitution and invalid, are hereby dismissed.

175.4 Prayer 3 of the applicant's amended notice of motion declaring in its entirety, section 9 of the Currency and Exchange Act 9 of 1933 inconsistent with the Constitution and invalid, is hereby dismissed.

175.5 Prayer 4.1 which is couched as an alternative to prayer 3 above, is hereby dismissed insofar as it is intended to declare paragraphs (a), (c) and (f) of subsection 2 of section 9 of the Act inconsistent with the Constitution and invalid.

175.6 Prayer 4.2 which is also couched as an alternative to prayer 3 declaring that subsection (3) of section 9 of the Act inconsistent with the Constitution invalid, is hereby granted and subsection (3) of section 9 of the Act is accordingly declared inconsistent with the Constitution and is struck down subject to confirmation by the Constitutional Court in terms of section 172 of the Constitution.

175.7 Prayer 4.3 which also serves as an alternative to prayer 3, declaring subsection (5) of section 9 of the Act inconsistent with the Constitution and invalid, is hereby dismissed.

175.8 Prayer 5 declaring that the Exchange Control Regulations in their entirety are inconsistent with the Constitution and invalid, is hereby dismissed.

175.9 In the alternative to prayer 5 of the applicant's amended notice of motion, it is hereby declared that regulation 3(1) in its entirety is inconsistent with section 22 of the Constitution and invalid. Declaration of constitutional invalidity herein, is suspended for a period of twelve months to enable the respondents to correct the cause of constitutional invalidity.

175.9.1 Further in the alternative to prayer 5 of the applicant's amended notice of motion, prayer 6.1 is hereby granted and it is hereby declared that the paragraphs (a) to (c) of Regulation 3 (1) are additionally inconsistent with the Constitution and invalid to the extent that:

- Paragraphs (a), (b) and (b *bis*) are invalid and inconsistent with section 21(1) and (2) of the Constitution to the extent that 'consign' in paragraphs (b) and (b *bis*) is excluded from declaration of invalidity and inconsistency with section 21(1) and (2) of the Constitution.
- Paragraph (c) is further inconsistent with sections 14 and 16 of the Constitution.

175.9.2 Declaration of constitutional invalidity in paragraph 175.9.1 above is hereby suspended for a period of twelve months to enable the respondents to correct the cause of constitutional invalidity.

175.10 Prayers 6.2 and 6.3 which serve as alternative to prayer 5, declaring sub-regulations (3) and (5) of Regulation 3 inconsistent, with the Constitution and invalid, are hereby granted insofar as they have not been promulgated in compliance with section 9(2)(a) of the Act. The declaration of invalidity is hereby suspended for a period of 12 months to enable the respondents to attend to the cause of constitutional invalidity.

175.11 Prayers 6.4 which serves as an alternative to prayer 5, declaring Regulation 10(1)(b) of the Exchange Control Regulations inconsistent with section 21(2) of the Constitution and invalid, is hereby granted and declaration of constitutional inconsistency and invalidity hereof, is suspended for a period of 12 months to enable the respondents to correct the cause of constitutional invalidity.

175.12 Prayer 6.5 which serves as an alternative to prayer 5 of the applicant's amended notice of motion, declaring that Regulation 18 of the Exchange Control Regulations is inconsistent with the constitution and invalid, is hereby dismissed.

175.13Prayer 6.6 which serves as an alternative to prayer 5, declaring Regulation 19(1) of the Exchange and Control Regulations inconsistent with section 14 of the Constitution and invalid, is hereby granted and declaration of unconstitutionality and invalidity thereof, is suspended for a period of twelve months from the date of handing down of this judgment, to enable the respondents to correct the cause of constitutional invalidity herein.

175.14 Prayer 6.7 which also serves as an alternative to prayer 5, declaring the words "unless he proves that he did not know, and could not by exercise of reasonable degree of care have ascertained that the statement was incorrect" in Regulation 22 of the Exchange Control Regulations inconsistent with sections 35(1)(a) and 35(1)(b) of the Constitution and invalid, is hereby granted, and the words aforesaid are hereby struck down.

175.15 Prayers 7 and 8 of the applicant's amended notice of motion, declaring the Orders and Rules under the Exchange and Control Regulations inconsistent with the Constitution and invalid, are hereby dismissed.

175.16 Prayer 9 of the applicant's amended notice of motion seeking to declare the policy of the first respondent not to deal directly with members of the public in relation to the exercise of its delegated powers under the Exchange Control Regulations, and insisting that members of the public communicate with it through the intermediation of authorised dealer banks, inconsistent with the Constitution and invalid, is hereby dismissed.

175.17 Each party to pay his or her own costs.

M F LEGODI
JUDGE OF THE HIGH COURT

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